



**Climate Emergency Declarations and the Transition to a Sustainable Corporate Model - Justifying Emergency Measures to Create a Green Business Framework.**

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Source: *The King's Student Law Review*, Vol XII, Issue I, 30-57

Cite as: Eoin Jackson (2022) *Climate Emergency Declarations and the Transition to a Sustainable Corporate Model - Justifying Emergency Measures to Create a Green Business Framework* *The King's Student Law Review*, Vol XII, Issue I, 30-57

Published by: King's College London on behalf of The King's Student Law Review

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# Climate Emergency Declarations and the Transition to a Sustainable Corporate Model - Justifying Emergency Measures to Create a Green Business Framework

Eoin Jackson<sup>1</sup>

## Abstract

*This article seeks to argue in favour of the use of a climate emergency declaration to impose heightened restrictions on business activity. It will discuss how the present climate emergency framework allows businesses to exploit it in order to continue engaging in unsustainable activity. The article will then chart how a climate emergency declaration could be utilised to justify radical methods of transforming the corporate model to reflect the need for sustainability. This will involve analysing how the framework can be incorporated into existing corporate governance, before discussing how this could be advanced through the lens of human rights discourse. Potential challenges to this reconceptualisation of a climate emergency declaration will be addressed and refuted, with particular reference to the emergency framework utilised during the Covid-19 pandemic.*

## Introduction

As of 2022, 2047 jurisdictions in 37 countries have declared a climate emergency.<sup>2</sup> This declaration is designed to highlight the urgency of the climate crisis,<sup>3</sup> ensure that climate mitigation is at the forefront of government policy and mobilise stakeholders to make adjustments reflective of the need to achieve a net zero society.<sup>4</sup> One under-discussed aspect

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<sup>2</sup> Climate Emergency Declaration, 'Climate emergency declarations in 2,047 jurisdictions and local governments cover 1 billion citizens' (Climate Emergency Declaration, 15 April 2022) <<https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/>> accessed 11 January 2022.

<sup>3</sup> IPCC, 'Sixth Assessment Report' (IPCC 2022).

<sup>4</sup> Sylvia Nissen and Raven Cretney, 'Retrofitting an Emergency approach to the climate crisis: A study of two climate emergency declarations in Aotearoa New Zealand' (2022) 40(1) Environment and Planning C: Politics and Space 340.

of the climate emergency framework is the role corporations should play in reducing carbon emissions. While many businesses have begun to transition towards a sustainable corporate model, it is questionable as to whether they have pursued this transition with the ambition a climate emergency declaration should reflect. The state has also failed to harness the full potential of a climate emergency declaration in order to drive green businesses. Climate emergency declarations have been treated primarily as symbolic policy measures, which do not take into account their capacity to promote appropriate action. This article seeks to argue that the declaration of a climate emergency should lead to an immediate and drastic remodelling of business operations in a manner conducive to a net zero economy.

The article will be divided into five parts, with each part analysing a different dimension of the above argument. Part I will discuss how the contemporary business world fails to recognise the climate crisis as being an emergency. Part II will analyse how the state facilitates this failure through its own approach to corporate environmental considerations. Part III will demonstrate how a climate emergency declaration should bolster the incorporation of an environmental policy into corporate governance models and business strategy. Part IV will argue that a climate emergency declaration should be a useful tool for furthering the human rights dimension to cases taken against business for climate inaction. Part V will highlight and address potential criticisms of the more radical utilisation of a climate emergency framework. Lastly, the paper concludes that the state should utilise authority derived from the declaration of a climate emergency to intervene in the market to ensure a rapid response from companies to the climate crisis.

## **Part I: Contemporary Corporate Failures to Recognise an Emergency Framework.**

Corporations have somewhat improved in their approach to the climate crisis in recent years. Sustainable investment is an ever-growing component of the financial industry, and there has been a shift away from the previously strict focus of firms on short-term shareholder centric profit.<sup>5</sup> However, the perceptual recognition of the climate crisis has not necessarily translated

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<sup>5</sup> Thomas Hemphill, 'The Ascendancy of Stakeholder Capitalism: What is its meaning for corporate

into drastic action reflective of its emergency status i.e. actions that will ensure net zero emissions can be achieved prior to permanent damage being inflicted upon the planet as a result of climate change.

## A. The Normalisation of Emergency Frameworks

One of the primary flaws with the current corporate approach to climate change, as mentioned above, has seen corporations place emphasis on sustainable investment and stakeholder capitalism, in its normalisation within governance models. Businesses have recognised the climate crisis either through calling for greater action from governmental bodies, or persuading shareholders that sustainability is a valuable market asset.<sup>6</sup> This allows climate change to be viewed as something external to the business that can be approached or avoided depending on market conditions.<sup>7</sup> These responses couch the crisis in familiar language designed to placate shareholders, without compromising the fundamentals, and often (given that most businesses continue to rely on fossil-fuels and other non-sustainable resources) carbon heavy, core of business.<sup>8</sup>

However, the language and process of responding to climate change requires more than a slow adaptation of traditional business models to a green era. The declaration of an emergency through legislative means,<sup>9</sup> by its very nature, should place the climate crisis at the centre of priority.<sup>10</sup> This may involve a rapid adjustment in policy that could, in the short-term, have a negative impact on the profits of businesses.<sup>11</sup> This is partially due to a potential decrease in a

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governance?’ (2021) 46(4) *Journal of General Management* 262.

<sup>6</sup> James Patterson, ‘The political effects of emergency frames in sustainability’ (*Nature Sustainability*, 26 July 2021) < <https://www.nature.com/articles/s41893-021-00749-9> > accessed 20 May 2022.

<sup>7</sup> Daniel Etsy and Michelle L Bell ‘Business Leadership in Climate Change Responses’ (2018) 108(2) *American Journal of Public Health* S80.

<sup>8</sup> Christopher Wright, ‘An Inconvenient Truth: How Organisations Translate Climate Change into Business as Usual’ (2016) 60(5) *Academy of Management Journal* 1633.

<sup>9</sup> This is the most common method of declaring a climate emergency. See for example: European Parliament resolution of 28 November 2019 on the climate and environment emergency 2019/2930(RSP) and HCt Climate Emergency Debate 14th-24th October 2019 Vol 666.

<sup>10</sup> James Bevan, *Doing Well By Doing Good: How Business Can Tackle the Climate Emergency UK Department* (London Chamber of Commerce 2020).

<sup>11</sup> Alexandre C Köberle, Toon Vandyk, Celine Guivarch, Nick Macaluso, Valentina Bosetti, Ajay Gambhir, Massimo Tavoni & Joeri Rogelj, ‘The cost of mitigation revisited’ (2021) 11 *Nature Climate Change* 1035.

business's share of the market, as corporations detach from old production methods and seek renewable suppliers.<sup>12</sup> In a business context, a climate emergency signals that the long-term survival of the company is dependent upon the prevention of further climate change. The boundaries between business and politics become blurred when the state utilises a climate emergency bill, that is, by its contentious nature, a political event.<sup>13</sup> Framing the crisis through the lens of traditional market force misinterprets this blurring of the lines, leading to a response to climate change that is not radical enough to achieve change within the necessary period of time to avoid disastrous environmental consequences.<sup>14</sup>

## **B. The Failure of Environmental Social Governance (ESG)**

A key mechanism that has been used by corporations to mitigate their impact on the climate crisis is the pursuit of voluntary ESG policies. ESG is defined as a firm's obligation to improve social welfare; and equitable and sustainable long-term wealth for stakeholders.<sup>15</sup> ESG policies represent a progressive step forward in terms of reconciling market forces with sustainable development. However, it is submitted that ESG objectives do not take adequate account of the emergency framework, created by a climate emergency declaration.

