

## Business, Human Rights, & The Triple Planetary Crisis

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### Abstract

According to the United Nations, the world is facing a triple planetary crisis of climate change, nature (biodiversity) loss, and pollution and waste, with the most egregious consequences felt by those least responsible. These crises are also intertwined: nature-based solutions are promoted as climate change solutions even as heat domes fuel forest fires; extraction of minerals for green energy solutions negatively impacts biodiversity and creates pollution and waste; and carbon major companies are also among the largest producers of plastic pollution. International human rights law is increasingly grappling with environmental rights and responsibilities, as evidenced by the work of special rapporteurs on the environment and on toxic substances, among others. This paper will consider how business and human rights instruments could help to guide solutions to triple planetary crisis that are attentive to the need to reduce overconsumption by the rich while supporting equity and resilience of those most vulnerable to planetary crisis.

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<sup>1</sup> There are many people who have contributed to my understanding of the ideas explored in this paper, only some of whom I am able to express gratitude to here. Beyond the BHR community, these include my co-editors of two books published in 2021, the *Cambridge Handbook of Environmental Justice and Sustainable Development* (Sumudu Atapattu and Carmen Gonzalez) and the *Research Handbook on Climate Change Law and Loss & Damage* (Meinhard Doelle), as well as our many contributors; members of the Global Network on Human Rights and the Environment (GNHRE) of which I am director for North America; fellow members of the International Law Association's white paper drafting committee on International Law in the Anthropocene; the many collaborators and research assistants who have contributed to ongoing UNEP-funded research on BHR and environment, with a focus on climate change, plastics and triple planetary crisis; and colleagues at Dalhousie's Marine & Environmental Law Institute (MELAW). My students are an inspiration. And of course, responsibility for the content of the paper rests with me.

## 1. Introduction

According to the United Nations, the world is facing a triple planetary crisis of climate change, nature (biodiversity) loss, and pollution and waste, with the most egregious consequences felt by those least responsible.<sup>2</sup> These crises are also intertwined. Nature-based solutions (NbS)<sup>3</sup> are promoted as climate change solutions both in terms of mitigation<sup>4</sup> and adaptation<sup>5</sup> even as forest fires destroy both local resilience and carbon offsets that are relied upon by companies to meet their net-zero targets.<sup>6</sup> Meanwhile, extraction of minerals for green energy solutions negatively impacts biodiversity<sup>7</sup> and creates pollution and waste;<sup>8</sup> while the green energy solutions themselves (such as solar panels and electric batteries) lead to further pollution and waste once they have reached the end of their use.<sup>9</sup> Of course, green solutions are also not human rights-neutral: done well, both NbS and green energy can support Indigenous and local community self-determination and governance;<sup>10</sup> done poorly, climate

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<sup>2</sup> UNEP, *Making Peace with Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity and Pollution Emergencies* (UNEP: Nairobi, 2021). See further <https://www.unep.org/resources/making-peace-nature>

<sup>3</sup> According to WWF, the text of the UNEA 5.2 resolution of March 2, 2022 formally adopted the following definition of NbS: ‘actions to protect, conserve, restore, sustainably use and manage natural or modified terrestrial, freshwater, coastal and marine ecosystems, which address social, economic and environmental challenges effectively and adaptively, while simultaneously providing human well-being, ecosystem services and resilience and biodiversity benefits.’

[https://wwf.panda.org/wwf\\_news/press\\_releases/local\\_press\\_releases/?5226891/nature-based-solutions-UNEA](https://wwf.panda.org/wwf_news/press_releases/local_press_releases/?5226891/nature-based-solutions-UNEA)

<sup>4</sup> UNEP & IUCN, *Nature-based solutions for climate change mitigation* (Nairobi and Gland, 2021), online:

<https://www.unep.org/resources/report/nature-based-solutions-climate-change-mitigation>

<sup>5</sup> UNFCCC, ‘Managing Climate Risks through Nature-based Solutions’ (22 November, 2021),

<https://unfccc.int/news/managing-climate-risks-through-nature-based-solutions>

<sup>6</sup> Camilla Hodgson, ‘US forest fires threaten carbon offsets as company-linked trees burn’ (3 August, 2021)

*Financial Times*, online: <https://www.ft.com/content/3f89c759-eb9a-4dfb-b768-d4af1ec5aa23>

<sup>7</sup> Sonter, L.J., Dade, M.C., Watson, J.E.M. *et al.* ‘Renewable energy production will exacerbate mining threats to biodiversity’. *Nat Commun* **11**, 4174 (2020), <https://doi.org/10.1038/s41467-020-17928-5>

<sup>8</sup> Jaya Nayar, ‘Not So “Green” Technology: The Complicated Legacy of Rare Earth Mining’ (12 August 2021)

*Harvard International Review*, online: <https://hir.harvard.edu/not-so-green-technology-the-complicated-legacy-of-rare-earth-mining/>

<sup>9</sup> Atalay Atasu, Serasu Duran, and Luk N Van Wassenhove, ‘The Dark Side of Solar Power’ (18 June 2021) *Harvard Business Review* online: <https://hbr.org/2021/06/the-dark-side-of-solar-power>; Gregory Barber & Aarian Marshall,

‘Cars Are Going Electric. What Happens to the Used Batteries?’ (2 November, 2021) *Wired*, online:

<https://www.wired.com/story/cars-going-electric-what-happens-used-batteries/>

<sup>10</sup> Stephanie Wood, ‘Meet the Cheakamus, the only community forest to develop carbon offsets in B.C.’ (August

14, 2021), *The Narwhal*, online: <https://thenarwhal.ca/bc-forests-carbon-offsets-cheakamus/> and Lindsay Jones,

‘Could 80,000 family woodlot owners be the key to saving the Acadian forest?’ (September 19, 2020), *The*

*Narwhal*, online: <https://thenarwhal.ca/acadian-forest-climate-change/> [both part of ‘Carbon Cache’ series on

NbS in Canada: <https://thenarwhal.ca/topics/carbon-cache/>]; Adrian A Smith & Dayna Nadine Scott, ‘Energy

without Injustice? Indigenous Participation in Renewable Energy Generation’ in Sumudu Atapattu, Carmen G.

Gonzalez & Sara L Seck, co-editors, *Cambridge Handbook of Environmental Justice and Sustainable Development* (CUP 2021) 383.

solutions can be human rights-violating.<sup>11</sup> The same lessons hold for terrestrial and ocean-based climate solutions, including carbon dioxide removal (CDR), whether NbS or technological.

Attention to the relationship between business and human rights (BHR), and environmental problems, has increased in recent years, with particular attention of late to the nexus between BHR and climate change.<sup>12</sup> This attention has been fueled in part by the Petition brought by Greenpeace Philippines in 2015 before the Commission on Human Rights of the Philippines requesting an investigation into the responsibility of the Carbon Major companies for human rights violations arising from the impacts of climate change.<sup>13</sup> The Petition relied upon the business responsibility to respect human rights under the UN Guiding Principles,<sup>14</sup> as well as climate attribution studies by Richard Heede that traced ‘the lion’s share of cumulative CO<sub>2</sub> and methane emissions since the industrial revolution’ to a list of ‘multinational and state-owned *producers* of crude oil, natural gas, coal, and cement’.<sup>15</sup> More recently, the Royal Dutch Shell PLC (RDS) decision of the Hague District Court from May 2021 relied upon the business responsibility to respect human rights from the UNGPs in ordering RDS to reduce emissions across all three scopes in accordance with the Paris Agreement.<sup>16</sup>

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<sup>11</sup> Statnett SF v Sør-Fosen sjette Supreme Court judgment 11 October 2021, HR-2021-1975-S (case no. 20-143891SIC-HRET, co no. 20-143892-SIV-HRET and case no. 20-143892SIV-HRET) [finding that wind farm development interfered with Sami reindeer herders’ right to enjoy their own culture]; Forest Peoples Programme, ‘Re-thinking nature-based solutions: seeking transformative change through culture and rights’, Briefing Note, online: [https://www.forestpeoples.org/sites/default/files/documents/Re-thinking%20nature-based%20solutions\\_Seeking%20transformative%20change%20through%20culture%20and%20rights\\_0.pdf](https://www.forestpeoples.org/sites/default/files/documents/Re-thinking%20nature-based%20solutions_Seeking%20transformative%20change%20through%20culture%20and%20rights_0.pdf)

<sup>12</sup> See for example OHCHR, *Human Rights, Climate Change, and Business: Key Messages*, online: <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>. For a sample of the scholarly literature, see for example Sara L Seck, “Climate Change, Corporate Social Responsibility, and the Extractive Industries” (2018) 33:1 *Journal of Environmental Law and Practice* 271; K Toft, ‘Climate Change as a Business and Human Rights Issue: A Proposal for a Moral Typology’ (2020) 5(1) *Business and Human Rights Journal*, 5(1), 1-27; Chira Macchi, ‘The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of ‘Climate Due Diligence’’ (2021) 6(1) *Business and Human Rights Journal*, 6(1), 93-119; Claire Bright & Karin Buhmann, “Risk-Based Due Diligence, Climate Change, Human Rights, and the Just Transition” (2021) 13 *Sustainability*, online: <https://www.mdpi.com/2071-1050/13/18/10454>; Chiara Macchi & Nadia Bernez, “Business, Human Rights and Climate Due Diligence: Understanding the Responsibility of Banks” (2021) 13(15) *Sustainability* online: <https://www.mdpi.com/2071-1050/13/15/8391>; Sara L. Seck, “A relational analysis of enterprise obligations and carbon majors for climate justice” *Oñati Socio-Legal Series*: (2021) 11:1 *Climate Justice in the Anthropocene* <https://opo.iisj.net/index.php/osls/article/view/1217>;

<sup>13</sup> See description and analysis of the petition in Sara L. Seck. “Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty” (2017) 26:2 *Transnational Law & Contemporary Problems* 383 at 394-413.

<sup>14</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, UN doc. A/HRC/17/31 (March 21, 2011).

<sup>15</sup> See discussion of Heede studies as relied upon in the Philippines Petition, *ibid*, 395-396. See also Climate Accountability <https://climateaccountability.org>

<sup>16</sup> *Milieudefensie et al v Royal Dutch Shell PLC*, ECLI-NL-RBDHA-2021-5339, Rechtbank Den Haag, C-09-571932 - HA ZA 19-379 (engelse versie).

