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# **Business and Human Rights: From National to International and Back Again**

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## **ABSTRACT**

The negative impacts on individuals' enjoyment of human rights stemming from the activities of private economic actors such as corporations, including those which carry out activities of a transnational character, have long been documented. Impunity of corporations for their adverse human rights impacts, however, has been a recurrent problem at the national level. This has commonly been attributed to many national governments' lack of will or ability to regulate effectively the conduct of corporations with respect to human rights or to enforce any such regulation. Against this background, various constituencies have looked to international human rights law to compel states to regulate corporate conduct. Under international human rights law, however, the substantive requirements of the human rights obligations of states with respect to the activities of corporations remain vaguely defined. As for corporations themselves, they do not currently bear human rights obligations under international law. Given these limitations, voluntary or non-binding regulatory approaches have been relied on to date in the field of business and human rights. At the international level, specifically, a number of non-binding instruments on business and human rights have been developed and adopted. The most significant of these non-binding instruments is the UN Guiding Principles on Business and Human Rights (UNGPs), which aim to provide guidance to states and corporate actors on responsible business behaviour, *inter alia*, with respect to human rights. While scholars and practitioners have questioned the effectiveness of this non-binding instrument in improving corporate behaviour with respect to human rights and in tackling corporate accountability gaps, the UNGPs have nonetheless acted as catalyst for the more recent, ongoing elaboration at the international level of a treaty on business and human rights. They have also informed the substance of this so-called 'draft legally binding instrument'. Similarly, and until now more significantly, the UNGPs have inspired the development and informed the substance of a number of national laws which place certain human rights obligations on relevant categories of corporate actors at the domestic level. More recently, the UNGPs have arguably influenced and informed EU-wide legislation requiring Member States to place certain obligations on relevant categories of companies under their respective domestic law.

This thesis explores the recent developments in the business and human rights regulatory journey through international and national law, a journey intertwined but not co-extensive with the regulatory journey from binding to non-binding and return. It examines these different levels, international and national, of this regulatory journey and their interaction. At the same time, it examines the function of non-binding instruments in the recent law-making efforts to tackle the negative externalities of corporate globalization.



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## LIST OF ABBREVIATIONS

<b>ACHPR</b>	African Charter on Human and People's Rights
<b>ACHR</b>	American Convention on Human Rights
<b>ACtHPR</b>	African Court on Human and People's Rights
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CEDAW</b>	Convention on the Elimination of All Forms of Racial Discrimination against Women
<b>CRC</b>	Convention on the Rights of the Child
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CSDDD</b>	Corporate Sustainability Due Diligence Directive
<b>ECHR</b>	European Convention on Human Rights
<b>ECJ</b>	European Court of Justice
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>HRC</b>	Human Rights Council
<b>HR Committee</b>	Human Rights Committee
<b>HRDD</b>	Human Rights Due Diligence
<b>IACHR</b>	Inter-American Commission on Human Rights
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Court of Justice

<b>ICRMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
<b>ILC</b>	International Law Commission
<b>ILO</b>	International Labour Organization
<b>NAP</b>	National Action Plan
<b>NCP</b>	National Contact Point
<b>NGO</b>	Non-governmental Organization
<b>NHRI</b>	National Human Rights Institution
<b>OECD</b>	Organization for Economic Cooperation and Development
<b>OEIGWG</b>	Open-ended Intergovernmental Working Group
<b>PCIJ</b>	Permanent Court of International Justice
<b>SOE</b>	State-owned Enterprise
<b>SRSG</b>	Special Representative of the Secretary-General
<b>TNC</b>	Transnational Corporation
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNGPs</b>	United Nations Guiding Principles on Business and Human Rights
<b>UN Norms</b>	UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights
<b>US</b>	United States
<b>VCLT</b>	Vienna Convention on the Law of Treaties



# CHAPTER 1

## Introduction

### 1. Prologue

The last thirty years have witnessed a fast process of expansion of cross-border business operations worldwide – commonly referred to as ‘corporate globalization’<sup>1</sup>. The global reach of business actors has never been greater. Companies nowadays operate across the world, with their activities and supply chains touching all corners of the globe. It is undeniable that corporate globalization contributes to the economic development and growth of many regions of the world through, *inter alia*, the provision of foreign direct investment and the consequent creation of jobs<sup>2</sup>. This, in turn, is considered to have certain beneficial effects on individuals’ enjoyment of their human rights. By way of example, ‘the work and wages that corporate enterprises bring to many communities are key elements in the establishment and maintenance of individual human dignity – to which end human rights strive’<sup>3</sup>. Notwithstanding this, corporate globalization oftentimes has negative externalities, including on the individuals’ enjoyment of those same human rights.