ESG policies are designed to implement new business models only where such policies align with the profit-driven aspirations of shareholders. The focus is not on shifting the business model of operations, but rather on the incorporation of new environmental goals within the existing structure of the business.<sup>16</sup> This is particularly evident in the context of companies responsible for a high volume of carbon emissions. Shell Oil, for example, has a dedicated

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<sup>12</sup> Forfas, 'Adaptation to Climate Change: Issues for Business' (Forfas 2010) <[http://www.itic.ie/wp-content/uploads/2015/05/Adaptation\\_to\\_Climate\\_Change\\_Summary\\_Report\\_ONLINE\\_FINAL.pdf](http://www.itic.ie/wp-content/uploads/2015/05/Adaptation_to_Climate_Change_Summary_Report_ONLINE_FINAL.pdf)>accessed 5 May 2022.

<sup>13</sup> Patrick Hodder and Brian Martin, 'Climate Crisis? The Politics of Emergency Framing' (2009) 44(36) *Economics and Political Weekly* 53.

<sup>14</sup> Jane Andrew, 'Carbon tax: Challenging neoliberal solutions to climate change' (2010) 21(7) *Critical Perspectives on Accounting* 611.

<sup>15</sup> Dima Jamali, 'CSR logics in developing countries: Translation, adaptation and stalled development' (2017) 52(3) *Journal of World Business* 343.

<sup>16</sup> Tamas Barko, Martijn Cremers and Luc Reneboog, 'Shareholder Engagement on Environmental, Social, and Governance Performance' [2021] *Journal of Business Ethics* 1.

ESG unit to their business,<sup>17</sup> yet a Dutch court held that they had not done enough to ensure an appropriate reduction in emissions.<sup>18</sup> This is particularly evident in the context of companies responsible for a high volume of carbon emissions. Similarly, the case of *Okpabi v Royal Dutch Shell*,<sup>19</sup> identified that a group-wide environmental policy had been introduced for Shell and its subsidiaries. However, it was considered insufficient to prevent the oil spill that had led to the litigation in question.<sup>20</sup> In other words, while cases like *Okpabi* demonstrate that it is possible to hold companies to account for environmental damage, they do little to ensure that the company's environmental policy is in itself sufficiently ambiguous as to enact radical sustainable change.<sup>21</sup> Thus, the changes that are made are not radical enough to achieve the net zero emission within a desirable period of time i.e. the time necessary to avoid a further rise in global temperature.

Therefore, while ESG policies are a pragmatic approach to measuring environmental success, they are not sufficient to transform business models in a manner conducive to adequate recognition of a climate emergency declaration. The policies remain too dependent upon the whims of the market to be successfully enacted.<sup>22</sup> This means that, in incidents where a business may have to curtail operations in a manner detrimental to its market share e.g. an oil company needing to reduce its output, the resulting backlash from stakeholders could impede the capacity for such a policy to be initiated.<sup>23</sup> While the pendulum of the market has swung firmly in favour of sustainability,<sup>24</sup> there is no guarantee that this trend will continue in the event that harsher restrictions are placed on the corporate model. Should there be an

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<sup>17</sup> Shell, 'Sustainability Report' (Shell 2020) <<https://reports.shell.com/sustainability-report/2020/>> accessed 20 May 2022.

<sup>18</sup> *Milieudefensie v Shell* [(2021) C/09/571932].

<sup>19</sup> *Okpabi v Royal Dutch Shell* [2021] UKSC 3, [2021] 1 WLR 1294.

<sup>20</sup> *ibid* and Daniel Bertram, 'Transnational Experts Wanted: Nigerian Oil Spills before the Dutch Courts' (2021) 33(2) *Journal of Environmental Law* 423.

<sup>21</sup> See also my previous work in 'The Case for Eco-Liability: Post *Okpabi* Justifications for the Imposition of Liability on Parent Companies for Damage caused to the Environment by their Subsidiaries' (2021) 7(1) *LSE Law Review* 61.

<sup>22</sup> Myria Allen and Christopher Craig 'Rethinking corporate social responsibility in the age of climate change: a communication perspective' (2016) 1(1) *International Journal of Corporate Social Responsibility* 1.

<sup>23</sup> Mara Del Baldo, 'Renewing and improving the business model toward sustainability in theory and practice' (2017) 2(3) *International Journal of Corporate Social Responsibility* 1.

<sup>24</sup> Pratama Bansal and Mark DesJardine 'Business sustainability: It is about time' (2014) 12(1) *Strategic Organisation* 70; Jenny van Doorn, Hans Risselada and Peter Verhoef, 'Does sustainability sell? The impact of sustainability claims on the success of national brands' new product introductions' (2021) 138 *Journal of Business Research* 182.

outcry, albeit one grounded in myopic thinking, then there is nothing within the current framework to prevent businesses reversing or greenwashing ESG policies.<sup>25</sup>

At the same time it must be acknowledged that businesses are largely beholden to the whims of the market by virtue of needing to operate in a profitable manner. Given that, at least conceptually, it is the state who is responsible for setting out the limitations of the market through regulation,<sup>26</sup> making it important to consider how the latter interacts with businesses post the declaration of a climate emergency.

## **Part II: State - Corporate Relations and the Climate Emergency**

The relationship between the state and corporations post the declaration of a climate emergency acts as a further illustration of the misunderstanding of a business's obligations. As will be discussed below, states have been reluctant to enforce harsh restrictions on business's that would assist with achieving a sustainable market. Measures that have been taken have predominantly allowed for greenwashing,<sup>27</sup> which is in turn reflective of the voluntary and laissez faire approach taken by businesses in general.

### **A. Greenwashing of Market Regulation**

An example of this complacency can be seen in the EU's willingness to allow a certain degree of greenwashing in order to facilitate corporate approval of their European Green Deal.<sup>28</sup> Under the draft EU proposal, the European Commission intends to allow nuclear and gas

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<sup>25</sup> Silvia Ruiz-Blanco, Silvia Romero, Belén and Fernandez-Feijoo 'Green, blue or black, but washing—What company characteristics determine greenwashing?' (2021) 24 Environment Development and Sustainability 4024; Tiffany Gallicano, 'A Critical Analysis of Greenwashing Claims' (2011) 5(3) The Public Relations Journal 1. For a formal definition of greenwashing, see: Sebastião Vieira de Freitas Netto, 'Concepts and forms of greenwashing: a systematic review' (2020) 32 Environmental Sciences Journal 1.

<sup>26</sup> Louis Pahlow and Sebastian Teupe, 'Introduction: Business and the Law' (2019) 14(4) Management and Organisational History 311.

<sup>27</sup> Sebastião Vieira de Freitas Netto, 'Concepts and forms of greenwashing: a systematic review' (2020) 32 Environmental Sciences Journal 1.

<sup>28</sup> Silvia Amaro, 'EU's plan to include gas and nuclear in 'green' ranking leaves investors confused' (CNBC, 6th January 2022) <<https://www.cnbc.com/2022/01/06/eus-plan-to-include-gas-nuclear-in-green-ranking-leaves-investors-confused.html>> accessed on 6 January 2022.

investments to be deemed 'green investments' for the purposes of taxonomy regulation.<sup>29</sup> The stated aim is to allow for a fair transition to a net zero corporate model, in line with the European Green Deals objective of net zero emissions by 2050.<sup>30</sup> However, were the EU to be taking adequate account of its own climate emergency declaration,<sup>31</sup> no such transition phase would be possible, given the urgency of the situation. The allowance may appease the market, but in doing so it compromises on the market's capacity to achieve net zero emissions.

Similarly, the EU has signalled an unwillingness to reform sections of the competition policy, such as a relaxation of the rules surrounding anti-competitive agreements and merger control,<sup>32</sup> which would allow businesses to collaborate in order to speed up the process of developing new green technologies.<sup>33</sup> The reluctance to tackle companies in ways that could upset the market shows that the state is unwilling to engage with market reform without the agreement of business leaders.<sup>34</sup> The problem with this approach is that a business will, for the most part, only agree to reforms that aligns with market desires.<sup>35</sup> While the wishes of consumers and shareholders are becoming more environmentally conscious,<sup>36</sup> this is not necessarily conducive to change rapidly enough to avoid further damage to the environment. In either scenario, regardless of the market's desires, the demands of a climate emergency declaration should supersede consumer and shareholder interests, so that the state can force corporations to centre all decisions around environmental protection. Otherwise, the

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<sup>29</sup> European Commission, *EU Taxonomy: Commission begins expert consultations on Complementary Delegated Act covering certain nuclear and gas activities* (1st January 2022)

<[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_2](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2)> accessed 5 May 2022.