By contrast, there has been less explicit attention given to the relationship between BHR and the biodiversity crisis,<sup>17</sup> or BHR and pollution and waste<sup>18</sup> beyond the resource extraction context.<sup>19</sup> The global plastics crisis has recently been in the news with a March 2022 resolution of the United Nations Environment Assembly (UNEA-5) committing to the negotiation of a legally binding agreement<sup>20</sup> that would be ‘based on a comprehensive approach that addresses the full lifecycle of plastic’<sup>21</sup> and not limited to the marine context. While the human rights implications of the plastics life cycle have been clarified in recent reports by UNEP<sup>22</sup> as well as a 2021 report of the Special Rapporteur on human rights and toxic substances,<sup>23</sup> there has to date been little consideration given to the BHR dimensions of this crisis,<sup>24</sup> by comparison to the extensive resources exploring circular economy solutions.<sup>25</sup> Yet the plastics problem has grave implications not only for terrestrial and marine ecosystems, but also for people, and even the climate system.<sup>26</sup> Notably, carbon major companies are also among the largest producers of

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<sup>17</sup> UNEP & OHCHR, “Human Rights and Biodiversity: Key Messages”, (Message 08), online: <https://wedocs.unep.org/bitstream/handle/20.500.11822/35407/KMBio.pdf>

<sup>18</sup> UNEP & OHCHR, “Human Rights and Hazardous Substances: Key Messages” (Messages 03 and 06), online: <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMHazardousSubstances25febLight.pdf>

<sup>19</sup> There literature on BHR and mining is extensive. Transboundary movements of hazardous wastes is also an area that has received attention. See for example cases discussed in Amnesty International, *Injustice Incorporated: Corporate abuses and the human rights to remedy* (2014), online: <https://www.amnesty.org/en/documents/pol30/001/2014/en/>

<sup>20</sup> UNEP Press release, 02 March 2022, ‘Historic day in the campaign to beat plastic pollution: Nations commit to develop a legally binding agreement’ online: <https://www.unep.org/news-and-stories/press-release/historic-day-campaign-beat-plastic-pollution-nations-commit-develop>.

<sup>21</sup> See further text of adopted resolution: *End plastic pollution: Towards an internationally legally binding instrument*, UNEP/EA.5/L.23/Rev.1, 2 March 2022, para 3. The text continues: ‘taking into account among other things, the principles of the Rio Declaration on Environment and Development, as well as national circumstances and capabilities’. It then lists 16 aspects that would be covered by treaty provisions.

<sup>22</sup> See for example SEA circular issue brief 01 ‘A human rights-based approach to preventing plastic pollution’, online: [https://www.sea-circular.org/wp-content/uploads/2020/03/UNEP-COBSEA-SEA-circular\\_Issue-Brief-01\\_A-human-rights-based-approach-to-preventing-plastic-pollution.pdf](https://www.sea-circular.org/wp-content/uploads/2020/03/UNEP-COBSEA-SEA-circular_Issue-Brief-01_A-human-rights-based-approach-to-preventing-plastic-pollution.pdf); UNEP, COBSEA, SEI, *Marine Plastic Litter in East Asian Seas – Gender, Human Rights and Economic Dimensions* (2019), online: [https://www.sea-circular.org/wp-content/uploads/2019/11/SEI\\_SEA-circular-1.pdf](https://www.sea-circular.org/wp-content/uploads/2019/11/SEI_SEA-circular-1.pdf); and UNEP, AZUL, *Neglected – Environmental justice Impacts of Marine Litter and Plastic Pollution* (2021), online: <https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/35417/EJIPP.pdf>

<sup>23</sup> Marcos Orellana, *Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes: The stages of the plastics cycle and their impacts on human rights*, UNGA, Human Rights Council, 76th Sess, UN Doc A/76/207 (22 July 2021), online: <https://undocs.org/Home/Mobile?FinalSymbol=A%2F76%2F207&Language=E&DeviceType=Desktop>

<sup>24</sup> *But see* Marine & Environmental Law Institute, “Plastics Toolbox: Business, Human Rights, and the Environment” (last updated November 2021) (Dalhousie University, Schulich School of Law), online: <https://digitalcommons.schulichlaw.dal.ca/bhreplastics/1/>. The compilation of this toolbox, which will be updated in 2022, was funded by UNEP.

<sup>25</sup> See for example Ellen MacArthur Foundation, ‘Plastics and the Circular Economy’ Archive: <https://archive.ellenmacarthurfoundation.org/explore/plastics-and-the-circular-economy>

<sup>26</sup> Center for International Environmental Law, *Plastic & Climate: The Hidden Costs of a Plastic Planet* (2019) online: <https://www.ciel.org/wp-content/uploads/2019/05/Plastic-and-Climate-FINAL-2019.pdf>

plastic pollution. Indeed, a study by the Minderoo Foundation identified 100 companies as the producers of 90% of single-use plastic waste, with Exxon Mobile in top place.<sup>27</sup>

Beyond the interdependent nature of climate change (including ocean acidification), biodiversity loss (terrestrial & marine), and pollution and waste (including plastics), is the concern that existing tools are not working quickly or effectively enough given the urgency of the planetary crisis. Coinciding with the celebrations over the resolution on a future plastics treaty was dismay at the release of the findings of the Intergovernmental Panel on Climate Change (IPCC)'s Sixth Assessment Report on *Impacts, Adaptation and Vulnerability*.<sup>28</sup> Among the conclusions presented in the *Summary for Policymakers* is that there have already been irreversible impacts on both natural and human systems that have been unable to adapt to climate extremes, and that the people disproportionately affected are those most vulnerable.<sup>29</sup> The report further confirms that vulnerability of people to climate change is driven by 'patterns of intersecting socio-economic development, unsustainable ocean and land use, inequity, marginalization, historical and ongoing patterns of inequity such as colonialism, and governance.'<sup>30</sup> Vulnerability of both people and ecosystems are interdependent, and unsustainable development patterns increase exposure to climate hazards, with over 3 billion people living in highly vulnerable contexts.<sup>31</sup> If global warming can be kept to close to 1.5 degrees, projected losses and damages from climate change can be substantially reduced, but not eliminated.<sup>32</sup> Given the important role that biodiversity and ecosystems play in climate adaptation and mitigation, they must be safeguarded at a global scale for 'climate resilient development'.<sup>33</sup> If greenhouse gas (GHG) emissions do not 'rapidly decline', the prospect of climate resilient development is increasingly limited.<sup>34</sup>

What is to be done?<sup>35</sup> As frustration grows over the slow pace – or inability – of the climate regime to solve the climate crisis, new studies are drawing attention to a different way of thinking about solutions, focusing on the problem of overconsumption. An aptly worded media post by Jag Bhalla in February 2021 following the release of the 2020 United Nations Emissions Gap Report summed up the problem this way: 'How the right to pursue happiness

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<sup>27</sup> Plastic Waste Makers Index, 'Top 100 Polymer Producers' online: <https://www.minderoo.org/plastic-waste-makers-index/data/indices/producers/>

<sup>28</sup> IPCC Sixth Assessment Report, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, (Working Group II), online: <https://www.ipcc.ch/report/ar6/wg2/>

<sup>29</sup> IPCC Sixth Assessment Report, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, (Working Group II), Summary for Policymakers, at SPM.B.1, online:

[https://report.ipcc.ch/ar6wg2/pdf/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)

<sup>30</sup> Ibid at SPM.B.2

<sup>31</sup> Ibid.

<sup>32</sup> Ibid at SPM.B.3.

<sup>33</sup> Ibid at SPM.D.4.

<sup>34</sup> Ibid.

<sup>35</sup> Especially as the world is confronted by war in the Ukraine and beyond. My sense is that the overconsumption of the affluent issue underlies these conflicts but it is beyond my present ability to elaborate.

through unlimited consumption harms the planet, and our kids'.<sup>36</sup> This issue was starkly raised as media highlighted the irony of private jets flying participants to COP26 in Glasgow.<sup>37</sup>

This purpose of this paper is to explore whether BHR has anything to offer the problem of overconsumption by the 'affluent' in light of the interconnected triple planetary crisis.<sup>38</sup> Overproduction and overconsumption may not have an obvious connection to 'human rights'. But it is now commonly accepted that 'climate change directly and indirectly interferes with the enjoyment of all human rights' and exacerbates inequalities,<sup>39</sup> that all hazardous substances have an adverse effect on human rights including the rights to health and life,<sup>40</sup> and that thriving biodiversity and healthy ecosystems are essential for the fulfilment of many human rights.<sup>41</sup> As overconsumption contributes to climate change, biodiversity loss, and pollution and waste, overconsumption *is* a BHR issue. But can BHR tools assist?

The paper will proceed as follows. First, I will explore the problem of overconsumption from a triple planetary crisis perspective. I will then explore possible approaches to the problem, beginning with litigation using the example of the RDS case, then turning to the European Commission's proposal for a Directive on corporate sustainability due diligence,<sup>42</sup> followed by reflection on the SDGs, and concluding with consideration of the OECD Guidelines for Multinational Enterprises' responsible business conduct (RBC) approach of risk-based due diligence including the role of consumers. I will then turn to insights from human rights and environment frameworks developed by special rapporteurs on human rights and the environment,<sup>43</sup> to explore whether these might offer insights into BHR solutions to the overconsumption problem. I conclude by contemplating alternate pathways, drawing in part on previous work.

## 2. The Problem of Overconsumption

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<sup>36</sup> Jag Bhalla, 'What's your "fair share" of carbon emissions? You're probably blowing way past it.' (24 February 2021), Vox, online: <https://www.vox.com/22291568/climate-change-carbon-footprint-greta-thunberg-un-emissions-gap-report>.

<sup>37</sup> See for example the outrage over private jets being used to fly the 'elite' to COP26 as reported in various media sources: <https://www.dailymail.co.uk/news/article-10152027/Hypocrite-airways-Jeff-Bezoss-48m-gulf-stream-leads-parade-400-private-jets.html>

<sup>38</sup> Conversations about overconsumption are often countered with reference to overpopulation. This paper will not delve into this debate, taking the position that affluence, especially the affluence of the 1% and 10% is a real issue, even if technology enables increases in efficiency. For a quick overview of the debate, see <https://theconversation.com/population-is-only-part-of-the-environmental-impact-equation-4009>;

<sup>39</sup> OHCHR, *Human Rights, Climate Change, and Business: Key Messages*, p1, online: <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>.