Business actors, in particular transnational corporations (TNCs), have repeatedly been in the international spotlight for harmful human rights impacts stemming from their irresponsible and, often, unregulated global activities. Adverse human rights impacts have been documented and linked to a variety of business activities carried out in a number of sectors. Examples include the clothing industry, which employs millions of workers in Asian, Latin American and Eastern European countries. Adverse impacts on labour rights in clothing facilities around the world are widespread and include forced labour, denial of maternity leaves and retaliation against workers who form or join unions<sup>4</sup>. Children have also been exposed on many occasions to the harmful impacts of corporate activities in different stages of global supply chains in the agricultural and manufacturing sectors. The latest global estimates suggest that 160 million children worldwide are

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<sup>1</sup> Ruggie J, *Just Business. Multinational Corporations and Human Rights* (W.W. Norton & Company, Inc. 2013) at 15. See also Nolan J, 'Business and Human Rights in Context' in Baumann-Pauly D and Nolan J (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 23, at 2.

<sup>2</sup> Nolan J, 'Business and Human Rights in Context' in Baumann-Pauly D and Nolan J (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 23, at 3: ‘a globalized economy has generated millions of jobs over the last quarter-century. It has lifted hundreds of millions of people out of extreme poverty’. See also Bernaz N, *Business and Human Rights. History, Law and Policy: Bridging the Accountability Gap* (Routledge 2017) at 1.

<sup>3</sup> UN Doc. A/RES/65/216, ‘Globalization and its Impact on the Full Enjoyment of All Human Rights’, (6 April 2011), para. 10. See also Nolan J, 'Business and Human Rights in Context' in Baumann-Pauly D and Nolan J (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 23, at 3.

<sup>4</sup> Human Rights Watch, available at: <https://www.hrw.org/topic/womens-rights/labor-rights-garment-industry>

still engaged in child labour, with 79 million of them performing hazardous work<sup>5</sup>. The agricultural sector accounts for the largest share of child labour worldwide<sup>6</sup>. Another sector in which the adverse impact of irresponsible business conduct has been most evident is the extractive one. Here, corporate activities have frequently endangered the health and lives of local communities as a result of severe environmental pollution or other harm<sup>7</sup>.

Although corporate actors have increasingly come under scrutiny for their adverse human rights impacts, impunity has been a recurrent problem at the national level. This has commonly been linked to many national governments' lack of will or ability to regulate effectively the conduct of corporations with respect to human rights or to enforce any such regulation<sup>8</sup>. As for lack of will, it has been observed that, because some corporations can 'muster enough economic power to dwarf the power of certain States'<sup>9</sup> and perform functions resembling those of governments<sup>10</sup>, they are able to influence various national governments by providing jobs and investments in exchange for permissive environments with low regulatory standards<sup>11</sup>. These national governments may be reluctant to enact or may even do away with relevant laws 'in order to attract transnational business'<sup>12</sup>, fearful that 'imposing higher standards of accountability [might] have an adverse effect [on] the economic growth of their countries'<sup>13</sup>. As for lack of ability, even where national governments attempt to regulate the conduct of corporations with respect to human rights and to hold them to account for their adverse human rights impacts, a number of practical and doctrinal

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<sup>5</sup> Report by International Labor Organization (ILO) and Unicef, *Child Labor: Global Estimates 2020, Trends and the Road Forward* (2021), available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipecc/documents/publication/wcms\\_797515.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipecc/documents/publication/wcms_797515.pdf).

<sup>6</sup> *Ibid.*

<sup>7</sup> Suffice here to recall the major oil spills and consequent pollution caused by Shell's Nigerian subsidiaries in the Niger Delta in 2008 and 2009, which severely affected the health, livelihood, and land of members of Nigeria's Bodo community. For an overview of the facts of the incident and the lawsuit which followed, see <https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria/>.

<sup>8</sup> In principle, as a matter of international human rights law, states are obliged to take all reasonable measures to safeguard the enjoyment by individuals within their territory or jurisdiction of the latter's human rights against the conduct of private actors, including corporations. This obligation entails that states adopt measures to regulate the conduct of corporations in order to prevent adverse human rights impacts linked to their activities, and to provide effective remedies when such impacts occur. In many circumstances, however, states have fallen short of their international obligations.