<sup>30</sup> Greenpeace European Unit, 'EU Commission's taxonomy plan is "licence to greenwash"' (Greenpeace 2022)

<<https://www.greenpeace.org/eu-unit/issues/climate-energy/45988/nuclear-gas-eu-taxonomy-licence-to-greenwash/>> accessed on 5 January 2022.

<sup>31</sup> European Parliament, European Parliament Resolution of 28 November 2019 on the Climate and Environment Emergency 2019/2930(RSP).

<sup>32</sup> Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go' (2021) 12(6) *Journal of European Competition Law and Practice* 430.

<sup>33</sup> European Commission, *Competition Policy in Support of Europe's Green Ambition* (2021)

<[https://ec.europa.eu/competition-policy/policy/green-gazette/competition-policy\\_en](https://ec.europa.eu/competition-policy/policy/green-gazette/competition-policy_en)> accessed 23 May 2022.

<sup>34</sup> Terry Hathaway, 'Neoliberalism as Corporate Power' (2020) 14(3) *Competition and Change* 315.

<sup>35</sup> European Commission, *Young Experts View on the Greening of Competition Policy* (2021)

<[https://ec.europa.eu/competition-policy/index/news/young-experts-views-greening-competition-policy-2021-12-10\\_en](https://ec.europa.eu/competition-policy/index/news/young-experts-views-greening-competition-policy-2021-12-10_en)> accessed 19 May 2022; Stefanie Beninger and June Francis, 'Collective market shaping by competitors and its contribution to market resilience' (2020) 122 *Journal of Business Research* 293; Trilochan Sastry, 'Exploring the role of business in society' (2011) 23(4) *IIMB Management Review* 246.

<sup>36</sup> Othar Kordsachia, Maximilian Focke and Patrick Velte, 'Do sustainable institutional investors contribute to firms' environmental performance? Empirical Evidence from Europe' (2021) 15(6) *Review of Managerial Science* 1.



declaration of a climate emergency is merely one additional factor to be incorporated into business decisions, with the state encouraging, but not forcing its prioritisation.

It is submitted that this reflects a misunderstanding of what it means for a state to operate in an emergency framework. By choosing to operate within the market, rather than overriding the market through emergency powers, the state becomes beholden to the whims of individual businesses, despite the traditional capacity to set the market's limitations. Such a relationship may function quite efficiently under ordinary circumstances provided there are regulatory mechanisms in place,<sup>37</sup> but it should not be transposed onto a climate crisis that requires urgent state intervention into business operations.

## **B. Challenging the States Market Centric Approach**

The lack of desire to hold companies accountable for not promptly adjusting to sustainable models is increasingly being challenged through legislative mechanisms. States in general have often failed to recognise their own obligations when operating in an emergency setting. *FIE v Government of Ireland*,<sup>38</sup> and *Urgenda v The Netherlands*,<sup>39</sup> saw the state criticised for its failure to introduce sufficiently ambitious and specific measures to ensure the achievement of zero emissions by 2050.<sup>40</sup> Attempts to introduce more radical measures, such as increased obligations on businesses to use sustainable resources, have often been eradicated using parliamentary procedure. In Ireland, for example, the Climate Emergency Measures Bill would have banned issuing of licences to intended gas and oil projects while the climate emergency remained in effect.<sup>41</sup> However, this was halted by a 'money message'

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<sup>37</sup> For example, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, Articles 101 and 102.

<sup>38</sup> *FIE v Government of Ireland* [2020] IESC 49.

<sup>39</sup> *Urgenda v The Netherlands* [2015] 09/00456689.

<sup>40</sup> Orla Kelleher, 'A critical appraisal of Friends of the Irish Environment v Government of Ireland' (2020) 30(1) Review of European, Comparative and International Environmental Law 138.

<sup>41</sup> Digital Staff, 'Govt's use of 'money messages' to block climate bill leads to furious row in Dáil' *Irish Examiner* (9 July 2019) <<https://www.irishexaminer.com/news/arid-30935828.html>> accessed 11 February 2022.

requirement,<sup>42</sup> which led to the Bill being stalled before it could enter the committee stage.<sup>43</sup> This ‘stifling’ of corporate accountability facilitated new governmental plans that will proceed at a much slower pace than the Climate Emergency Bill.<sup>44</sup> Thus, the state becomes wedded to its traditionally deferential relationship with the corporate world,<sup>45</sup> while businesses are allowed to proceed with green developments on a voluntary or ‘in their own time’ basis.

### **Part III: Justifying an Extreme Approach - Climate Emergency Declarations and the Environment as a Stakeholder**

It is acknowledged that it would be simply inadequate to argue for more extreme measure to business operations without illustrating how the declaration of a climate emergency should interact with governance models. It is argued that climate emergency can be incorporated within a corporate governance framework, by positioning the environment within a shareholder and stakeholder model.

#### **A. Positioning the Shareholder in an Eco-centric Business Model**

Under the traditional business model, shareholders take primacy within corporate governance.<sup>46</sup> This means that the business will act in the interests of shareholders, without necessarily needing to account for the interests of stakeholders of society.<sup>47</sup> However, recently there has been a shift in favour of the stakeholder theory of capitalism, which places an

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<sup>42</sup> The money message procedure is a mechanism used by the ruling party of the Irish legislature to halt any bills that would require the expenditure of public monies. Bills that require public expenditure require the approval of the Irish government. Thus, if the Irish government refuses to provide funding, the Bill is unable to be passed, regardless of whatever political or public support the Bill may enjoy. For more on the money message procedure, see: Louise Fitzgerald ‘A veto for the government: the Money Message as a foil to new legislation’ (2022) 37(1) Irish Political Studies 103.

<sup>43</sup> Louise Fitzgerald, Paul Tobin, Charlotte Burns and Peter Eckersley, ‘The ‘Stifling’ of New Climate Politics in Ireland’ (2021) 9(2) Politics and Governance 41.

<sup>44</sup> *ibid.*

<sup>45</sup> Ellis Aizenberg and Marcel Hanegraaff, ‘Is politics under increasing corporate sway? A longitudinal study on the drivers of corporate access’ (2019) 43(1) West European Politics 181.

<sup>46</sup> Lynn Stout, ‘The Toxic Side Effects Of Shareholder Primacy’ (2013) 161(7) University of Pennsylvania Law Review 2003.

<sup>47</sup> Re Freeman, Kirsten Martin and Bidhan Parmar, ‘Stakeholder Capitalism’ (2007) 74(4) Journal of Business Ethics 303.

obligation on corporations to consider the interests of more than just their shareholders.<sup>48</sup> In considering these alternative stakeholder interests, a business will naturally use a variety of factors to determine which stakeholder should take priority in the event of conflicting obligations.<sup>49</sup> Consequently, businesses have come to recognise the environment as a key stakeholder within their organisational structures.<sup>50</sup>

Ordinarily, the interest of a shareholder would take precedence, even under a more inclusive corporate model.<sup>51</sup> However, it is submitted that a climate emergency declaration should act as an intervening factor, which places environmental interests at the top of the stakeholder hierarchy. This is due to the fact that it mobilises society onto a footing outside of economic norms.<sup>52</sup> Thus shareholders as an entity, for example, may have an interest only in ensuring that the company collects as much profit as possible. However, the shareholder as an individual will become obligated to recognise that averting a climate disaster has, by virtue of legislative and policy decisions, undertaken using a more extreme conceptualisation of a climate emergency declaration, becomes a necessary aspect to all social organisations.<sup>53</sup> Thus, even in advocating for their interests, they become obligated to be cognisant of the environmental impact their decisions would have. From a shareholder perspective, the climate emergency declaration ought to absolve a corporation of the necessity to balance concerns, given that the shareholders themselves become obligated to incorporate the climate crisis into their sphere of influence.<sup>54</sup>

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<sup>48</sup> Sergei Dmytriiev, Edward Freeman and Jacob Hörisch, 'The Relationship between Stakeholder Theory and Corporate Social Responsibility: Differences, Similarities, and Implications for Social Issues in Management' (2021) 58(6) *Journal of Management Studies* 1441.