<sup>40</sup> Key messages, toxics, p1

<sup>41</sup> Key messages, biodiversity, p1

<sup>42</sup> [https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex\\_en](https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en)

<sup>43</sup> <https://www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndex.aspx> See also the work of the Special rapporteur for toxic substances: <https://www.ohchr.org/EN/Issues/Environment/SRToxicsandhumanrights/Pages/Index.aspx>

As will be explored below, while Sustainable Development Goal (SDG) 12<sup>44</sup> points to the importance of ensuring sustainable consumption and production patterns, SDG 13<sup>45</sup> on Climate Action has nothing to say about excess emissions by the wealthy. On the other hand, the link between climate change, human rights, and inequality in consumption patterns was highlighted in the 2019 report of the Special Rapporteur on extreme poverty, who noted the perversity that ‘the richest people’ are both ‘responsible for and have benefited from the vast majority of [GHG] emissions’ and ‘have the greatest capacity to adapt’; meanwhile those most harmed are the poorest, ‘who have contributed the least to emissions and have the least capacity to react.’<sup>46</sup> Relying on a 2015 report by Oxfam, the Special Rapporteur noted:

‘The poorest half of the world’s population – 3.5 billion people – is responsible for just 10 per cent of the carbon emissions, while the richest 10 per cent are responsible for a full half. A person in the wealthiest 1 per cent uses 175 times more carbon than one in the bottom 10 per cent.’<sup>47</sup>

Further studies have confirmed and expanded on this assessment in the climate context, increasingly squarely pointing the finger at the problem of individual overconsumption – or excess emissions – especially of the ‘rich’ as a key part of the problem.<sup>48</sup>

Most recently, according to Chapter 6, ‘Global Carbon Inequality’ of the 2022 World Inequality Report<sup>49</sup>:

Global income and wealth inequalities are tightly connected to ecological inequalities and to inequalities in contribution to climate change. On average humans emit 6.6 tonnes of carbon dioxide equivalent (CO<sub>2</sub>) per capita and per year. Our novel dataset on

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<sup>44</sup> <https://sdgs.un.org/goals/goal12>

<sup>45</sup> <https://sdgs.un.org/goals/goal13>

<sup>46</sup> *Report of the Special Rapporteur on extreme poverty and human rights: Climate change and poverty*, UNGA A/HRC/41/39 (17 July 2019) para 14, online:

<https://www.ohchr.org/EN/Issues/Poverty/Pages/ClimateChange.aspx>

<sup>47</sup> *Ibid* para 14, referencing Oxfam, “World’s richest 10% produce half of carbon emissions while poorest 3.5 billion account for just a tenth”, 2 December 2015.

<sup>48</sup> See for example the analysis of UNEP’s 2020 Emissions Gap Report data as described in Vox:

<https://www.vox.com/22291568/climate-change-carbon-footprint-greta-thunberg-un-emissions-gap-report> .

According to this data, the top 1% global income group have incomes greater than \$109,000 USD, while the top 10% have income levels above \$38,000. To reach their ‘fair share’ of carbon, they would need to reduce their emissions by 97% and 91% respectively. See further UNEP *Emissions Gap Report*, (9 December 2020),

<https://www.unep.org/emissions-gap-report-2020> (especially Chapter 6 ‘Bridging the Gap – the role of equitable low-carbon lifestyles’). See also Oxfam & Stockholm Environment Institute, 2020 study <https://www.sei.org/wp-content/uploads/2020/09/research-report-carbon-inequality-era.pdf>; <https://grist.org/equity/carbon-emission-inequality-in-2021/> ; <https://www.bbc.com/future/article/20211025-climate-how-to-make-the-rich-pay-for-their-carbon-emissions> ;

<sup>49</sup> World Inequality Report 2022, online: <https://wir2022.wid.world> (see chapter 6, Global Carbon Inequality <https://wir2022.wid.world/chapter-6/> ) According to Figure 6.5a, ‘Personal carbon footprints include emissions from domestic consumption, public and private investments, as well as imports and exports of carbon embedded in goods and services traded with rest of the world.’

carbon emissions inequalities reveals important inequalities in CO2 emissions at the world level: the top 10% of emitters are responsible for close to 50% of all emissions, while the bottom 50% make 12% of the total.

These inequalities are not just a rich vs. poor country issue. There are high emitters in low and middle income countries and low emitters in rich countries. In Europe, the bottom 50% of the population emits around 5 tonnes per year and per person; the bottom 50% in East Asia emits around 3 tonnes and the bottom 50% in North America around 10 tonnes. This contrasts sharply with emission levels of the top 10% in these regions (27 in Europe, 34 in East Asia and 69 tonnes in North America).

This report also reveals that the poorest half of the population in rich countries is already at (or near) climate 2030 climate targets set by rich countries, when these targets are expressed on a per capita basis. This is not the case for the top half of the population. Large inequalities in emissions suggest that climate policies should target wealthy polluters more. So far, climate policies such as carbon taxes have often disproportionately impacted low and middle income groups,<sup>50</sup> while leaving consumption habits of wealthiest groups unchanged.

Notably, the report observes that since 1990, the per capita emissions of the global top 1% have increased substantially, whereas for poorer groups within rich countries emissions have decreased.<sup>51</sup> Troublingly, this time period aligns with the existence of the international climate regime. The proposed solutions to the problems identified in this report include ensuring appropriate data collection within states of carbon inequality, implementation of progressive wealth tax strategies, and taxation of carbon assets.<sup>52</sup> The chapter also points to the highly problematic emissions associated with space travel, an example of ‘extreme pollution’ engaged in by the ‘ultra-wealthy’: ‘It therefore takes a few minutes in space travel to emit at least as much carbon as an individual from the bottom billion emit in her entire lifetime.’<sup>53</sup>

As discussed above, the climate crisis is inextricably intertwined with the plastic pollution problem. Indeed, a study by the Minderoo Foundation identified 100 companies as the producers of 90% of single-use plastic waste, with Exxon Mobile in top place.<sup>54</sup> Plastics are also major contributors to global GHG emissions.<sup>55</sup> Might the ‘rich’ also play a disproportionate role in plastic consumption? According to the OECD’s recently published *Global Plastics*

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<sup>50</sup> The authors note that this observation depends on the structure of the carbon tax or carbon pricing mechanism and so the disproportionate impact on lower income groups is not universally applicable.

<sup>51</sup> WIR 2022, chapter 6

<sup>52</sup> Ibid. See also <https://www.brookings.edu/blog/future-development/2021/11/23/missing-from-cop26-lifestyle-choices-of-middle-class-and-rich-consumers/>

<sup>53</sup> WIR 2022, chapter 6, text at note 25.

<sup>54</sup> Plastic Waste Makers Index, ‘Top 100 Polymer Producers’ online: <https://www.minderoo.org/plastic-waste-makers-index/data/indices/producers/>

<sup>55</sup> Center for International Environmental Law, *Plastic & Climate: The Hidden Costs of a Plastic Planet* (2019) online: <https://www.ciel.org/wp-content/uploads/2019/05/Plastic-and-Climate-FINAL-2019.pdf>

*Outlook: Economic Drivers, Environmental Impacts and Policy Options*,<sup>56</sup> global use of plastics has quadrupled in the last 30 years, and the COVID-19 pandemic has led to increased use in terms of personal protective equipment, restaurant take-away, and online retail shopping.<sup>57</sup> OECD countries and China account for two-thirds of current plastics use (20% China; 18% US; 18% OECD Europe; 9% other OECD).<sup>58</sup> Data on plastic use per capita is also available in the OECD report, noting that a key driver of plastics use is GDP: per capita plastics use globally is 60.1 kg, while for OECD countries it is 155.8kg and non-OECD countries 39.2kg. The USA (255.2kg) and Canada (202.2kg) are by far the highest per capita users of plastic, while African countries (excluding North Africa) are the least (15.9kg).<sup>59</sup> However, data on plastics use by individuals based on wealth measures within countries appears lacking in this report and elsewhere. (Additional data in the OECD report examines plastic waste, materials, industry context, and transboundary movements).

What about biodiversity? While individual ecological footprint calculations<sup>60</sup> have been around for a while, I am not aware of a comparative data set for individual biodiversity or nature loss inequality, although data is available for country comparisons.<sup>61</sup> I am also not aware of individual data on pollution and waste, although individual plastics<sup>62</sup> and water<sup>63</sup> footprint calculators do. Recent studies have drawn attention more generally to the link between ‘affluence’, resource use, and pollutants, concluding that the ‘affluent citizens of the world are responsible for most environmental impacts and are central to any future prospect of retreating to safer environmental conditions.’<sup>64</sup> Biophysical resource use is driven by ‘highly affluent consumers’ whether in a direct manner through high consumption, or by driving

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<sup>56</sup> OECD, *Global Plastics Outlook: Economic Drivers, Environmental Impacts and Policy Options* (2022) online: [https://www.oecd-ilibrary.org/environment/global-plastics-outlook\\_de747aef-en](https://www.oecd-ilibrary.org/environment/global-plastics-outlook_de747aef-en)

<sup>57</sup> OECD *ibid* (section 2.2)

<sup>58</sup> OECD *ibid* (section 2.2). [Also, confirm how this report treats plastics used in manufacturing/transport from China to developed countries?]

<sup>59</sup> OECD *ibid* (section 2.2, Table 2.4). See also data on plastics intensity relative to GDP.

<sup>60</sup> See Global Footprint Network, ‘Biodiversity’, online: <https://www.footprintnetwork.org/biodiversity/>. See also CBD, *Global Biodiversity Outlook 5, 2020* <https://www.cbd.int/gbo/gbo5/publication/gbo-5-en.pdf>

<sup>61</sup> See [https://data.footprintnetwork.org/?\\_ga=2.223305874.806409058.1645994373-718436783.1645994373#/#/](https://data.footprintnetwork.org/?_ga=2.223305874.806409058.1645994373-718436783.1645994373#/) ‘An ecological deficit occurs when the Ecological Footprint of a population exceeds the biocapacity of the area available to that population. A national ecological deficit means that the nation is importing biocapacity through trade, liquidating national ecological assets or emitting carbon dioxide waste into the atmosphere. An ecological reserve exists when the biocapacity of a region exceeds its population’s Ecological Footprint.’ See also biocapacity per capita calculations: [https://data.footprintnetwork.org/?\\_ga=2.223305874.806409058.1645994373-718436783.1645994373#/#/](https://data.footprintnetwork.org/?_ga=2.223305874.806409058.1645994373-718436783.1645994373#/) See also 2017 study entitled ‘Quantifying Biodiversity Losses Due to Human Consumption: A Global-Scale Footprint Analysis’ <https://pubs.acs.org/doi/10.1021/acs.est.6b05296>

<sup>62</sup> Plastics footprint calculators <https://www.earthday.org/plastic-pollution-calculator-2/> and <https://www.omnicalculator.com/ecology/plastic-footprint>

<sup>63</sup> Water footprint calculators <https://www.watercalculator.org> and <https://waterfootprint.org/en/resources/interactive-tools/personal-water-footprint-calculator/>

<sup>64</sup> Widmann, Lenzen, Keysser & Steinberger, ‘Scientists’ warning on affluence’ (2020) *Nature Communications* 11:3107 <https://doi.org/10.1038/s41467-020-16941-y> at 1.