<sup>9</sup> Karavias M, *Corporate Obligations Under International Law* (Oxford University Press 2013) at 2. See also Muchlinski P, *Multinational Enterprise and the Law* (2nd edn, Oxford University Press 2007) at 4: 'it is often said that the major MNEs have a turnover larger than many nation states, that they are powerful enough to set their own rules and to sidestep national regulation. They appear to be a power unto themselves'.

<sup>10</sup> *Ibid.*

<sup>11</sup> Birchall D, 'Corporate Power over Human Rights: An Analytical Framework' (2021) 6 *Business and Human Rights Journal* 42, at 52.

<sup>12</sup> Skinner GL, Chambers R and McGrath S, *Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy* (Cambridge University Press 2020), at 28.

<sup>13</sup> Prihandono I, 'Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries' (2011) 3 *Journal of Law and Conflict Resolution* 89, at 100.

legal obstacles arise out of the application of the principles of public and private international law to the structure of many such corporations. These obstacles widen the existing corporate regulatory and accountability gaps with respect to human rights.

As states have frequently been unwilling or unable to regulate and to enforce the regulation of corporations with respect to adverse human rights impacts, various constituencies have looked to international human rights law to close the existing regulatory and accountability gaps. Under the various universal and regional human rights treaties, states parties are obliged to take all reasonable measures to safeguard against the acts of private parties, including corporations, the enjoyment by individuals within their territory or jurisdiction of their human rights. But the content of states parties' international human rights obligations in relation to corporate activity remains vague. Nor are states parties obliged to safeguard against the acts of corporations the enjoyment of human rights by individuals located outside their territory. As for corporations themselves, they do not currently bear human rights obligations under international law. While their desirability is claimed by their proponents, 'the [international] legal basis for corporate human rights obligations remains an unsettled question'<sup>14</sup>.

Given these limitations, voluntary approaches<sup>15</sup> have chiefly been relied on to date at the international level in the field of business and human rights. International institutional efforts dedicated to the regulation of corporate conduct with respect to human rights have produced a number of legally non-binding instruments that set out standards of recommended conduct by corporations and in some cases also by states. The most significant of these non-binding instruments is the UNGPs, unanimously endorsed by the UN HRC in 2011<sup>16</sup>. Other such instruments broadly dealing with business and human rights include the OECD Guidelines for Multinational Enterprises<sup>17</sup>, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>18</sup>, and the UN Global Compact<sup>19</sup>. These non-binding instruments

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<sup>14</sup> Chiussi L, *General Principles for Business and Human Rights in International Law* (Brill Nijhoff 2020) at 3.

<sup>15</sup> This refers to the elaboration of standards of expected behaviour for corporations with respect to human rights. Under international human rights law states remain bound to comply with their obligation to protect human rights against the conduct of private parties, including corporations.

<sup>16</sup> HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie', 21 March 2011, UN Doc. A/HRC/17/31.

<sup>17</sup> Organization for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 1976 (first version).

<sup>18</sup> International Labor Organization (ILO), *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 1977 (first version).

<sup>19</sup> See <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

aim to provide guidance to states and corporate actors on responsible business conduct, *inter alia*, with respect to human rights.

While many have questioned the effectiveness of such non-binding instruments in improving corporate behaviour with respect to human rights and in tackling corporate accountability gaps, these instruments have nonetheless paved the way for the more recent on-going elaboration at the international level of a treaty on business and human rights<sup>20</sup>. They have also informed the substance of this so-called ‘draft legally binding instrument’. Similarly, and until now more significantly, these non-binding instruments have inspired a number of national jurisdictions to develop and adopt binding legislation which places certain human rights obligations under domestic law on relevant categories of corporate actors. The substantive obligations set forth in this kind of legislation, already enacted in countries like France, Germany and Norway, are generally informed and modelled on standards embodied in non-binding international instruments. Moreover, more recently, the EU has adopted legislation that requires Member States to place certain obligations on relevant categories of companies under their respective domestic law. These obligations arguably reflect the expectations of non-binding international instruments on business and human rights.

This thesis explores the business and human rights regulatory journey and its recent developments through international and national law<sup>21</sup>, a journey intertwined but not co-extensive with the regulatory journey from binding to non-binding and return. It examines these different levels, international and national, of this regulatory journey and their interaction. At the same time, it examines the function of non-binding instruments in the recent law-making efforts to tackle the negative externalities of corporate globalization.

## **2. Contribution to Existing Literature**

‘Business and human rights’ has by now become an established field of legal, and particularly international legal, scholarship. A number of topics within this field have received extensive attention from scholars across several legal disciplines<sup>22</sup>. A number of aspects of the business and

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<sup>20</sup> HRC, ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, 14 July 2014, UN Doc. A/HRC/RES/26/9.