<sup>49</sup> David Wheeler and Maria Sillanpää, 'Including the Stakeholders: The Business Case' (1998) 31(2) *Long Range Planning* 201.

<sup>50</sup> Rosel Tan, 'Protecting the Silent Stakeholder: Giving the Environment a Voice within Company Law' (2018) 5 *Bristol Law Review* 27.

<sup>51</sup> Max. Clarkson, 'A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance' (1995) 20 *The Academy of Management Review* 92.

<sup>52</sup> James Patterson, Carina Wyborn, Linda Westman, Marie Brisbois, Manjana Milkoreit and Dhanasree Jayaram, 'The political effects of emergency frames in sustainability' (2021) 4(10) *Nature Sustainability* 841.

<sup>53</sup> Brian Schaefer, 'Shareholders and Social Responsibility' (2008) 81 *Journal of Business Ethics* 297.

<sup>54</sup> Ruth Aguilera and others, 'The Corporate Governance of Environmental Sustainability: A Review and Proposal for More Integrated Research' (2021) 47(6) *Journal of Management* 1468.

## **B. The Environment as a Stakeholder under a Climate Emergency**

Separately, the environment as an independent stakeholder can take primacy within governance models through a climate emergency declaration. This is made necessary by the fact that the environment must exert its influence within a corporation through the advocacy of third parties.<sup>55</sup> Typically, these third parties could be internal company officers, environmental activists, or even 'enlightened' shareholders who involve themselves in the decision making process.<sup>56</sup> By declaring a climate emergency, the state is implicitly assuming a position as one of these third party advocates.

A declaration should therefore place pressure not only on the state itself, but on those affected by the state's actions (in this case corporations), to avert a climate crisis. The government can therefore begin advocating in the interests of the environment, either directly through relevant legislation, or indirectly via business conferences, informal meetings with company leaders etc. If a corporation chooses to continue to operate within this state of emergency, then this form of advocacy must translate into business action to accommodate the environment. Otherwise, a corporation is not paying sufficient regard to its obligation towards the environment as a stakeholder. This would be due to the fact that it would be ignoring the state that is acting as the third party advocate for its interests.<sup>57</sup>

## **C. Risk Management**

The declaration of a climate emergency can also be assessed through the need for corporations to engage in risk management. A corporation must seek to minimise the impact of detrimental events on its stakeholders in order to adequately fulfil its duties as an organisation.<sup>58</sup> A climate

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<sup>55</sup> Rosel Tan, 'Protecting the Silent Stakeholder: Giving the Environment a Voice within Company Law' (2018) 5 Bristol Law Review 27.

<sup>56</sup> Jacob Hörisch, Edward Freeman and Stefan Schaltegger, 'Applying Stakeholder Theory in Sustainability Management: Links, Similarities, Dissimilarities, and a Conceptual Framework' (2014) 27(4) Organisation & Environment 328.

<sup>57</sup> Mark Anthony Camilleri, 'Corporate sustainability and responsibility: creating value for business, society and the environment' (2017) 2 Asian Journal of Sustainability and Social Responsibility 59.

<sup>58</sup> Nicholas Simpson, 'A framework for complex climate change risk assessment' (2021) 4 One Earth 4; Martin N Ndlela, 'A Stakeholder Approach to Risk Management' in Martin Ndlela (ed) *Crisis Communications* (Palgrave Publications 2018); Martin Loosemore, 'Managing stakeholder perceptions of risk and opportunity in

emergency declaration is a very direct means of identifying such a risk oriented event. In fact, by placing the climate crisis onto a platform of exceptionality, the crisis becomes the leading risk facing corporations wishing to engage with the market.<sup>59</sup> Even if a declaration is merely symbolic, that symbolism transposes itself onto the community that the business is seeking to market its product to.<sup>60</sup> This is reflected in the increasing demand for green products, like sustainable bonds,<sup>61</sup> from consumers in countries where a climate emergency declaration has been issued.<sup>62</sup> Therefore even from a strictly economic interpretation of risk management, it is good business practice for firms to prioritise environmental interests once a climate emergency has been declared. Intervention by the state to pursue more extreme measures, such as increased restrictions on unsustainable operations, or harsh penalties for firms who refuse to use sustainable resources, can therefore be incorporated into this risk management practice.

#### **D. Political and Moral Obligations of Business under a Climate Emergency Declaration**

It is important to note that the prioritisation of environmental interests suggested in the parts above is not the same as placing sole responsibility onto corporations for climate change mitigation. Instead, it is merely requiring them to incorporate environmental considerations into all areas of business management. The state remains the primary actor responsible for preventing further climate change, but the creation of an emergency framework acts as a tool to impute obligations onto corporations to act in the best interest of the environment.<sup>63</sup> This obligation can be viewed as a matter of politics i.e. the corporation recognizes that it should not act against the desire of a state where it is seeking to gain a share of the market.<sup>64</sup> A climate

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social infrastructure projects using a multimedia approach' (2011) 3 Project Organisation and Management 307; Limin Fu, 'Broad or Narrow Stakeholder Management? A Signalling Theory Perspective' (2021) 60 Journal of Business and Society 8.

<sup>59</sup> Nikolaos Demertzidi, 'A benchmarking framework to evaluate business climate change risks: A practical tool suitable for investors decision-making process' (2015) 10 Climate Risk Management 95.

<sup>60</sup> Anna Davies, 'Is there a New Climate Politics' (2021) 9(2) Politics and Governance 140.

<sup>61</sup> Harrison Hong, 'Climate Finance' (2020) 33(3) The Review of Financial Studies 1011.

<sup>62</sup> Sean Shangher, 'Responding to the climate crisis: Green consumerism or the Green New Deal?' (2021) 28(1) Irish Journal of Sociology 97.

<sup>63</sup> Eva Karrin Olsson, 'Responsibility framing in a 'climate change induced' compounded crisis: Facing tragic choices in the Murray - Darling Basin' (2009) 8(3) Journal of Environmental Hazards 226.

<sup>64</sup> Hsieh N-hê, 'The Responsibilities and Role of Business in Relation to Society: Back to Basics?' (2017) 27 Business Ethics Quarterly 293

emergency declaration is an inherently political activity, as it requires legislative approval, but, in mobilising climate action, it also forces businesses to address climate based politics. Otherwise, a business is placing itself outside of the political status quo, which could lead to action being taken against them by state actors like regulators.<sup>65</sup> Businesses are not naturally obligated to engage with political affairs, but their impact on the environment means they cannot avoid paying attention to how the government addresses the climate crisis. If the state subsequently opts to recognise it as an emergency, then the business can vindicate political obligations through adopting urgent sustainable measures.

Alternatively, it could be construed as a moral obligation not to cause further damage to a situation that the state has deemed in urgent need of mitigation. Businesses ordinarily obey moral conventions through engaging with the general concept of corporate social responsibility.<sup>66</sup> Corporate social responsibility refers to firm activities that go beyond the law in incorporating social, environmental, ethical, and consumer concerns into their business operations to create shareholder and stakeholder value.<sup>67</sup> As a result of this concept, a business could be deemed to be contradicting moral conventions were it to operate in a manner that exacerbated a social crisis.<sup>68</sup> This was illustrated during the Covid-19 pandemic when businesses like the hospitality industry faced criticism for failing to comply with public health measures.<sup>69</sup> Indeed, a moral obligation regarding the climate crisis has already been socially accepted. This is demonstrated by the condemnation of fossil fuel companies for deliberately hiding research which indicated the impact of their business on the environment during the 20th century.<sup>70</sup> This condemnation, when coupled with the general market trend towards

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<sup>65</sup> Andreas Georg Scherer 'The New Political Role of Business in a Globalised World: A Review of a New Perspective on CSR and its Implications for Firm, Governance, and Democracy' (2011) 48(4) *Journal of Management Studies* 899.