‘consumption norms’.<sup>65</sup> Among solutions proposed is the need to transform economic systems to support ‘business models that encourage sharing and giving economies, based on cooperation, communities and localised economies instead of competition.’<sup>66</sup>

My claim is that data on global consumption patterns and implications for triple planetary crisis, with particular attention to overconsumption by the affluent, is important if we are to develop effective solutions to triple planetary crisis, including equitable solutions that are also perceived as legitimate.<sup>67</sup> It is also relevant to the question of whether – or not – BHR can serve as a meaningful tool for addressing the urgent global ecological challenges of today. Despite the evidence put forward earlier in this paper that triple planetary crisis has grave implications for human rights, BHR to date appears to have had little if anything to offer with regard to the problem of overproduction to feed the overconsumption of the affluent. Indeed, businesses as tools of capitalist production especially when understood to be driven by shareholder primacy norms and profit-maximization appear doomed to fail. There is a definite push for businesses to adopt ‘green’ production patterns through circular economy models and ‘zero waste’ ambitions so as to minimize ecological footprints, but this push is coming primarily from business sustainability movements and does not seem to confront overconsumption, focusing instead of intensification and efficiency. This is of course extremely important work. But does BHR<sup>68</sup> have anything to offer to the problem of overconsumption?

### 3. Human rights-based Climate Litigation

The international climate regime focuses attention on the GHG emissions of states and embedded within the UNFCCC and subsequent agreements is the distinction between the responsibilities of developed and developing states on the basis of common but differentiated responsibilities and capabilities in accordance with principles of international environmental law.<sup>69</sup> As noted above, an alternate lens is that of the carbon major enterprise, with climate attribution studies pointing to the responsibilities of a small number of carbon major enterprises over time.<sup>70</sup> Subsequent climate litigation has relied upon these studies to ground claims in court and before human rights tribunals, yet the focus of this litigation has largely

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<sup>65</sup> Ibid at 3. It is worth noting the development of biodiversity disclosures for businesses. See for example CDSB Framework, ‘Application guidance for biodiversity-related disclosures’ (November 2021) online: <https://ccli.ubc.ca/wp-content/uploads/2021/12/Application-guidance-for-biodiversity-related-disclosures.pdf>

<sup>66</sup> Ibid at 8.

<sup>67</sup> See for example the outrage over private jets being used to fly the ‘elite’ to COP26 as reported in various media sources: <https://www.dailymail.co.uk/news/article-10152027/Hypocrite-airways-Jeff-Bezoss-48m-gulf-stream-leads-parade-400-private-jets.html>

<sup>68</sup> A quick text search of the BHRJ for the word ‘overconsumption’ pulled up 0 articles; whereas ‘consumption’ pulled up 20. At a glance, none seem to address the issues raised here more than in passing. [but I could be wrong]

<sup>69</sup> See Patricia Galvao Ferreira, “Differentiation in International Environmental Law: Has Pragmatism Displaced Considerations of Justice?” in Neil Craik, Cameron Jefferies, Sara L Seck, & Timothy Stephens (editors), *Global Environmental Change and Innovation in International Law* (CUP, 2018) 21-41; Nathalie Chalifour, ‘Equity Considerations in Loss and Damage’ in Meinhard Doelle and Sara L Seck (editors), *Research Handbook on Climate Change Law and Loss & Damage* (Edward Elgar Publishing, 2021) 18-42.

<sup>70</sup> See above

been on western investor-owned enterprises, leaving aside the responsibility of state-owned or nation state enterprises despite these being highlighted in the research.<sup>71</sup> For the purpose of this paper, these cases also render invisible the contributions of individuals, especially the rich, and so do not point the finger squarely at the problem of individual overconsumption.

To start, it is worth reflecting on the *RDS* climate case. The *RDS* case is regarded as particularly significant not only because it is the first time that a court has ordered a company rather than a government to reduce emissions but for having included Scope 3 emissions within *RDS*'s responsibility – including, for example, the fossil fuel-related emissions of energy products purchased by customers and emitted when driving their own cars.<sup>72</sup> That it was able to do so reflects in part existing practices by multinational enterprises like Shell that report on their GHG emissions in accordance with GHG accounting standards developed by non-state initiatives such as the World Resources Institute (WRI) and World Business Council for Sustainable Development (WBCSD)'s Greenhouse Gas Protocol (GHG Protocol), dating from 2001.<sup>73</sup> However, this case is under appeal, and *RDS* has moved its head office out of the Netherlands.<sup>74</sup> More concerningly for the purpose of this paper, it is not at all clear what the impact of Shell's compliance with the court's order would be on the prevention of climate harms in the global context. Ultimately, as *RDS* 'determines the energy package of the Shell group – and consequently, the range of energy products', the court suggested that beyond its current obligations, *RDS* is 'free to decide not to make new investments in explorations and fossil fuels, and to change the energy package offered by the Shell group, such as the reduction pathways require ...'<sup>75</sup> Crucially, the design of the reduction obligation is left entirely up to Shell,<sup>76</sup> so it is unclear what practical oversight the court can undertake aside from a review of Shell's GHG emissions reporting ostensibly undertaken at its (former?) head office in the Netherlands.

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<sup>71</sup> See for example the 2019 update (1965-2017) to Heede's work, which puts Saudi Aramco in first place, Gazprom in third following Chevron in second place, and the National Iranian Oil Co in fifth place, behind ExxonMobil but ahead of BP and Shell. Coal India, PEMEX, Petroleos de Venezuela, PetroChina and Peabody Energy round out the top 10. See <https://climateaccountability.org/carbonmajors.html> See further discussion of this point in Lisa Benjamin & Sara Seck, 'The Escalating Risks of Climate Litigation for Corporations' in Larry W Thorpe, Peter F McLaughlin, and Sarah E McMillan, editors, (Fall 2021) Vol 18 No 1 *The SciTechLawyer, A Publication of the American Bar Association Science & Technology Law Section* 10-14.

<sup>72</sup> See eg Maxine Joselow, "Court orders Shell to slash emissions in historic ruling" May 27, 2021 *Scientific American* <https://www.scientificamerican.com/article/court-orders-shell-to-slash-emissions-in-historic-ruling/>; Joanna Setzer and Catherine Highman (2021) *Global trends in climate change litigation: 2021 snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, London) at 31. [Add Benjamin/Seck in ABA?]

<sup>73</sup> See Greenhouse Gas Protocol, <https://ghgprotocol.org/about-us>

<sup>74</sup> Laura Hurst and Diederik Baazil, 'Shell to drop 'Dutch' from name, relocate HQ to London' (15 November 2021) Bloomberg, Aljazeera, online: <https://www.aljazeera.com/economy/2021/11/15/bb-shell-to-drop-dutch-from-name-relocate-hq-to-london>

<sup>75</sup> *RDS* Decision 4.4.25 (It is through the energy package that *RDS* 'controls and influences the Scope 3 emissions of the end-users of the products produced and sold by the Shell group.')

<sup>76</sup> *RDS* Decision para 4.1.4 ('taking account of its current obligations and other relevant circumstances.')

For the climate concerned, this may seem surprisingly underwhelming, when compared to an indication from the court that the Shell group should (must) refrain from any new fossil fuel investments or even remedy past climate harms as a climate justice approach would require.<sup>77</sup> Indeed, the court is clear that the CO<sub>2</sub> emissions of the Shell group are not currently unlawful, despite the plaintiffs' claim.<sup>78</sup> At another point in the judgment the court suggests that a consequence of setting the emissions reduction guideline at net 45% lower than 2019 levels (a 'significant obligation') 'may be that RDS will forgo new investments in the extraction of fossil fuels and/or will limit its production of fossil fuels.'<sup>79</sup> The explanation for this underwhelming order lies in the analysis of reduction pathways and the acceptance of 'negative emissions' – that is, 'processes that extract [GHGs] from the atmosphere, such as a combination of capturing biomass and storing CO<sub>2</sub>'.<sup>80</sup> The court did not accept the plaintiffs' argument that to reach net zero by 2050 requires 'an absolute reduction of 45% in 2030' – rather, while acknowledging that scenarios involving 'large-scale negative emissions' are unacceptable, 'there must be room for scenarios with negative emissions.'<sup>81</sup>

Nature-based solutions (NbS) are promoted as important negative emissions technologies, having the potential to address both climate change and biodiversity loss concerns at the same time, yet are open to misuse and greenwashing,<sup>82</sup> and can themselves give rise to human rights abuses.<sup>83</sup> The purchase of NbS to offset emissions rather than significantly reducing emissions is a serious concern, and one that is arguably exacerbated from a jurisdictional perspective if the NbS proposed is in a different jurisdiction from that of the court issuing the order to reduce emissions. On the facts of RDS, the order issued was 'declared provisionally enforceable'<sup>84</sup> but absent from the decision is how - and where – actions need to be taken, leaving this up to RDS to decide, and presumably report.<sup>85</sup>

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<sup>77</sup> Notably, the RDS court denied standing to a Dutch NGO that's focus of concern was the impact of climate change in Africa, whereas Dutch NGOs concerned about climate impacts in the Netherlands were granted standing. RDS Decision 4.21 – 4.26. On BHR and climate justice, see Sara L. Seck, "A relational analysis of enterprise obligations and carbon majors for climate justice" (2021) 11:1 Oñati Socio-Legal Series 254-284: Climate Justice in the Anthropocene.

<sup>78</sup> RDS Decision 4.5.7

<sup>79</sup> RDS Decision 4.4.39.

<sup>80</sup> RDS Decision 4.4.30.

<sup>81</sup> RDS Decision 4.4.30

<sup>82</sup> Nature-based Solutions Initiative, 'On the misuse of nature-based carbon offsets' (2021)

<https://www.naturebasedsolutionsinitiative.org/wp-content/uploads/2021/04/Greenwashing-response-final-version.pdf>

<sup>83</sup> Ibid, and Forest Peoples Programme, above note 11. See also UNPRI, 'New investor guide to negative emission technologies and land use' (26 October 2020), online: <https://www.unpri.org/news-and-press/new-investor-guide-to-negative-emission-technologies-and-land-use/6655.article>

<sup>84</sup> RDS Decision at para 4.5.7

<sup>85</sup> Indeed, a New Zealand court expressed concern over an action seeking an injunction that would require GHG emitting companies to produce or cause zero emissions by 2030, linearly reducing net emissions each year, as supervising the injunction including the acceptability of offsets would turn the court into a regulator but without the requisite expertise. *Smith v Fontera Co-Operative Group Ltd and Ors* [2020] NZHC 419 at paras 107-108. [update to Court of Appeal?]