<sup>21</sup> EU law is addressed in the thesis through the lens of national law, since recent EU regulatory measures on business and human rights are designed to harmonize the respective national laws of EU Member States.

<sup>22</sup> For a general bibliography on business and human rights see, *inter alia*, Baumann-Pauly D and Nolan J *Business and Human Rights: From Principles to Practice* (Routledge 2016); Bernaz N, *Business and Human Rights. History, Law and Policy: Bridging the Accountability Gap* (Routledge 2017); Bird RC, Cahoy DR and Prenekert JD, *Law, Business and Human Rights:*

human rights regulatory journey have been overly explored in the existing academic literature. Among others, the history of the development and the perceived strengths and shortcomings of existing non-binding international instruments on business and human rights, including the UNGPs, have been explored in depth<sup>23</sup>. The processes leading to the development and adoption of certain international and national binding legal instruments on business and human rights and a number of substantive aspects of these legal developments have also been the focus of scholarly research<sup>24</sup>.

Against this background, the thesis aims to contribute to the existing literature on business and human rights in two respects.

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*Bridging the Gap* (Edward Elgar 2014); Chesterman S, 'Laws, Standards or Voluntary Guidelines?' in Nystuen G, Føllesdal A and Mestad O (eds), *Human Rights, Corporate Complicity and Disinvestment* (Cambridge University Press 2011); Chiussi L, *General Principles for Business and Human Rights in International Law* (Brill Nijhoff 2020); Clapham A, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006); Deva S, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012); Deva S and Birchall D, *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020); Karavias M, *Corporate Obligations Under International Law* (Oxford University Press 2013); Morgera E, *Corporate Accountability in International Environmental Law* (Oxford University Press 2009); Muchlinski P, *Multinational Enterprise and the Law* (2nd edn, Oxford University Press 2007); Rodríguez-Garavito C, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017); Ruggie J, *Just Business. Multinational Corporations and Human Rights* (W.W. Norton & Company, Inc. 2013); Ruth J and Wetzel M, *Human Rights in Transnational Business: Translating Human Rights Obligations into Compliance Procedures* (Springer 2016); Andreassen B and Vinh K, *Duties Across Borders: Advancing Human Rights in Transnational Business* (Intersentia 2016); Bilchitz D and Deva S, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013); Bantekas I and Stein MA, *The Cambridge Companion to Business and Human Rights Law* (Cambridge University Press 2021); Jägers N, *Corporate Human Rights Obligations: in Search for Accountability* (Intersentia 2002).

<sup>23</sup> See, among others, the following book chapters: Rodríguez-Garavito C, 'Business and Human Rights: Beyond the End of the Beginning' in Rodríguez-Garavito C (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017), Chs 1 and 4; Ruth J and Wetzel M, *Human Rights in Transnational Business: Translating Human Rights Obligations into Compliance Procedures* (Springer 2016), Chs 5 and 6; Bilchitz D and Deva S, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013), Chs 1, 3, 4 and 5; Deva S, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012), Chs 3 and 4; Bantekas I and Stein MA, *The Cambridge Companion to Business and Human Rights Law* (Cambridge University Press 2021), Chs 7, 8, and 9.

<sup>24</sup> See, among others, the following book and scholarly articles: Deva S and Bilchitz D, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017); Bernaz N, 'Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty' (2021) 22 *Human Rights Review* 45; Černič JL and Bukor C, 'The Potential United Nations Business and Human Rights Treaty: Turning of the Tides of Justice?' in Bornheim JJ and Riffel C (eds), *New Zealand Yearbook of International Law* (Brill Nijhoff 2022) 97; Shutter OD, 'Towards a New Treaty on Business and Human Rights' (2015) 1 *Business and Human Rights Journal* 41; Deva S, 'Treaty Tantrums: Past, Present and Future of a Business and Human Rights Treaty' (2022) 40 *Netherlands Quarterly of Human Rights* 211; Cossart S, Chaplier J and Lomenie TBD, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317; Savourey E and Brabant S, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption' (2021) 6 *Business and Human Rights Journal* 141; Deva S, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) *Leiden Journal of International Law* 389; Mares R, 'The United Nations Draft Treaty on Business and Human Rights: An Analysis of its Emergence, Development and Potential' in Marx A and others (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar 2022) 22; McCorquodale R, 'Human Rights Due Diligence Instruments: Evaluating the Current Legislative Landscape' in Marx A and others (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar Publishing 2022) 121; Mares R, 'Regulating Transnational Corporations at the United Nations - The Negotiations of a Treaty on Business and Human Rights' (2022) 26 *The International Journal of Human Rights* 1522.