<sup>66</sup> Anne Fordham, 'Mapping meanings of corporate social responsibility - an Australian case study' (2018) 3(1) *International Journal of Corporate Social Responsibility* 1.

<sup>67</sup> Carol Newman, 'Corporate Social Responsibility in a Competitive Business Environment' (2020) 56 *The Journal of Development Studies* 1455.

<sup>68</sup> Timothy Coombs, 'Protecting Organization Reputations During a Crisis: The Development and Application of Situational Crisis Communication Theory' (2007) 10 *Corporate Reputation Review* 163.

<sup>69</sup> Cormac McQuinn, 'Hospitality industry to be warned to improve compliance with Covid-19 rules' *The Irish Times* (9th November 2021) <<https://www.irishtimes.com/news/ireland/irish-news/hospitality-industry-to-be-warned-to-improve-compliance-with-covid-19-rules-1.4722981>> accessed on 24 April 2022.

<sup>70</sup> Chris McGreal, 'Big oil and gas kept a dirty secret for decades. Now they may pay the price' *The Guardian* (30th June 2021) <<https://www.theguardian.com/environment/2021/jun/30/climate-crimes-oil-and-gas-environment>> accessed on 24 April 2022.

sustainability,<sup>71</sup> demonstrates that society, at least from a moral perspective, expects businesses to act in a manner that does not exacerbate the climate crisis.<sup>72</sup>

It is argued that a climate emergency declaration places this moral obligation onto a framework that can more easily be incorporated into business decisions. A business can, through appropriate ethical management,<sup>73</sup> anticipate socio-moral reactions to its practises,<sup>74</sup> but a declaration makes it easier for business to understand what this reaction may entail.<sup>75</sup> Thus, a business can adopt radical sustainable measures, confident that an enhanced version of a climate emergency declaration bolsters the moral foundation for acting in a manner that mitigates the climate crisis. In the interests of fairness, corporate social responsibility can only ever occur within the framework of wider society.<sup>76</sup> However, when that society expands its own framework to encompass a climate emergency, a business must recognise this and adopt its approach accordingly.

When all of these components are taken into account, it becomes clear that a climate emergency declaration should establish an intersection between corporate policy and the climate crisis. This intersection should take precedence over how a business may operate in ordinary times, which in turns justifies potentially restrictive measures that could damage short-term business profits. These restrictions can also be examined from a human rights perspective.

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<sup>71</sup> Jana Hojnik, 'Transition towards Sustainability: Adoption of Eco-Products among Consumers' (2019) 11(16) Sustainability 4308.

<sup>72</sup> Simon Caney and Derek Bell, 'Morality and Climate Change' (2011) 94(3) The Monist 305.

<sup>73</sup> Włodzimierz Srokaa, 'The Perception of Ethics in Business: Analysis of Research Results' (2015) 34 Procedia Economics and Finance 156.

<sup>74</sup> Kristen Bell DeTienne, 'Moral Development in Business Ethics: An Examination and Critique' (2019) 170(3) Journal of Business Ethics 429.

<sup>75</sup> Sade Hornio, 'Can Corporations Have (Moral) Responsibility Regarding Climate Change Mitigation?' (2017) 20(3) Ethics Policy and Environment 314.

<sup>76</sup> *ibid.*

## Part IV: Business, Human Rights and a Climate Emergency Declaration

It is submitted that increased restrictions on businesses, which would be imposed through the use of a more extreme version of a climate emergency declaration, could be partially justified through reliance on the human rights dimension of a climate emergency declaration. The climate crisis has increasingly been recognised as a human rights crisis,<sup>77</sup> with the UN Environment Program describing climate change as ‘one of the greatest threats to human rights of our generation’.<sup>78</sup>

### A. Policy, Human Rights and the Climate Emergency

From a policy perspective, there are a number of intersecting frameworks, such as the OECD Guidelines for Multinational Enterprises,<sup>79</sup> the UN Guiding Principles on Business and Human Rights,<sup>80</sup> and current and pending human rights due diligence legislation,<sup>81</sup> which recognise that businesses have an impact on human rights. As a result of this impact, there is an obligation on businesses to respect human rights.<sup>82</sup> More broadly, this obligation to respect rights is increasingly being linked to the environment, either through a direct recognition of a right to a healthy environment,<sup>83</sup> or through the subsequent impact pollution has on pre-existing human rights like the right to life.<sup>84</sup> The draft European Due Diligence Act for example, will obligate businesses to take into account the human rights implications of their supply chains.<sup>85</sup> This will include an obligation to consider environmental impacts when

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<sup>77</sup> Amy Sinden, 'Climate Change and Human Rights' (2007) 27 *Journal of Land Resources and Environmental Law* 255.

<sup>78</sup> United Nations Environment Program, *Climate Change and Human Rights* (2015) <[https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate\\_Change\\_and\\_Human\\_Rightshuman-rights-climate-change.pdf.pdf?sequence=2&isAllowed=>](https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf.pdf?sequence=2&isAllowed=>) accessed 20 May 2022.

<sup>79</sup> OECD, 'Due Diligence Guidance for Responsible Business Conduct' (OECD 2018).

<sup>80</sup> UN Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights* (2011) <[https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf)> accessed 22 May 2022.

<sup>81</sup> See for example the French Duty of Vigilance, LOI n° 2017-399 and European Parliament, Proposal For A Directive Of The European Parliament And Of The Council On Corporate Sustainability Due Diligence And Amending Directive (Eu) 2019/1937.

<sup>82</sup> Stephen Keim, 'Climate Change and Human Rights' (2013) 19 *J Juris* 305.

<sup>83</sup> UN Human Rights Council Resolution 48/13 (18th October 2021).

<sup>84</sup> OCHR, 'Guiding Principles on Business and Human Rights' (OCHR 2011).

<sup>85</sup> European Parliament, European Parliament Resolution Of 10 March 2021 With Recommendations To The Commission On Corporate Due Diligence And Corporate Accountability 52021IP0073 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021IP0073>> accessed 23 May 2022.



establishing and maintaining global supply chains.<sup>86</sup> Consequently, the proposed legislation points to an understanding that the state can enforce enhanced obligations on business to comply with human rights principles.

The declaration of a climate emergency establishes that the impact of human activity on the climate deviates from norms. This is due to a state of emergency recognising an exception to norms that requires the state to intervene in an unprecedented manner.<sup>87</sup> Examples of this can be seen throughout history; from the state of emergency that many governments adopted during the Second World War,<sup>88</sup> to the more recent public health emergency that was declared by Ireland among other states, in response to the COVID-19 Pandemic.<sup>89</sup> These emergencies led to societal responses that would have otherwise been considered outside of established norms like the introduction of rationing in the UK during the Second World War,<sup>90</sup> or the requirement for citizens to follow social distancing rules during the pandemic.<sup>91</sup> The climate crisis is no different when it comes to recognising this state of exceptionality through an emergency declaration.

Similarly, if there is a link between this impact and an impact on human rights, a climate emergency declaration can be viewed, by extension, as a human rights emergency.<sup>92</sup> This holistic perception of a climate emergency is logical given the general commitment of an emergency declaration to use the institutions available to the state to alleviate the crisis.<sup>93</sup> A declaration is therefore aligning policy commitments with an intention to prevent future

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<sup>86</sup> European Parliament, Proposal For A Directive Of The European Parliament And Of The Council On Corporate Sustainability Due Diligence And Amending Directive (Eu) 2019/1937 Article 15; Claire Bright, 'Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition' (2021) 13(18) *Journal of Sustainability* 10454.

<sup>87</sup> John Ferejohn, 'The law of the exception: A typology of emergency powers' (2004) 13(2) *International Journal of Constitutional Law* 210.