As a result, while human rights-based climate litigation drawing upon the UNGPs gives cause of excitement, it should also be tempered with a reality check. Litigation is likely easier against investor-owned companies, than state-owned or nation-state producers, and so this can only ever be a small piece of the puzzle. Moreover, a focus on emissions reduction without attention to the problem of offsets including NbS can create incentives for ‘climate-washing’<sup>86</sup> rather than meaningful climate action.

#### 4. Mandatory HReDD

A different BHR tool is mandatory human rights (and environmental) due diligence (mandatory HReDD). The recently released European Commission proposal provides food for thought here.<sup>87</sup> First, this Directive proposal needs to be understood in light of existing and proposed complementary initiatives, including a proposed regulation on supply chains and deforestation, a proposed regulation for new batteries, a sustainable products initiative aimed at revising an existing ecodesign directive, among many existing environmental initiatives and non-financial disclosure initiatives.<sup>88</sup> There is also the domestic legal context to consider, and indeed the purpose of this initiative appears in part to ensure a level playing field across the EU for due diligence, and to improve legal certainty.<sup>89</sup>

Given the purpose of this paper, my observations with regard to this initiative will be brief and focused. The purpose of the Directive as set out in Article 1 is to set rules with regard to the due diligence obligations of companies with attention to their own operations, subsidiaries, and value chain operations; the focus of the due diligence is on both actual and potential human rights and environmental adverse impacts, and appropriate liability rules in case of violation.<sup>90</sup> Article 15 asks Member States to ensure select companies adopt a plan setting out a business model and strategy for the company that is compatible with limiting global warming in line with the Paris Agreement and transition to a sustainable economy.<sup>91</sup> The Annex contains lists that specify the adverse environmental and human rights impacts relevant to the Directive, classified separately.

Article 15 is subtitled ‘Combating climate change’ and clarifies that companies are to identify in their plan ‘on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company’s operations’.<sup>92</sup> Where climate change ‘is or should have been identified as a principal risk for, or a principal impact of, the company’s operations’, Member States are to ensure that ‘the company includes

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<sup>86</sup> See for example re climate-washing cases <https://www.reuters.com/business/sustainable-business/environmental-groups-sue-totalenergies-over-climate-marketing-claims-2022-03-03/>

<sup>87</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022, COM(2022) 71 final, 2022/0051 (COD)

<sup>88</sup> Proposed EC Directive, Explanatory Memorandum, pp3-9.

<sup>89</sup> Proposed EC Directive, p18.

<sup>90</sup> Proposed EC Directive, pp23-24. (summary)

<sup>91</sup> Proposed EC Directive p25. (summary)

<sup>92</sup> Proposed EC Directive, Article 15.

emission reduction objectives in its plan'.<sup>93</sup> However there is no mention of emission scopes, so it is unclear whether the emission reductions include all three scopes or whether there is a more limited objective. There is also no obvious reference to 'net zero' or 'offsets' making it unclear (at least on a quick glance) what the actual expectation is.

With regard to the materials listed in the Annex,<sup>94</sup> and therefore subject to the due diligence obligations, Part I, 'violations of rights and prohibitions included in international human rights agreements', provides a list including as #18:

'Violation of the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources, that

- (a) Impairs the natural bases for the preservation and production of food, or
- (b) Denies a person access to safe and clean drinking water or
- (c) Makes it difficult for a person to access sanitary facilities or destroys them or
- (d) Harms the health, safety, the normal use of property or land or the normal conduct of economic activity of a person or
- (e) Affects ecological integrity, such as deforestation,

in accordance with Article 3 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Civil and Political Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights.'<sup>95</sup>

This is followed in #19 by livelihood rights violations in relation to land, forests and waters, and in #20 by Indigenous rights violations.

As someone who teaches environmental law in the domestic Canadian context, it is difficult to know what to make of #18. Domestic environmental law is premised upon a permissible approach to pollution – commonly described as 'command and control', whereby companies seek permits to pollute in accordance with specified limits. It is difficult to understand what would not be included here, but this would accord with a human rights-informed approach to environmental justice.<sup>96</sup> Obviously, domestic approaches to environmental law are broken or we would not be in a situation of triple planetary crisis. Might this provision be useful, or is it so broad as to be unimplementable in practice? (It does not of course speak to the overconsumption issue.)

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<sup>93</sup> Proposed EC Directive, Article 15.

<sup>94</sup> [https://ec.europa.eu/info/sites/default/files/1\\_2\\_183888\\_annex\\_dir\\_susta\\_en.pdf](https://ec.europa.eu/info/sites/default/files/1_2_183888_annex_dir_susta_en.pdf)

<sup>95</sup> Ibid #18

<sup>96</sup> See for example Erin Daly and James R May, 'The Indivisibility of Human Dignity and Sustainability' in Sumudu Atapattu, Carmen G. Gonzalez & Sara L Seck, co-editors, *Cambridge Handbook of Environmental Justice and Sustainable Development* (CUP 2021) at 23-28; Carmen Gonzalez, Racial Capitalism and the Anthropocene in Sumudu Atapattu, Carmen G. Gonzalez & Sara L Seck, co-editors, *Cambridge Handbook of Environmental Justice and Sustainable Development* (CUP 2021) at 72-85.

Part II, on the other hand, provides a separate list of ‘violations of internationally recognized objectives and prohibitions included in environmental conventions.’<sup>97</sup> While the first item addresses biodiversity, and the second trade in endangered species, the rest focus on discrete provisions in relation to toxic or hazardous substances. This may be reflective of the limited number of binding international legal obligations that easily translate into business responsibilities. By contrast with the (overly?) expansive nature of #18 in Part I, Part II seems unnecessarily narrow. Both Parts suffer from a focus that is almost entirely on state-based treaty law.

Another important dimension of the Directive is Article 25 which clarifies the duty of care of directors. States are to ensure that directors of companies ‘take into account’ climate change, human rights, and ‘environmental consequences including in the short, medium and long term’ when ‘fulfilling their duty to act in the best interest of the company’.<sup>98</sup> Much could be said about both the importance and limitations of this kind of change.<sup>99</sup>

Overall, while the objectives of mandatory HReDD legislation are laudatory, it is unclear whether what is proposed in the EC Directive would lead to effective change at least with regard to the human rights dimensions of triple planetary crisis. While this brief glance cannot provide a fulsome assessment of this initiative or its broader context, my reading is that it does not appear to have the potential to address the overconsumption problem, nor, importantly, is it designed to. Indeed, the word consumption only appears twice (both in the explanatory memorandum), and the problem of overconsumption (or excess emissions) is not identified.

## 5. Sustainable Development Goals

Unlike human rights-based corporate climate accountability litigation, or mandatory HReDD legislation, the 2030 Agenda for Sustainable Development with its seventeen SDGs and 169 targets clearly does contemplate the problem of overconsumption.<sup>100</sup> Sustainable development is often thought to require the balancing of three pillars of economic development, social development, and environmental protection, sometimes described as resembling a three-legged stool each supporting equal weight.<sup>101</sup> Yet this vision of sustainable development is highly problematic in that it fails to recognize the place of humanity within the biosphere, endorsing a view of humans as separate from the environment.<sup>102</sup> Instead, environment must

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<sup>97</sup> Proposed EC Directive Part II

<sup>98</sup> Proposed EC Directive, Article 25.

<sup>99</sup> See for example Beate Sjøfjell and Mark B. Taylor, “A Clash of Norms: Shareholder Primacy VS Sustainable Corporate Purpose” (2019) 13:3 *International & Comparative Corporate Law Journal* 40-66.

<sup>100</sup> UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Oct 21, 2015, UN Doc A/RES/70/1.

<sup>101</sup> Sumudu Atapattu, Carmen G. Gonzalez & Sara L Seck, “Intersections of Environmental Justice and Sustainable Development” in Sumudu Atapattu, Carmen G. Gonzalez & Sara L Seck, co-editors, *Cambridge Handbook of Environmental Justice and Sustainable Development* (CUP 2021) 1-19 at 3-4.

<sup>102</sup> *Ibid* at 4.

be understood as the floor on which society and all economic activity must stand.<sup>103</sup> Critics of the concept of sustainable development argue that it ‘fosters the illusion of unlimited economic growth on a finite planet’ and is deployed by ‘global elites’ who ‘subordinate nature to the imperatives of economic growth, while ignoring ecological limits and planetary boundaries.’<sup>104</sup>

The 2030 Agenda is, however, explicitly based on human rights,<sup>105</sup> and close interrogation of the social pillar of sustainable development should reveal useful frames for BHR.<sup>106</sup> What about overconsumption by the affluent? SDG 12<sup>107</sup> (Ensure sustainable consumption and production patterns) perhaps holds promise with targets that include halving food waste, life cycle approaches to managing chemicals and waste, substantially reducing waste through ‘prevention, reduction, recycling and reuse’, encouraging companies to adopt sustainable practices and sustainability reporting, and ensuring ‘people everywhere have relevant information and awareness for sustainable development and lifestyles in harmony with nature.’<sup>108</sup> According to the OHCHR, SDG 12 reflects human rights to health, adequate food, safe drinking water, and the right of all peoples to freely dispose of their natural resources.<sup>109</sup> Yet there seems to be a disconnect between the nature of the problem and the solutions proposed – while there doesn’t seem to be a down side to everyone learning about how to live in harmony with nature, it does seem to sidestep the problematic reality of wealth inequity as documented in studies such as that of Oxfam which found in 2019 that the poorest half of the world’s population controlled as much wealth as 26 billionaires.<sup>110</sup> It also seems counterintuitive when read in light of SDG 1 which includes targets such as to ‘eradicate extreme poverty for all people everywhere’ (defined as living on less than \$1.25 per day), and to ‘build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events’ etc.<sup>111</sup> In short, the SDGs seem to have no trouble identifying specific targets for the ‘poor’; why not be explicit about reduced consumption targets for the ‘rich’?<sup>112</sup>

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<sup>103</sup> Ibid p5. Alternately, environment may be viewed as a ceiling of planetary boundaries which must not be exceeded. See further (above and below) on resilience and the Anthropocene.

<sup>104</sup> Ibid p5.

<sup>105</sup> Ibid p5 (‘We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential ...’)

<sup>106</sup> See for example Vijayarasa, R., & Liu, M. (2022). Fast Fashion for 2030: Using the Pattern of the Sustainable Development Goals (SDGs) to Cut a More Gender-Just Fashion Sector. *Business and Human Rights Journal*, 7(1), 45-66. doi:10.1017/bhj.2021.29; and JÄGERS, N. (2021). UN Guiding Principles at 10: Permeating Narratives or Yet Another Silo? *Business and Human Rights Journal*, 6(2), 198-211. doi:10.1017/bhj.2021.9.