First, the thesis attempts to contribute to the existing literature on the business and human rights regulatory journey by examining, *inter alia*, the most recent developments at different regulatory levels, specifically the international and national, of this journey and their interaction. Secondly, the thesis attempts to contribute to the existing literature by examining the interaction of existing non-binding international standards on business and human rights, specifically the UNGPs, with the recent international and national law-making processes in the field of business and human rights.

### **3. Research Question**

The overarching research question addressed by the thesis is why and how regulatory efforts in the field of business and human rights, including the most recent ones, have to date progressed through international and national law. In addressing this question, the thesis examines the interplay between these two levels of regulatory efforts as well as between binding rules and non-binding standards, in attempts to date to tackle by legal means the negative externalities of corporate globalization.

In addressing the main research question the thesis begins with an examination of the practical and legal obstacles to the domestic regulation and adjudication at the national level of the adverse human rights impacts of corporations, especially transnational corporations, which arguably led interested parties to look for solutions in international human rights law. The thesis then examines in response to what limitations of international human rights law, in its specific application to the adverse human rights impacts of corporations, the UNGPs were developed and adopted. Finally, the thesis investigates to what extent the UNGPs have informed and continue to inform the recent binding developments at the international and national level in the area of business and human rights. This investigation collaterally addresses the function of non-binding international standards in law-making processes in the area of business and human rights.

### **4. Argument**

The thesis confirms the existing argument that the limitations of the relevant law at the national and then international levels led to the development of non-binding international instruments on business and human rights, and specifically the UNGPs. In addition, the thesis contends that the UNGPs' limitations and essential content have driven and continue to drive efforts to date towards new law on business and human rights at the international and national level. The thesis also argues, in part along the lines of the academic literature on the function of such non-binding international

instruments, that the hortatory standards set forth in the UNGPs continue to influence and inform the content of recent substantive legal developments in business and human rights under international and national law, including at the EU level.

## **5. Methodology**

In terms of methodology, the thesis engages in doctrinal and contextual analysis of regulatory efforts in the field of business and human rights. With specific regard to the move from non-binding international instruments to international and national law, the thesis undertakes a textual and contextual analysis of the UNGPs, as a point of departure for the investigation of their role in the development of relevant international and national law. Selected international and national legal developments, including the most recent ones in the business and human rights regulatory journey, are then analysed vis-à-vis the UNGPs to examine the extent to which these legal developments and their substantive elements are informed by the latter instrument. The binding developments analysed in the thesis include the 2023 updated Draft Treaty on business and human rights currently being negotiated at the UN, the national legislation on mandatory human rights due diligence adopted in recent years in France, Germany and Norway, and the latest 2024 Corporate Sustainability Due Diligence Directive adopted at the EU level.

The analysis undertaken in the thesis is explicatory rather than normative. It seeks to explain the relationship and interaction between the different levels of regulatory efforts in the area of business and human rights. It does not engage in the ongoing debate over whether the legal instruments examined are preferable over existing non-binding international instruments. Nor does it address whether these legal developments, as currently drafted, are likely to succeed in tackling the adverse human rights impacts of corporate, and especially transnational corporate, conduct.

## **6. Scope**

Of the international non-binding regulatory initiatives on business and human rights, the UNGPs are the main focus. Other international non-binding instruments dealing with business and human rights issues and adopted prior to the UNGPs are considered only by way of context. These instruments include the OECD Guidelines for Multinational Enterprises<sup>25</sup>, the ILO Tripartite

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<sup>25</sup> First adopted in 1976, later revised in 2000 and most recently updated in 2023, these are a set of voluntary and legally non-binding recommendations to multinational enterprises addressed by the OECD member states and adhering non-member states. The instrument aims to promote responsible business conduct and to assist the business sector in aligning their business activities to the principles enshrined in the Guidelines, specifically in the areas of human rights,

Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>26</sup>, and the UN Global Compact<sup>27</sup>.

## 7. Terminology

Some terminological clarifications are also in order at the outset.

### A. ‘Corporation’ and ‘Transnational Corporation’

‘Corporation’ as employed throughout the thesis refers to a legal person which is established by way of incorporation under the law of a given state and which, under that law, enjoys separate legal personality from the natural persons that are its directors, employees and shareholders. To say that corporations enjoy separate legal personality is to say that they are able to hold legal rights and to bear legal obligations and liabilities in their own right. As a consequence of their separate legal personality corporations enjoy limited liability, meaning that the liabilities of the company cannot in principle be attributed to the company’s directors or shareholders.