<sup>88</sup> Bryan Rooney, 'Emergency powers in democratic states: Introducing the Democratic Emergency Powers dataset' (2019) 6(4) *Research and Politics* 2053168019892436.

<sup>89</sup> Conor Casey, 'Ireland's Emergency Powers During the Covid-19 Pandemic' (Irish Human Rights and Equality Commission 2021).

<sup>90</sup> Sujay Kulshrestha, 'Wartime Rationing During World War II and the Effect of Public Opinion in Great Britain and Austria' (2010) 2(12) *Inquiries Journal* 1.

<sup>91</sup> Stephen Thompson, 'COVID-19 emergency measures and the impending authoritarian pandemic' (2020) 7(1) *Journal of Law and Biosciences* 1.

<sup>92</sup> William Boyd, 'The Poverty of Theory: Public Problems, Instrument Choice, and the Climate Emergency' (2021) 46 *Columbia Journal of Environmental Law* 399.

<sup>93</sup> Christian Bjørnskov, 'Emergencies: on the misuse of government powers' (2022) 190 *Public Choice* 1.

human rights abuses. It can, depending on the language of the declaration, create a unique state of exception that would authorise the state to take drastic measures to mitigate breaches of human rights.<sup>94</sup> The politics of human rights become the politics of sustainability.

Indeed, many sections of society have already recognised this conception of the emergency. This is witnessed by the demands of climate activists at the COP 26 summit for the crisis to be treated as a human right emergency,<sup>95</sup> as well as demands from key interest groups.<sup>96</sup> Democratic procedures are being challenged for their reluctance to embrace the human rights dimension to the climate emergency, which can be seen through the rise of extreme activist groups such as Extinction Rebellion.<sup>97</sup> Therefore, the state must recognise these challenges or face increasing unrest and destabilisation.

Thus, it is contended that the state can legitimise different forms of business adaptation using the climate emergency. Firstly, it can allow for the imposition of additional positive obligations on businesses to respect human rights.<sup>98</sup> This could include, for example, an obligation to immediately switch to sustainable means of production or additional due diligence requirements similar to those proposed in the EU Bill. Were these obligations to be challenged by businesses they could be justified through the argument that the current state of affairs represents an atypical detraction from human rights standards.

The climate crisis cannot be viewed in strictly economic terms if a declaration, through the use of appropriate language coupled with enforceable policy agendas, illustrates how the environmental impacts link to wider principles of inequality.<sup>99</sup> In light of the exceptionality created by a state of emergency, positive obligations that may otherwise be seen as radical, can instead be viewed as necessary for the fulfilment of the state's own duties to prevent such

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<sup>94</sup> *ibid.*

<sup>95</sup> Amnesty International, 'COP26: Climate emergency is 'human rights crisis of catastrophic proportions' (Amnesty International October 2021) <<https://www.amnesty.org.uk/press-releases/cop26-climate-emergency-human-rights-crisis-catastrophic-proportions>> accessed on 17 January 2022.

<sup>96</sup> UN News, 'COP26: Convert climate 'promises to action', urges UN rights experts' United Nations (UN News December 2021) <<https://news.un.org/en/story/2021/12/1107112>> accessed on 17 January 2022.

<sup>97</sup> Tom Smiles, 'How does the Extinction Rebellion engage with climate justice? A case study of XR Norwich' (2021) 26(12) International Journal of Justice and Sustainability 1445.

<sup>98</sup> Bruce Lindsay, 'Climate of Exception: What Might a Climate Emergency Mean in Law' (2010) 38 Federal Law Review 255.

<sup>99</sup> *ibid.*

inequality.<sup>100</sup>

Secondly, it could allow for new restrictions to be imposed on businesses to avoid the continuation of the extreme breach of human rights theoretically recognised by a climate emergency. Derogations from traditional approaches to the market (the aforementioned voluntary approach to business adaptation discussed in parts I and II) could be deemed legitimate on the basis that, without restrictions, businesses will continue to engage in severe human rights breaches, like the maintaining of unsustainable supply chains.<sup>101</sup> This allows for a proportionality analysis to give greater weight to eco-centric human rights, like the right to life,<sup>102</sup> over any rights that may be enjoyed by corporations or individual entrepreneurs.<sup>103</sup> Such analysis has been applied previously to legislation concerning Covid-19,<sup>104</sup> which in turn allowed for extreme interferences with ordinary business practice e.g. the imposition of social distancing, the introduction of mask mandates and the closure of business sectors such as the hospitality industry during lockdown periods.<sup>105</sup> Policy measures that would ordinarily infringe on market freedoms therefore can be justified as an emergency intervention designed to preserve the relative freedom of the market for future generations.

## **B. Strategic Litigation and the State of Emergency**

These human rights arguments are reflected in new and pending litigation across various jurisdictions. In the case of *Royal Dutch Shell*, the Court made reference to a number of human rights instruments, such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, when ordering the company to reduce its

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<sup>100</sup> Chiara Maachi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'' (2021) 6 Business and Human Rights Journal 93.

<sup>101</sup> Brigitte Hamm, 'The Struggle for Legitimacy in Business and Human Rights Regulation - a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty' (2021) 23 Human Rights Review 103.

<sup>102</sup> Helen Dancer, 'Harmony with Nature: towards a new deep legal pluralism' (2021) 53(1) The Journal of Legal Pluralism and Unofficial Law 21.

<sup>103</sup> David Birchall, 'Corporate Power over Human Rights: An Analytical Framework' (2020) 6(1) Business and Human Rights Journal 42.

<sup>104</sup> Deirde Ahern and Suryapratim Roy, 'Law And Policy Responses To Covid-19 In Ireland: Supporting Individuals, Communities, Businesses, And The Economy' ( Covid-19 Legal Observatory 2020).

<sup>105</sup> Paul Cairney, 'The UK Government's COVID-19 Policy: What Does "Guided by the Science" Mean in Practice?' (2021) 3 Frontiers in Political Science 11.

emission levels.<sup>106</sup> In particular, it noted that Articles 2 and 8 of the ECHR offer protection against the consequences of climate change.<sup>107</sup> A French activist group has also filed a case against leading oil companies, arguing that their inaction on climate change constitutes a violation of their obligation to maintain vigilance over risks to human rights.<sup>108</sup> While both cases rely on the unique approach taken to human rights within each jurisdiction,<sup>109</sup> they offer an example of how human rights arguments can be incorporated into climate litigation involving business.

This litigation could potentially be strengthened by tying the climate emergency to the existing human rights arguments. Were the Court to accept the climate emergency declaration as evidence of a human rights emergency, it could further efforts to force business to proceed with environmental adjustments at a faster pace. The declaration can act as a policy instrument, similar to international human rights treaties, which justify a Court holding companies to a higher standard.<sup>110</sup>

This would bolster arguments that were made in *Royal Dutch Shell*, but importantly, allow the rights dimension to be framed in a national context.<sup>111</sup> For example, the UK could use a parliamentary climate emergency bill to analyse human rights arguments, without needing to overtly rely on more controversial (in a political context) rights documents, such as the Human Rights Act.<sup>112</sup> A climate emergency declaration is not an automatic announcement that corporations must suspend all polluting activities. However, it should allow for otherwise radical arguments in relation to human rights, to be established on an appropriate

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<sup>106</sup> *Vereniging Milieudefensie and Others v Royal Dutch Shell PLC* (2021) C/09/571932.

<sup>107</sup> *ibid.*

<sup>108</sup> Stéphane Brabant, Charlotte Michon and Elsa Savourey, 'The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance' (2017) 5 *Revue Internationale de la Compliance et de l'Éthique des Affaires* 6 <[http://www.bhrinlaw.org/frenchcorporatedutylaw\\_articles.pdf](http://www.bhrinlaw.org/frenchcorporatedutylaw_articles.pdf)> accessed on 6 January 2022.

<sup>109</sup> Claire Bright, 'Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition' (2021) 13(18) *Journal of Sustainability* 10454.