<sup>107</sup> <https://sdgs.un.org/goals/goal12>

<sup>108</sup> SDG 12, Targets 12.3, 12.4, 12.5, 12.6, 12.8

<sup>109</sup> [https://www.ohchr.org/Documents/Issues/MDGs/Post2015/SDG\\_HR\\_Table.pdf](https://www.ohchr.org/Documents/Issues/MDGs/Post2015/SDG_HR_Table.pdf)

<sup>110</sup> Atapattu et al, (supra note x) p6, citing Oxfam, ‘Public Good or Private Wealth’ Jan 2019, p12.

<sup>111</sup> <https://sdgs.un.org/goals/goal1> SDG 1, Targets 1.1 and 1.5.

<sup>112</sup> Of course, the poor are not treated as having agency in SDG 1, but rather the action is directed at others. For a related discussion of outstanding research questions with regard to the relationship between sustainable development and environmental justice, see Sumudu Atapattu, Carmen G. Gonzalez & Sara L Seck, “Beyond Fragmentation: Reflections, Strategies and Challenges” in Sumudu Atapattu, Carmen G. Gonzalez & Sara L Seck, co-editors, *Cambridge Handbook of Environmental Justice and Sustainable Development* (CUP 2021) 470-476.

A different but perhaps related concern is with Goal 8's call to 'Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all'.<sup>113</sup> Targets include to '[s]ustain per capita economic growth in accordance with national circumstances'.<sup>114</sup> This suggests an embrace of 'economic growth' for all despite movements advocating for 'sustainable degrowth' in wealthy parts of the world so as to 'meet basic human needs and ensure a high quality of life, while reducing the ecological impact of the global economy to a sustainable level, equitably distributed among nations'.<sup>115</sup> Instead, Target 8.4 embraces the decoupling of economic growth and environmental degradation, through improvements in 'global resource efficiency in production and consumption'.<sup>116</sup> Yet while the indicators listed point to the importance of material footprint analysis, SDG 8 similarly refrains from explicitly highlighting the problem of overconsumption by individuals that are rich.<sup>117</sup>

Similar concerns arise with regard to SDG 10 'Reduce inequality within and among countries'.<sup>118</sup> Target 10.1 is '[b]y 2030, progressively achieve and sustain income growth of the bottom 40 per cent of the population at a rate higher than the national average' with indicator 10.1.1 '[g]rowth rates of household expenditure or income per capita among the bottom 40 per cent of the population and the total population'.<sup>119</sup> Yet given the reality of triple planetary crisis and planetary boundaries, why is there no explicit mention of the need for those in the top 10 percent at least to lower their income and expenditure (degrowth?) rather than continuing the charade that we live on a planet with no ecological limits?

Notably, according to a Tweet by ecological economist Timothée Parrique on March 1, 2022, 'degrowth' is referenced multiple times in the IPCC's latest report, although not in the summary for policy-makers.<sup>120</sup>

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<sup>113</sup> SDG 8 <https://sdgs.un.org/goals/goal8>

<sup>114</sup> SDG 8, Target 8.1. Indicator 8.1.1 is 'Annual growth rate of real GDP per capita'.

<sup>115</sup> Atapattu et al, (supra note x) pp6-7, citing the 2008 Degrowth Declaration adopted at the Economic Degrowth for Ecological Sustainability and Social Equity Conference held in Paris in 2008.

<sup>116</sup> SDG 8, Target 8.4. The framing arguably aligns with calls by UNEP for 'green growth'. See generally Atapattu et al (supra note x) pp7-8.

<sup>117</sup> SDG 8, Indicator 8.4.1 'Material footprint, material footprint per capita, and material footprint per GDP'; Indicator 8.4.2 'Domestic material consumption, domestic material consumption per capita, and domestic material consumption per GDP'. See further the 10 Year Framework of Programmes on Sustainable Consumption and Production Patterns: <https://www.unep.org/explore-topics/resource-efficiency/what-we-do/one-planet-network/10yfp-10-year-framework-programmes> and the One Planet Network, including its work on Responsible Industry, Sustainable Lifestyles, and the Life Cycle Initiative.

<sup>118</sup> <https://sdgs.un.org/goals/goal10>

<sup>119</sup> Ibid

<sup>120</sup> Tweet by Timothée Parrique, March 1, 2022, claiming 'degrowth' appears 27 times in the 3,675 pages of the full report, 12 of which are in the bibliography, but it is not mentioned in the technical summary or summary for policy makers. According to Parrique, it appears in Chapter 1, pp67-68 (contrasted with ecomodernism); once in a summary paragraph of Chapter 1; in Chapter 18 p21 (as one of five categories of perspectives on development) and p31 (speaking of the quality of development processes and actions) and p65 (political economy of client resilient development) and pp81-82 (economic and financial arenas).

## 6. OECD Guidelines for Multinational Enterprises

In this part I will consider whether responsible business conduct (RBC) as developed through the work of the OECD might offer useful tools for addressing the overconsumption of the rich problem. My analysis so far suggests the UNGPs have nothing obvious to offer on this topic, and neither do the Principles of the UN Global Compact.<sup>121</sup> The OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines),<sup>122</sup> on the other hand, appear to offer some potential given that Chapter VIII is devoted to Consumer Interests.

The OECD MNE Guidelines and accompanying Due Diligence guidance tools<sup>123</sup> are promoted to businesses by 50 adhering states<sup>124</sup> each of which is required to establish a National Contact Point (NCP) agency designed to both promote RBC and to hear specific instance complaints using non-judicial grievance processes.<sup>125</sup> While initially developed in the 1970s, the most recent version of the OECD MNE Guidelines dates from 2011. Part I, General Concepts and Principles, clarifies that expectations are the same for domestic and multinational enterprises, and that small and medium-sized enterprises (SMEs) are encouraged to observe the MNE Guidelines as much as possible given their capacity.<sup>126</sup> For all enterprises, the first obligation is to obey domestic law, with the OECD MNE Guidelines often extending beyond the law.<sup>127</sup> Should domestic laws conflict with any standards or principles, enterprises are expected to seek to honour them to the fullest extent without violating domestic law, and governments of adhering or third countries are encouraged to co-operate in good faith to resolve such conflicts.<sup>128</sup> Part II, General Policies, confirms the expectation that enterprises should both take into account policies in the countries in which they operate and take into account the views of stakeholders.<sup>129</sup> In addition to contributing to sustainable development and respecting human rights, as well as developing effective practices of self-regulation and management, enterprises are expected to carry out “risk-based due diligence” so as to “identify, prevent and mitigate actual and potential impacts” and to “account for how those impacts are addressed” with the “nature and extent of due diligence depend[ing] on the circumstances of a particular situation”.<sup>130</sup> Going beyond the human rights focus of the UNGPs, the expectation is for risk-

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<sup>121</sup> Neither the human rights nor environment principles of the UNGC appear to provide guidance on this point (see generally <https://www.unglobalcompact.org/what-is-gc/mission/principles>), although to the extent that UNGP members align with the SDGs there will be expectations regarding overproduction, overconsumption, circular economy, etc (see generally <https://www.unglobalcompact.org/take-action/action/sdg-blueprint> ) Indeed, a search for ‘overconsumption’ pulled up 75 references in Communications on Progress, while ‘overproduction’ pulled up a mere 63. Circular economy pulled up close to 3000, including in UNGC websites (14) and news stories (13). Close to 5500 Communications on progress referenced life cycle assessment, with news (4) and a website (1).

<sup>122</sup> <https://www.oecd.org/daf/inv/mne/48004323.pdf>

<sup>123</sup> <https://mneguidelines.oecd.org/duediligence/>

<sup>124</sup> <https://www.oecd.org/investment/mne/oecddeclarationanddecisions.htm>

<sup>125</sup> <https://mneguidelines.oecd.org/ncps/>

<sup>126</sup> OECD MNE Guidelines p18, paras 5-6.

<sup>127</sup> OECD MNE Guidelines p17, para 2.

<sup>128</sup> OECD MNE Guidelines pp17-18, paras 2 & 8.

<sup>129</sup> OECD MNE Guidelines p19.

<sup>130</sup> OECD MNE Guidelines pp19-20, paras 1, 2, 7, and 10.

based due diligence to be conducted in relation to matters covered by other chapters of the OECD MNE Guidelines.<sup>131</sup> This means that enterprises need to “[a]void causing or contributing to adverse impacts” “through their own activities, and address such impacts when they occur”, and also “[s]eek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.”<sup>132</sup> Enterprises should also encourage business partners to apply RBC principles, including sub-contractors and suppliers, and should “[e]ngage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.”<sup>133</sup> MNEs that are state-owned (SOEs) are also subject to the OECD MNE Guidelines.<sup>134</sup> A crucial component of RBC due diligence under the OECD MNE Guidelines is for due diligence to go “beyond simply identifying and managing materials risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the *Guidelines*”<sup>135</sup> including risks to rights holders.<sup>136</sup>

Chapter IV on Human Rights replicates the responsibility to respect human rights and so does not offer more than the UNGPs. Other potentially relevant chapters to the overconsumption issue are Chapter III (Disclosure), Chapter VI (Environment), and Chapter VIII (Consumer Interests).

The disclosure chapter confirms the need for enterprises to ensure timely disclosure of accurate material information on enterprise activities including where appropriate for geographic areas or business lines.<sup>137</sup> Enterprise disclosure policies should include information on risk factors that are foreseeable, as well as ‘issues regarding workers and other stakeholders’.<sup>138</sup> Businesses are encouraged to publicly communicate additional information including on matters relating to the OECD MNE Guidelines or other codes of conduct, ‘internal audit, risk management, and legal compliance systems’, as well as information regarding stakeholder and worker relationships.<sup>139</sup> Non-financial disclosure, including social and environmental reporting should be undertaken in accordance with high quality reporting standards, and the standards or policies themselves should be reported.<sup>140</sup>

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<sup>131</sup> OECD MNE Guidelines p20 para 11

<sup>132</sup> OECD MNE Guidelines p20, paras 11-12.

<sup>133</sup> OECD MNE Guidelines p20, para 14. See further p25, para 25 (stating in part: “Effective stakeholder engagement is characterised by two-way communication and depends on the good faith of participants on both sides.”)

<sup>134</sup> OECD MNE Guidelines p22, para 10 (Commentary).

<sup>135</sup> OECD MNE Guidelines p23, para 14 (Commentary). However, the expectation of due diligence does not apply to the chapters on Taxation, Competition, or Science and Technology.