One particular kind of corporation is the so-called ‘transnational corporation’ (TNC), a corporate entity that engages in business activities in more than one state. The UN defines a TNCs as

an enterprise, comprising entities in two or more countries, regardless of the legal form and the fields of activities of those entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant

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disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and taxation’. The principles enshrined in the Guidelines are derived from a number of international instruments, including the Universal Declaration of Human Rights (UDHR) and a number of international human rights treaties.

<sup>26</sup> Adopted in 1977 and later amended in 2000, 2006 and 2017, the Declaration offers guidelines to MNEs, governments, employers’ and workers’ organizations on labor-related aspects of social corporate responsibility. The overall aim of the Declaration is to highlight and encourage the positive contribution of MNEs in fostering social and economic progress and in realizing decent work for all, as well as in mitigating the negative impacts stemming from their business activities.

<sup>27</sup> Formally launched in 2000 by the then UN Secretary General Kofi Annan, the UN Global Compact is a multi-stakeholder voluntary initiative which provides guidance to business actors on how to align their business activities to the ten principles developed by the UN and derived from existing international instruments in the areas of human rights, labor, environment, and anti-corruption. The Global Compact expects companies to incorporate the ten principles in their business strategy, as well as in their decision-making processes, to contribute to development objectives through business activities, and to communicate the ways in which they intend to implement the principles in practice.

influence over the activities of the others and, in particular, to share knowledge, resources and responsibility with the others<sup>28</sup>.

TNCs undertake activities in these multiple jurisdictions through foreign subsidiaries. The so-called ‘parent’ company of a TNC will be established by way of incorporation under the laws of a given state, referred to as the ‘home’ state. For the purpose of expanding its business operations abroad, this parent company will tend to establish by way of incorporation under the laws of other states separate companies, referred to as subsidiaries, which will undertake business activities in those other states, referred to as ‘host’ states. The parent company will tend to exercise a degree of control over the subsidiary, often by way of holding more than fifty percent of the latter’s shares. The thesis employs the terms ‘transnational corporation’ (TNC), ‘multinational corporation’ (MNC), ‘multinational enterprise’ (MNE), and ‘transnational enterprise’ (TNE) synonymously.

#### B. ‘Responsibility’ and ‘Accountability’

The thesis refers to both corporate ‘responsibility’ and corporate ‘accountability’. It is crucial to clarify the use of these terms.

In the business and human rights context, the ‘responsibility’ employed in the expression ‘corporate responsibility’ refers to a non-binding expectation of conduct. That is, it refers to a non-legal standard of corporate behaviour. This differs from the use of ‘responsibility’ in the international legal terms ‘state responsibility’<sup>29</sup>, ‘the responsibility of international organizations’<sup>30</sup> and ‘individual criminal responsibility’<sup>31</sup>, where the word refers to the consequence under international law of the breach of an international obligation binding on the relevant legal actor.

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<sup>28</sup> See, in this regard, UNCTNC, ‘Draft Code of Conduct for Transnational Corporations’, 21 January 1983, UN Doc. E/1983/17/Rev.1, Chapter II, 1(a). See also Muchlinski P, *Multinational Enterprise and the Law* (2nd edn, Oxford University Press 2007) 5-7.

<sup>29</sup> As a matter of international law, ‘responsibility’ arises from every internationally wrongful act of a State. Wrongful acts consist of conduct by a State, either actions or omissions, which is attributable to the State and constitute a breach of an obligation binding on that State under international law. The principles pertaining to the international responsibility of states have been codified by the International Law Commission (ILC). See International Law Commission, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries’, 2001, UN Doc. A/56/10, Articles 1 and 2.

<sup>30</sup> Here ‘responsibility’ arises from every internationally wrongful act of an international organization. Wrongful acts consist of a conduct by an international organization, either actions or omissions, which is attributable to the international organization and constitute a breach of an international obligation of the organization. The principles pertaining to the international responsibility of international organizations have been codified by the International Law Commission (ILC). See International Law Commission, ‘Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts with Commentaries’, 2011, UN Doc. A/66/10, Articles 1 and 2.

<sup>31</sup> As a matter of international criminal law, ‘a person shall be criminally responsible and liable for punishment for a crime [...]’. See Article 25(2) of the Statute of the International Criminal Court (ICC).