<sup>110</sup> Margaretha Wewerinke-Singh, 'The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation' (2021) 30(2) *Review of European, Comparative & International Environmental Law* 275.

<sup>111</sup> Victoria Adelmant, Phillip Alston and Matthew Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 31(1) *Review of Human Rights Practice* 1.

<sup>112</sup> UK Ministry of Justice 'Plan to reform Human Rights Act' (2021) <https://www.gov.uk/government/news/plan-to-reform-human-rights-act> accessed 20th May 2022.

legislative foundation.

Alternatively, the human rights aspect of a climate emergency bill can be used strategically to pressure governments into reconsideration of the role of private business in the climate crisis. Such an approach was taken by climate activists Plan B in their challenge of the decision to expand Heathrow airport.<sup>113</sup> While the initial lawsuit was unsuccessful, subsequent pressure applied by Plan B which made reference to the emergency, led to the UK government to commit to reconsidering its plan.<sup>114</sup>

Even if the climate emergency argument is dismissed within the courtroom, the political capital it can generate, legitimises attempts to hold corporations accountable for a failure to adjust to a sustainable model. This is due to the fact that the government cannot be seen to be rejecting the narrative of urgency it has promulgated through a climate emergency bill. When such a rejection has occurred, for example when Ireland dismissed more extreme measures for oil companies, it leads to widespread political backlash.<sup>115</sup>

The climate emergency could also be useful in addressing concerns surrounding standing that have affected climate activists seeking to rely on human rights based arguments. In *FIE v Ireland*,<sup>116</sup> the plaintiff was denied standing to argue that the state had breached the right to environment due to the absence of an individual harm.<sup>117</sup> It is contended that reliance on the climate emergency declaration could be a mechanism through which judges could adopt a relaxed approach to standing. Taking the climate emergency to be a human rights emergency, a court could recognise that any legally recognised person has an interest in a corporation's effect on the environment.

The people affected by the climate crisis can encompass as broad a range as possible, which

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<sup>113</sup> *R (on the application of the London Borough of Hillingdon and others) v Secretary of State for Transport* (2010) EWHC 626, [2010] 3 WLUK 781.

<sup>114</sup> Plan B, 'Government Tells Plan B it May Review Heathrow Plans' (*Plan B*, 12 May 2019) <<https://planb.earth/government-tells-plan-b-it-may-review-heathrow-plans/>> accessed 10 December 2019.

<sup>115</sup> Diarmuid Torney, 'The Politics of Emergency? Ireland's Response to Climate Change' (2020) 31 Irish Journal of International Affairs 13.

<sup>116</sup> *FIE v Ireland* [2020] IESC 49.

<sup>117</sup> Orla Kelleher, 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach' (2021) 34(1) Journal of Environmental Law 107.

would explain why climate change is recognised under an emergency framework.<sup>118</sup> Organisations can point to the declaration as evidence that they represent the interests of future generations, whose rights will be threatened should society continue to exist in a state of emergency. The Bill presents versatile, and legally binding options that can and should be utilised by the Court to allow human rights cases to be taken in order to account for a business environmental impact.

## **Part V: Challenges to a More Extreme Approach**

This article has primarily focused on the potential uses of a climate emergency declaration. It is disappointing that states at present have not attempted to utilise the state of emergency in this manner to force an extreme corporate adjustment at a pace that is scientifically necessary to alleviate climate change. There are, however, a number of challenges that exist under present emergency frameworks. These challenges will be examined in the section below to consider the effectiveness of a climate emergency bill in the context of corporate accountability.

### **A. Local Climate Emergency Bills in a Global Market**

At present, climate emergency declarations operate on a national or localised basis. However, the majority of polluters consist of multinational corporations who operate across a multitude of jurisdictions. Therefore it could be argued that it would be ineffective to utilise a national emergency declaration to enforce stringent obligations on companies when it can only be effective at the national level. In fact it may even be entirely unworkable given the globalised nature of modern businesses supply chains.<sup>119</sup>

While it is true that a global state of emergency would be a preferable framework, a national

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<sup>118</sup> Barry Kellman, 'Standing to Challenge Climate Change Decisions' (2016) 46 Environmental Law Reporter News and Analysis 10116, 10117.

<sup>119</sup> William Boyd, 'The Poverty of Theory: Public Problems, Instrument Choice, and the Climate Emergency' (2021) 46 Columbia Journal of Environmental Law 399.

climate emergency declaration is conducive to a speeding up of business efforts to comply with international obligations. Evidence demonstrates that the current pace of the green transition will not achieve the requisite reduction in carbon emissions.<sup>120</sup> However, governments who operate in a state of climate emergency are committing themselves to using all policy instruments to mitigate the effects of climate change.<sup>121</sup> That state is also likely to have signed on to international treaties such as the Paris Agreement, meaning they are in turn legally bound to prevent exacerbation of the climate crisis.<sup>122</sup> Thus, increasing demands on companies, who are primarily responsible for the majority of emissions, is in turn ensuring that the business can meet the expectations of a global community committed to climate progress.

The use of a national climate emergency bill also fills the void left by international failures on climate change commitments. This was most recently illustrated at the COP 26 Summit. While the international community engaged in a great deal of dialogue, the Summit itself failed to establish an accelerated phasing out of coal, with many urgent matters postponed for discussion until the next conference.<sup>123</sup> The complexity of international politics allows corporations the opportunity to exploit differences and avoid engaging in drastic sustainability measures. At the same time larger states such as China and India can use their influence to slow down measures that other national governments would be relatively happy to pursue like divestment from fossil-fuel industries.<sup>124</sup> Consequently, it would be illogical for other states who have declared climate emergencies to wait for an idealised perception of the climate response before challenging multinationals. These efforts to tackle multinational corporations would be strengthened if different countries under a state of climate emergency work together on climate mitigation measures i.e. a quasi-internationalised response.<sup>125</sup>

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<sup>120</sup> Brad Plumer, 'Yes there has been Progress. No it's not nearly enough' *New York Times* (25 October 2021) <<https://www.nytimes.com/interactive/2021/10/25/climate/world-climate-pledges-cop26.html>> accessed on 19 January 2022.

<sup>121</sup> Ross Mittiga, 'Political Legitimacy, Authoritarianism, and Climate Change' [2021] *American Political Science Review* 1.

<sup>122</sup> United Nations Framework Convention on Climate Change, *The Paris Climate Agreement* (2016).

<sup>123</sup> George Monibot, 'After the failure of Cop26, there's only one last hope for our survival' *The Guardian* (14 November 2021) <<https://www.theguardian.com/commentisfree/2021/nov/14/cop26-last-hope-survival-climate-civil-disobedience>> accessed 20 January 2022.

<sup>124</sup> Malu Cursino, 'COP26: China and India must explain themselves, says Sharma' *BBC News* (14 November 2021) <<https://www.bbc.com/news/uk-59280241>> accessed 20 January 2022.

<sup>125</sup> Ross Mittiga, 'Political Legitimacy, Authoritarianism, and Climate Change' [2021] *American Political Science Review* 1.

Acting at a national level recognises that a company's undertaking in one country will have a knock on effect across the globe. Using environmentally damaging materials in Nigeria for example, will eventually damage global consumer economies, through the impact the climate crisis has on the world as a whole.<sup>126</sup> This is due to the globalised nature of supply chains, as well as the fact that any actions that contribute to a rise in carbon emissions will naturally exacerbate the climate crisis.<sup>127</sup> Indeed, this has been somewhat recognised at a judicial level.

In *Okpabi v Royal Dutch Shell*,<sup>128</sup> the Supreme Court blurred the lines of limited liability in order to allow jurisdiction for UK based plaintiffs to challenge a Nigerian based subsidiary of Royal Dutch Shell.<sup>129</sup> They achieved this by determining that the establishment of a company-wide environmental policy demonstrates the parent firm's desire to police environmental matters across the entire corporate entity.<sup>130</sup> National measures that impact global corporations are merely the policy equivalent of this blurring of the lines. Therefore, localised emergency responses can be seen as a pragmatic mechanism through which more radical climate legislation can be affected.