<sup>136</sup> OECD MNE Guidelines [insert pinpoint]

<sup>137</sup> OECD MNE Guidelines p27, para 1.

<sup>138</sup> OECD MNE Guidelines p27, para 2.

<sup>139</sup> OECD MNE Guidelines pp27-28, para 3.

<sup>140</sup> OECD MNE Guidelines p28, para 4.

Beyond disclosure to shareholders, enterprise information is important to local communities, workers, governments, special interest groups, and society at large.<sup>141</sup> Businesses should operate transparently and be responsive to public demands for information.<sup>142</sup> Disclosure is important for non-traded enterprises, whether privately held or State-owned (SOEs).<sup>143</sup> The scope of information communicated to the public particularly with regard to environmental matters extends to activities of suppliers, contractors, or joint venture partners, particularly with regard to transfer of environmentally harmful activities.<sup>144</sup> Information should be communicated so as to be easily accessible, with particular attention to access by directly affected poorer communities.<sup>145</sup>

The environment chapter highlights the need for enterprises to take account of environmental protection while operating in accordance with relevant domestic and international law and policy and contributing to sustainable development.<sup>146</sup> To do so, businesses need to have environmental management systems in place that collect and evaluate environmental and health and safety (EHS) impacts in a timely fashion.<sup>147</sup> Measurable objectives and targets for improving environmental performance and utilization of resources should be established, consistent with national and international commitments. They should be reviewed periodically and subject to regular monitoring and verification of progress.<sup>148</sup>

The environment chapter also calls upon businesses to provide both workers and the public with timely information on potential EHS impacts of enterprise activities, and to engage in timely consultation with directly affected communities.<sup>149</sup> Foreseeable EHS impacts associated with the full life cycle of enterprise processes, goods and services should be assessed and addressed in decision-making, with the aim of avoiding impacts, and mitigating those that are unavoidable. Where impacts may be significant, an environmental impact assessment should be prepared.<sup>150</sup> A precautionary approach should be adopted,<sup>151</sup> and contingency plans should be in place for 'preventing, mitigating, and controlling serious' EHS damage, including in case of emergencies and accidents, with attention to 'immediate reporting to the competent authorities'.<sup>152</sup> Businesses should aim for continuous improvement of corporate environmental performance by the enterprise and through the supply chain, including through the development of products that 'can be reused, recycled, or disposed of safely', through the promotion of consumer awareness of the environmental impacts of enterprise products, and through the development of strategies for the 'substitution or reduction of use of toxic

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<sup>141</sup> OECD MNE Guidelines p28, para 28 (Commentary).

<sup>142</sup> OECD MNE Guidelines p28, para 28 (Commentary).

<sup>143</sup> OECD MNE Guidelines pp28-29 para 29 (Commentary).

<sup>144</sup> OECD MNE Guidelines pp29-30 para 33 (Commentary).

<sup>145</sup> OECD MNE Guidelines p30, para 35 (Commentary).

<sup>146</sup> OECD MNE Guidelines at p42.

<sup>147</sup> OECD MNE Guidelines at p42, para 1.

<sup>148</sup> OECD MNE Guidelines p42, para 1.

<sup>149</sup> OECD MNE Guidelines p42, para 2.

<sup>150</sup> OECD MNE Guidelines p43, para 3.

<sup>151</sup> OECD MNE Guidelines p43, para 4.

<sup>152</sup> OECD MNE Guidelines p43, para 5.

substances’, among others.<sup>153</sup> The environment chapter further calls upon businesses to educate and train workers in EHS matters, including in relation to hazardous materials, as well as environmental management, impact assessment, the prevention of accidents, and public relations.<sup>154</sup> Finally, businesses should contribute to public policy development so as to enhance environmental protection and awareness.<sup>155</sup>

The Consumer Interests chapter lays out the expectation that enterprises should ensure the quality of goods and services and should act fairly in marketing and advertising.<sup>156</sup> Goods and services should not only meet consumer health and safety standards, but also take into consideration “the needs of vulnerable and disadvantaged consumers.”<sup>157</sup> Accurate and clear information about environmental attributes and disposal, including recyclability of products should be provided to consumers to enable them to make informed decisions.<sup>158</sup> Enterprises should also support consumer education so that consumers can make informed decisions about complex goods, better understand the environmental and social impacts of their choices, and “support sustainable consumption.”<sup>159</sup> Enterprises are expected to fully co-operate with public officials in order to prevent or diminish serious public health and safety or environmental threats “deriving from the consumption, use or disposal” of business goods and services.<sup>160</sup>

While there are glimmers of hope in terms of reference to supporting consumer education, promoting environmental awareness, and non-financial disclosure, there does not appear to be anything that clearly points to a need for businesses to play a role in addressing the problem of overconsumption by the affluent. There are also arguably concerns with the consumer education angle, as critiques of precautionary consumption point out that it often places the burden to reduce (toxins) within the household on feminized labour.<sup>161</sup>

It is beyond the scope of this paper to delve in detail into the OECD’s extensive due diligence guidance tools for RBC.<sup>162</sup> However, in December 2021, the OECD published a paper

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<sup>153</sup> OECD MNE Guidelines p43 para 6.

<sup>154</sup> OECD MNE Guidelines p44 para 7.

<sup>155</sup> OECD MNE Guidelines p44 para 8.

<sup>156</sup> OECD MNE Guidelines at p51.

<sup>157</sup> OECD MNE Guidelines at pp51-52, paras 1 and 8.

<sup>158</sup> OECD MNE Guidelines at p51, para 2. See further p53 para 85 (Commentary).

<sup>159</sup> OECD MNE Guidelines at p51, para 5.

<sup>160</sup> OECD MNE Guidelines at p51, para 7.

<sup>161</sup> Dayna Nadine Scott, Jennie Haw, & Robyn Lee, ‘Wannabe Toxic-Free? From precautionary consumption to corporeal citizenship’ (2016) *Environmental Politics*.

<sup>162</sup> See generally OECD (2018) *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD Publishing, Paris) <<https://mneguidelines.oecd.org/duediligence/>>. Sector-specific due diligence guidance is available in multiple areas. According to the 2018 OECD Due Diligence Guidance, while ‘risk’ is often understood by enterprises as concerning risks to the enterprise itself, the OECD approach to risk-based due diligence is ‘outward-facing’: that is, its focus is on ‘the likelihood of adverse impacts on people, the environment and society that enterprises cause, contribute to, or to which they are directly linked.’ P15 Box 1. The 2018 OECD Due Diligence Guidance also pays close attention to the protection of human rights defenders who are identified as key rights holders for direct consultation, and as frequently subject to reprisals for documenting and speaking out about human rights impacts associated with projects. Ibid pp27, 38, 48. The 2018 Due Diligence Guidance for Responsible Supply Chains in the

designed to provide a snapshot of how OECD RBC instruments address global environmental challenges.<sup>163</sup> The paper emphasizes the importance of an environmental human rights approach,<sup>164</sup> introduces circular economy initiatives,<sup>165</sup> and provides an overview of OECD National Contact Point (NCP) cases.<sup>166</sup> It describes key provisions in the OECD MNE Guidelines and explores how they have been interpreted in select NCP decisions.<sup>167</sup> The paper subsequently explores OECD due diligence instruments and select sector-specific guidance<sup>168</sup> and concludes by introducing policy trends including mandatory human rights and environmental due diligence, as well as anti-waste and circular economy law and policy.<sup>169</sup> Annex A provides a comprehensive overview of NCP cases that have referred to the environment chapter.<sup>170</sup> Notably for the purpose of this paper, there are 14 references to ‘consumption’ in the paper, and much attention is given to the importance of circular economy initiatives.<sup>171</sup> However, again, there is no specific finger pointing to the consumption patterns of the affluent.

## 7. Lessons for BHR from Environmental Human Rights (EHR)

It is common for environmental issues to be treated as distinct from human rights issues, but increasingly these conversations are coming together. Indeed, in October 2021, the UN Human Rights Council passed a resolution recognizing ‘the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights.’<sup>172</sup> It further notes that the right is ‘related to other rights and existing international law,’ and affirms that the promotion of the right requires ‘the full implementation of the multilateral environmental agreements under the principles of international environmental law.’<sup>173</sup> To this end the resolution ‘encourages’ states to build capacities to protect the environment in order to fulfil all of their human rights obligations, as well as to enhance cooperation with others including: states; the OHCHR; the rest of the UN system; relevant regional actors; as well as relevant non-states stakeholders such as civil society, national human rights institutions, and

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Garment and Footwear Sector are notable in drawing attention to how due diligence is relevant to product design with the aim of reducing environmental impacts of product lines.

<sup>163</sup> OECD (2021), *The role of OECD instruments on responsible business conduct in progressing environmental objectives*, <https://mneguidelines.oecd.org/The-role-of-OECD-instruments-on-responsible-business-conduct-in-progressing-environmental-objectives.pdf>

<sup>164</sup> Ibid pp6, 25-26, 34-35.

<sup>165</sup> Ibid p12.

<sup>166</sup> Ibid pp14-15. See database of specific instances online: <https://mneguidelines.oecd.org/database/> .

<sup>167</sup> Ibid pp16-33.

<sup>168</sup> Ibid pp34-38. The only explicit mention of plastics is with regard to the Garment and Footwear Sector guidance where it is noted that consideration of environmental impacts across the full life cycle of a product would include ‘tak[ing] preventative action to avoid and reduce microplastic shedding and pollution’. Ibid p36.

<sup>169</sup> Ibid pp39-43.

<sup>170</sup> Ibid pp46-52.

<sup>171</sup> Ibid (2 are in the footnotes, the rest in various areas of the text)

<sup>172</sup> UNGA, *Resolution adopted by the Human Rights Council on 8 October 2021: The human right to a clean, healthy and sustainable environment*, A/HRC/RES/48/13 (18 October 2021) at p3.