For its part, the term ‘accountability’ is frequently employed as ‘a conceptual umbrella that covers various other distinct concepts’<sup>32</sup>, among them liability. Used in this broad sense, ‘accountability’ entails ‘a relationship between an actor and a forum, in which the actor has the obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences’<sup>33</sup>. In this way, ‘accountability’ reflects an actor’s being answerable and potentially liable for its acts or omissions. The thesis employs ‘accountability’ in this broad sense. This is in line with the use of ‘accountability’ in the work of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises<sup>34</sup>. The expression ‘accountability gaps’ is used in the thesis to refer to a situation in which an actor is insufficiently answerable, perhaps through not being potentially liable, for its conduct.

### C. ‘Complicity’

The thesis at times refers to corporate ‘complicity’. Outside the business and human rights context, ‘complicity’ usually refers to a specific mode of state<sup>35</sup>, international organization<sup>36</sup> or individual responsibility<sup>37</sup>. In contrast, in the business and human rights context, ‘complicity’ is generally used

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<sup>32</sup> Bovens M, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13 *European Law Journal* 447, at 449.

<sup>33</sup> *Ibid.*, at 450.

<sup>34</sup> See for instance HRC, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative’, UN Doc. A/HRC/17/31/Add.2, paras. 154-159.

<sup>35</sup> As a matter of international law, ‘a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State’. See International Law Commission, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries’, 2001, UN Doc. A/56/10, Article 16.

<sup>36</sup> An equivalent provision is found in the Articles on the Responsibility of International Organizations for Internationally Wrongful Acts, which provide that ‘an international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstance of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization’. See International Law Commission, ‘Draft Articles on Responsibility of International Organizations for Internationally Wrongful Acts with Commentaries’, 2011, UN Doc. A/66/10, Article 14.

<sup>37</sup> Under international criminal law, complicity in crimes, such as human rights violations that amount to international crimes, constitutes a ground for the criminal liability of individuals or natural persons. Article 25(3)(c) of Statute of the International Criminal Court (ICC) provides that ‘a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person, for the purpose of facilitating the commission of such a crime, aid[s], abet[s] or otherwise assist[s] in its commission or its attempted commission, including providing the means for its commission’. ‘Aiding and abetting’ has been generally accepted to consist of ‘acts directed to assist, encourage or lend moral support to the perpetration of a crime, which have a substantial effect upon its perpetration’. See, in this regard, HRC, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Clarifying the Concepts of “Sphere of Influence” and “Complicity”’, UN Doc. A/HRC/8/16, para. 36. It is important to specify that the ICC exercises jurisdiction over natural persons only and, accordingly, its Statute only provides for accomplice liability of natural persons. This means that legal persons such as business actors are currently excluded from the jurisdiction *ratione*

‘in a [...] colloquial manner to convey the connotation that someone has become caught up and implicated in something that is negative and unacceptable’<sup>38</sup>. In line with this informal usage<sup>39</sup>, the thesis employs ‘complicity’ in a broad, non-technical sense to refer to a corporation’s direct or indirect involvement in undesirable conduct by another actor, specifically in conduct by a state actor that violates international human rights law or in conduct by a private actor which, if engaged in by a state, would violate international human rights law.

#### D. ‘Adverse Human Rights Impact’

The academic literature on business and human rights often speaks in terms of ‘corporate human rights violations’ or ‘corporate human rights abuses’. The reference to ‘violations’ or ‘abuses’ by corporations, however, is inaccurate as a matter of international law. Corporations are currently not bound by human rights obligations under international law<sup>40</sup>. As such, they cannot violate

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*personae* of the ICC and cannot be held liable for complicity under international law. Corporate officials, however, are still subject to the jurisdiction of the Court and can be held criminally liable for complicity in crimes in their individual capacity. While international criminal law currently does not provide for legal persons to be criminally liable for complicity in international crimes, it has been noted that ‘a number of domestic jurisdictions allow for holding legal persons, including companies, criminally liable for at least some international crimes [...] [and] provided these jurisdictions also have aiding and abetting liability, it will generally be possible to criminally prosecute companies for aiding and abetting such crimes’. Alternatively, where corporate criminal liability is not recognized under domestic law, civil liability has generally been resorted to as a means to hold companies liable for their indirect participation in the abuses of other actors. See HRC, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Clarifying the Concepts of “Sphere of Influence” and “Complicity”’, UN Doc. A/HRC/8/16, paras. 14-15 and para. 52.

<sup>38</sup> Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Vol No. 1, (2008) 3.