## **B. The Necessity of an Emergency Framework**

It could also be questioned as to whether it is necessary to declare a climate emergency in order to justify increased market intervention. A government could, for example, use democratic referendums on the right to environment, or existing legislative agendas such as the European Green Deal to justify sweeping measures for businesses.<sup>131</sup> It is submitted that a climate emergency declaration is necessary to legitimise efforts. Environmental

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<sup>126</sup> Abhijeet Ghadge, 'Managing climate change risks in global supply chains: a review and research agenda' (2020) 58(1) International Journal of Production Research 44.

<sup>127</sup> *ibid.*

<sup>128</sup> *Okpabi v Royal Dutch Shell* [2021] UKSC 3, [2021] 1 WLR 1294. The case saw Nigerian members of the Okpabi tribe challenge Royal Dutch Shell for the pollution caused to their lands by a subsidiary of the company. For more on the factual and legal matrix of the case, see: Lucas Roorda, 'Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court' (2021) 6 Business and Human Rights Journal 368.

<sup>129</sup> Lucas Roorda, 'Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court' (2021) 6 Business and Human Rights Journal 368.

<sup>130</sup> *ibid.*

<sup>131</sup> Hanna Fekete, 'A review of successful climate change mitigation policies in major emitting economies and the potential of global replication' (2021) 137 Renewable and Sustainable Energy Reviews 110602.



authoritarianism must be pursued with appropriate safeguards to avoid the erosion of democratic norms.<sup>132</sup> The bill buttresses these safeguards through its requirement for democratic approval, and subsequently the ability to remove the state of emergency with further intervention. The state of emergency also highlights that the degree of market intervention is truly unprecedented in nature. Provided that companies comply with more restrictive measures, there is no reason for them to expect that such intervention will become a new norm.

The necessity of a climate emergency declaration is not derived from its legality but rather from the political capital it can generate. This has already been evidenced through the haste in which governments follow one another in making such declarations in the first place. If this ‘copycat’ approach can be seen with symbolic measures, it is possible for the same imitation to be coupled with measures of action. This would apply more pressure on businesses leading to a more effective climate response.

### **C. The Covid-19 Pandemic**

It is important to note that there is already precedent for businesses being forced to engage in drastic adjustments of their activities in response to an emergency. Covid-19 saw corporations be subject to extreme intervention in the market from the state, on the basis of preserving public health. As with climate change, there was no clear end date in sight for the pandemic when restrictions were initially introduced.<sup>133</sup> Despite this uncertainty, business acquiesced to the restrictions, and in many cases proactively used their resources to assist the state with the crisis like switching factories to the production of personal protective equipment.<sup>134</sup> While there were some complaints from facets of industry, these were largely dismissed on the basis that the emergency status of the Covid-19 response justified the short-term harm to commercial profit. The state recognised the intersecting social consequences of the public

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<sup>132</sup> Dan Shahar, ‘Rejecting Eco-Authoritarianism, Again’ (2015) 34(3) *Environmental* 345.

<sup>133</sup> Rubén Manzanedo and Peter Manning, ‘COVID-19: Lessons for the climate change emergency’ (2020) 742 *Science of the Total Environment* 140563.

<sup>134</sup> Nicolo Raimo, ‘Corporate Social Responsibility in the COVID-19 Pandemic Period: A Traditional Way to Address New Social Issues’ (2021) 13(12) *Journal of Sustainability* 6561.

health emergency, as social protection funding was increased to avoid an exacerbation in inequality caused by the sudden unemployment of vast swathes of people.<sup>135</sup> Governance of this nature has, by necessity, become legitimate in modern democracy. Further, this emergency based response did have an initial impact on carbon emissions,<sup>136</sup> with the reduction caused by the swift demands for behavioural transformation. While emissions did eventually recover to their previous levels, this only occurred once the emergency measures began to be relaxed.<sup>137</sup> Had these restrictions been coupled with eco-centric actions, it could have seen more permanent sustainable activity implemented within the transition to a Covid resilient society.<sup>138</sup>

The climate crisis can therefore use Covid-19 as a blueprint for how to derive action from climate emergency declarations. The danger is just as real and as present with climate change as with Covid-19. Coordination between the state and the market can be grounded in similar justifications, particular in light of the equivalent social and economic impacts of both crises.<sup>139</sup> Short-term disruption to the market will be offset by its long-term preservation, as occurred within the public health emergency. Covid-19 reinvented what it means for a government to use emergency powers to ensure corporate accountability.<sup>140</sup> This may place greater demands on business, but businesses have already shown that they can meet these demands, provided they are coupled with appropriate state support.<sup>141</sup> The same approach can and should be utilised within the emergency framework of the climate crisis.

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<sup>135</sup> Judit Simon, 'Impacts of the Covid-19 lockdown and relevant vulnerabilities on capability well-being, mental health and social support' (2021) 21(1) BMC Public Health 1.

<sup>136</sup> Corinne Le Quéré, 'Temporary reduction in daily global CO<sub>2</sub> emissions during the COVID-19 forced confinement' (2020) 10(7) Nature Climate Change 647.

<sup>137</sup> Paul Rincon, 'Climate change: Carbon emissions show rapid rebound after Covid dip' *BBC News* (4 November 2021) <<https://www.bbc.com/news/science-environment-59148520>> accessed 24 January 2022.

<sup>138</sup> Andrew Ringsmuth and Others, 'Lessons from COVID-19 for managing transboundary climate risks and building resilience' (2022) 35 Climate Risk Management 100395.

<sup>139</sup> Lynn Paine, 'Covid-19 Is Rewriting the Rules of Corporate Governance' [2020] Harvard Business Review 6.

<sup>140</sup> Robert Jerry, 'COVID-19: Responsibility and Accountability in a World of Rationing' (2020) 7(1) Journal of Law and the Biosciences 76.

<sup>141</sup> Anthony Kwame Morgan, 'The effects of COVID-19 on global economic output and sustainability: evidence from around the world and lessons for redress' (2021) 17(1) Journal of Sustainability, Science Practice and Policy 76.

## Conclusion

In conclusion, the declaration of a climate emergency has been a significantly underutilised policy instrument when it comes to forcing sustainable business activity. Both the state and the market have failed to appreciate the framework of exceptionality created by a climate emergency. However, were it to be incorporated into the climate response, it could allow for the state to impose additional positive obligations, as well as potential restrictions designed to facilitate a swift adjustment to environmentally responsible corporate models. Companies could also see more legal and social pressure placed on them to comply with human rights principles, were this dimension to a climate emergency declaration to be taken into account.

Corporate governance models could be forced to remodel themselves along eco-centric frameworks in order to accommodate the demands placed on them by an enforceable climate emergency declaration. This would in turn lead to better environmental outcomes, due to the adaptation of green mechanisms within all aspects of corporate policy. From a litigatory perspective, a climate emergency declaration would assist in bolstering human rights arguments that are increasingly being utilised to strengthen arguments in favour of greater corporate accountability on climate change. While these arguments are beginning to succeed in comparative jurisdictions, the climate emergency declaration would assist with difficulties in establishing causation and standing, particularly in common law jurisdictions that have struggled with these issues. This is due to the declaration acting as a means of recognising the human rights impact of the climate crisis, without compromising on traditional understandings of causation and standing.

However, the declaration does not exist in a vacuum and there are a number of recognised challenges to its theoretical use as an emergency powers instrument. These include the globalised nature of the world's economy and the question of whether a declaration is necessary to pursue sustainable corporate measures. While these criticisms are legitimate, they do not account for the pragmatic capacity of a climate emergency declaration to tackle global companies in a politically acceptable manner. Such an approach has already been adopted in the context of Covid-19 and many lessons from this emergency can be applied to

future market interventions by the state. The state of climate emergency has existed solely in the realm of symbolism. It is time to pair such symbolism with action to radically remodel the market in favour of a new sustainable economy.