<sup>173</sup> Ibid

business.<sup>174</sup> Additionally states are encouraged to share good practices, adopt policies for the enjoyment of the right with respect to biodiversity and ecosystems, and to take the right into account while implementing and following up on the SDGs.<sup>175</sup> The preambular language to the resolution recalls that the UNGPs ‘underscore the responsibility of all business enterprises to respect human rights, including the rights to liberty and security of human rights defenders working in environmental matters, referred to as environmental human rights defenders’.<sup>176</sup> It also notes that ‘more than 155 States have recognized some form of a right to a healthy environment’ whether in national constitutions, policies, legislation, or international agreements.<sup>177</sup>

This resolution is not, however, the full story of environmental human rights<sup>178</sup> Of note for this paper is the work of Special Rapporteurs on human rights and the environment whose work has clarified the nature of existing environmental human rights. These reports often make reference to business responsibilities while also clarifying state duties and draw upon a fulsome range of sources of international human rights and environmental law.<sup>179</sup>

For example, following an extensive process of mapping environmental human rights in international law,<sup>180</sup> the 2018 *Framework Principles for Human Rights and the Environment* consist of sixteen Principles largely aimed at clarifying state obligations.<sup>181</sup> The commentary to the first and second *Framework Principles* clarifies the interdependence of environment and human rights: without a ‘safe, clean, healthy and sustainable environment’ it is impossible to fully enjoy a vast range of human rights, including rights to life, health, food, water, and development; yet in order to protect the environment, it is vital to exercise human rights including rights to information, freedom of expression and association, participation and remedy.<sup>182</sup> Principle 12 confirms ‘States should ensure environmental standards are effectively enforced against both public and private actors’.<sup>183</sup> Paragraph 35 of the Commentary clarifies that the business responsibility to respect human rights in accordance with the UNGPs applies to adverse human rights impacts that arise through environmental harm, and that beyond compliance with environmental laws, businesses should respect human rights through

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<sup>174</sup> Ibid

<sup>175</sup> Ibid

<sup>176</sup> Ibid at p2.

<sup>177</sup> Ibid p2.

<sup>178</sup> Nor am I able to tell the full story here! See further resources available through the Global Network for Human Rights and the Environment (GNHRE): <https://gnhre.org>

<sup>179</sup> *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, UN doc. A/HRC/37/59 (Jan. 24, 2018), <https://undocs.org/A/HRC/37/59>. (“Framework Principles”)

<sup>180</sup> <https://www.ohchr.org/en/issues/environment/srenvironment/pages/mappingreport.aspx>

<sup>181</sup> *Framework Principles*, Principles 1-16.

<sup>182</sup> *Framework Principles*, Commentary para 4.

<sup>183</sup> *Framework Principles*, Principle 12. See further Principle 11 on the process through which states should ‘establish and maintain substantive standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfill human rights’.

environmental protection and remediation of adverse environmental human rights impacts they cause or to which they contribute.<sup>184</sup>

The *Framework Principles* treat non-discrimination as a cross-cutting theme.<sup>185</sup> Principle 14 elaborates upon the need for additional measures in relation to ‘those who are most vulnerable to, or at particular risk from, environmental harm.’ Vulnerability may arise due to the unusual susceptibility of some individuals to environmental harm, or due to a denial of their human rights, or both.<sup>186</sup> Those most vulnerable or at risk include women, older persons, the disabled, those living in poverty, racialized minorities, displaced persons and children.<sup>187</sup> Principle 15 elaborates the particular obligations owed by states in relation to Indigenous peoples and ‘members of traditional communities’.

Principles 4-10 of the *Framework Principles* clarify the content of procedural environmental human rights:<sup>188</sup>

- Access to information on environmental matters that may undermine rights (Principle 7)
- Prior assessment of possible environmental impacts of proposed projects and policies including effects on human rights (Principle 8)
- Freedom of expression, peaceful assembly, and association with regard to environmental matters (Principle 5) as well as a safe space for environmental human rights defenders that is free from harassment, threats, intimidation, and violence (Principle 4)
- Effective public participation in environmental decision-making for all (Principle 9)
- Access to effective remedies for violations of environmental human rights, including both violations of procedural rights and substantive rights (Principle 10)

Notably, Principle 6 provides that ‘States should provide for education and public awareness on environmental matters’, with the Commentary drawing specific attention to the ‘education of the child’ but also continuing to adulthood ‘[t]o ensure that adults as well as children understand environmental effects on their health and well-being’.<sup>189</sup> The aim is to build public capacity to ‘understand environmental challenges and policies’, so that they may fully exercise the full range of their environmental rights. Yet there is no reference to the need to educate the public, especially affluent adults, of the harms to human rights that arise from overconsumption patterns. While Principle 16 of the *Framework Principles* provides that ‘States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development’, there is no specific reference

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<sup>184</sup> *Framework Principles* Principle 12, Commentary para 35.

<sup>185</sup> *Framework Principles*, Principle 3 ‘States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment’

<sup>186</sup> *Framework Principles*, Principle 14 Commentary para 40

<sup>187</sup> *Framework Principles*, Principle 14 Commentary para 41

<sup>188</sup> *Framework Principles*, Principles 4-10. Note that I am intentionally using the phrase ‘environmental human rights’ in acknowledgement of the fact that the framing here goes beyond the three pillars of what are traditionally understood as procedural environmental rights from an environmental law perspective (access to information, public participation, and access to justice).

<sup>189</sup> *Framework Principle 6*, Commentary paras 15 – 16.

to SDGs that touch on overconsumption. Instead, the message is that the pursuance of environmental and developmental goals in accordance with human rights norms both promotes human dignity and strengthens policymaking.

The overarching substantive right to a safe, clean, healthy and sustainable environment are subdivided into specific issue areas which have received the attention of the current Special Rapporteur in dedicated reports.<sup>190</sup> These are rights: to breathe clean air; to a safe climate; to safe, sufficient water and healthy freshwater ecosystems; to healthy and sustainably produced food; to non-toxic environments in which to live, work, study or play; and to healthy biodiversity and ecosystems. Consumption is briefly referenced in some of the reports, including the need to reduce consumption of some food items.<sup>191</sup> Specific mention of the problem is made in the report on biodiversity, noting first that '[w]ealthy people are disproportionately responsible for overconsumption and pressure on nature', and identifying agriculture as the 'largest single factor in the destruction of ecosystems and the decline of biological diversity'.<sup>192</sup> Paragraph 82 of the conclusions is directly on point:

82. Transforming society to achieve a good quality of life for all in harmony with nature requires scaling up biodiversity conservation, large-scale restoration of degraded ecosystems, a rapid clean energy transition, shifting to a circular economy, *decreased material consumption by wealthy individuals* and reforming supply chains to reduce environmental impacts. Employing a rights-based approach could serve as a catalyst for accelerated action. History demonstrates – through the progress achieved by abolitionists, suffragettes, civil rights activists and indigenous peoples – the powerful role of human rights in sparking transformative societal changes.<sup>193</sup> [*emphasis added*]

## 8. Conclusions: Transformative Thinking for Equity & Resilience

This paper has explored the relationship between BHR, triple planetary crisis, and the problem of overconsumption by the 'rich'. My key argument is that the issue of overconsumption by the affluent is relevant to BHR, given that the human rights impacts of the triple planetary crisis are intimately connected to overconsumption. While the RDS corporate climate litigation and the newly proposed EC Directive have generated excitement, I argue that it is not clear that either speaks to the overconsumption problem. While the SDGs do consider responsible consumption and production, I argue that the approach is not sufficient, failing to draw clear attention to overconsumption by the wealthy. While OECD RBC guidance offers supplementary entry points into the overconsumption conversation, they too fall short despite attention to the role of the consumer and the importance of circular economy as complements to the integration of BHR into RBC.

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<sup>190</sup> <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/AnnualReports.aspx>

<sup>191</sup> See for example A/76/179

<sup>192</sup> *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Human rights depend on a healthy biosphere*, UNGA, A/75/161, 15 July 2020 at paras 16-17.

<sup>193</sup> *Ibid*, para 82 (*emphasis added*)

The work of Special Rapporteurs on human rights and environment offer food for thought on pathways forward. Access to education about environmental human rights, together with a fulsome understanding of procedural environmental human rights, creates necessary space for those most vulnerable to harm to exercise their rights. But creating space to act on environmental human rights concerns without at the same time drawing attention to the responsibility of wealthy individuals to reduce consumption (which, even if 'green' is most certainly beyond 'fair share') places the burden of guardianship to save the planet on those who are already burdened due to both colonialism and ecological crisis. This is not surprising, given the general failure of individual 'rights' talk to embrace individual responsibilities. There are good reasons to avoid a push away from business responsibilities to individual responsibilities, and I am not suggesting this. Rather, my claim is that the affluent are not just any individuals. This is particularly so for the 1%.<sup>194</sup>

The importance of not just of responsibility, but of reciprocal responsibilities between humans and non-humans, is evident if attention is paid to the justifications given by members of Indigenous communities, often women, who serve as land and water defenders. While Indigenous laws are unique to each nation, Anishnaabe scholar Deborah McGregor observes that 'Indigenous legal traditions reflect a set of reciprocal relationships and a coexistence with the natural world. Balanced relationships are sought between humans and other entities in the natural world (animals, plants, birds, forests, waters, etc.) as well as with the ancestors and future generations.'<sup>195</sup> It is curious, then, that environmental human rights frameworks and BHR acknowledge the need for environmental human rights defenders, including Indigenous land and water protectors, to have a safe space in which to exercise their rights, but does not contemplate placing responsibilities on wealthy individuals to reduce their overconsumption patterns even as it is evident that this conduct unnecessarily places burdens on defenders.

It may be that BHR simply cannot grapple effectively with the overconsumption problem. Alternately, perhaps the problem is in part, as I have argued in other work, that dominant voices need to rethink assumptions about who the human is who holds human rights, as well as who the humans are who contribute to the business enterprise. If workers, shareholders, members of corporate boards, and wealthy individuals were all understood to be what I have described<sup>196</sup> as ecologically embedded relational individuals – differentially situated – then

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<sup>194</sup> This line of argument also appears to align with the focus on sanctioning individual Russian 'oligarchs', although I have not fully thought this through... <https://www.theguardian.com/world/2022/mar/04/meet-the-oligarchs-sanctions-russian-billionaires> . [link to problematic posting by Elon Musk about increasingly oil & gas? No, decrease your own consumption EM!]

<sup>195</sup> Deborah McGregor, 'Indigenous Environmental Justice and Sustainability' in Sumudu Atapattu, Carmen G. Gonzalez & Sara L Seck, co-editors, *Cambridge Handbook of Environmental Justice and Sustainable Development* (CUP 2021) 58 at 65.

<sup>196</sup> See especially Sara L Seck, "Relational Law: Re-imagining Tools for Environmental and Climate Justice" (2019) 31:1 *Canadian Journal of Women and the Law* 151-177; Sara L Seck, "Transnational Labour Law and the Environment: Beyond the Bounded Autonomous Worker" (2018) 33:2 *Canadian Journal of Law & Society* 137-157; and Sara L. Seck, "A relational analysis of enterprise obligations and carbon majors for climate justice" (2021) 11:1 *Oñati Socio-Legal Series* 254-284: Climate Justice in the Anthropocene

perhaps the transformational conversations about both human rights and environmental responsibilities would not seem so challenging.