<sup>39</sup> A number of international non-binding instruments on business and human rights employ the notion of ‘complicity’ to refer to those situations where corporations are seen directly or indirectly involved in the adverse human rights impacts of state or non-state actors. This includes situations where the involvement by corporations in these adverse impacts might or might not give rise to the legal liability of the corporation in question. By way of example, Principle 2 of the UN Global Compact highlights that ‘allegations of complicity are not confined to situations in which a company could be held legally liable for its involvement in the human rights abuse committed by another’. The instrument distinguishes between two main categories of corporate involvement or complicity in the human rights abuses of another actor, namely, direct and indirect complicity. Within indirect complicity, beneficial and silent complicity can be further distinguished. While conduct akin to direct complicity translates into a direct or ‘active’ contribution of a corporate actor in the commission of violations by another actor, indirect complicity translates into conduct that provides an indirect or ‘inactive’ contribution to human rights violations, in that it ‘supports, in a general way, the ability of the perpetrator to carry out systematic human rights violations’ (see, in this regard, Wettstein F, ‘The Duty to Protect: Complicity, Political Responsibility, and Human Rights Advocacy’ (2010) 96 *Journal of Business Ethics* 33, at 36). Contrary to direct complicity, allegations of indirect complicity, such as beneficial and silent complicity, are generally unlikely to give rise to the legal liability of the relevant actor. The UNGPs also employ the notion of ‘complicity’ in this sense. The substance of the notion of ‘complicity’ as employed by the UNGPs is dealt with in the relevant chapter of the thesis.

<sup>40</sup> See, among others, Macchi C, *Business, Human Rights and the Environment: The Evolving Agenda* (Asser Press 2022) at 3: ‘Transnational corporations are not, at present, considered full subjects of international law, meaning that they are not generally bearers of [...] obligations under international human rights law’; Ruggie J, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101 *American Journal of International Law* 819, at 832; Pentikainen M, ‘Changing International “Subjectivity” and Rights and Obligations under International Law - Status of Corporations’ (2012) 8 *Utrecht Law Review* 145, at 149: ‘The traditional “indirect” regulation model according to which states are the only bearers of human rights obligations under international law still appears to be the prevailing standpoint’; Clapham A, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) at 240: ‘Nor does it appear that the human

international human rights law. Under international human rights law, individuals hold rights only in relation to states, which conversely are the sole bearers of obligations under international human rights law.

In this light, the thesis generally employs the expression ‘adverse human rights impacts’ to indicate the harmful effects of corporate activities on the enjoyment by individuals of those social goods protected, as against states, by international human rights law. Where instead the term ‘corporate human rights violations’ is used, it is intended to refer to adverse impacts on individuals’ enjoyment of their human rights resulting from corporate conduct which, if engaged in by a state, would amount to a breach of the state’s obligations under international human rights law. In other words, the use of the expression is not intended to suggest that corporations can actually violate international human rights law.

#### E. ‘Soft Law’

‘Soft law’ is a popular, if misleading ‘catchword’<sup>41</sup> or, more precisely, catchphrase that many use to refer to norms ‘that are deliberately made non-binding’<sup>42</sup> and to the instruments in which these norms are embodied<sup>43</sup>. Such non-binding norms embody recommended standards of conduct, as distinct from legal obligations. When referring to such norms and the instruments in which they are found, the thesis generally employs, in preference to ‘soft law’, the more formal and juridically accurate terms ‘non-binding standard’ or ‘non-binding norm’ and ‘non-binding instrument’. The expressions ‘soft law standard’, ‘soft law norm’ and ‘soft law instrument’ may, however, be occasionally used, in particular when quoting others.

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rights treaty bodies are ready to interpret the UN human rights treaties to [...] impose obligations on non-state actors or individuals’; López C, ‘The ‘Ruggie Process’: from Legal Obligations to Corporate Social Responsibility?’ in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 58, at 63: ‘[T]here is no human rights instrument that imposes binding obligations on business corporations’. Clear evidence that TNCs are currently not bound by international human rights law is the failure of the attempt to place obligations on TNCs under international human rights law via the 2003 UN Norms, which were generally dismissed for their perceived doctrinal excesses and problematic misstatements of international law. See, in this regard, Chapter 4. Additionally, and contrary to expectation, the latest draft of the international binding treaty on business and human rights currently being negotiated at the UN level follows the traditional state-centric model of international human rights instruments in placing obligations not on corporations themselves but only on states, obliging the latter to regulate business activities. See, in this regard, Chapter 5. Note that the common talk in this context of ‘direct’ and ‘indirect’ obligations is prone to confusion. There is no such thing in law as an ‘indirect’ obligation. Reference instead to ‘indirect regulation’ of corporations is unproblematic.

<sup>41</sup> UN Doc. A/CN.4/663, First Report on the Formation and Evidence of Customary International Law by Michael Wood, Special Rapporteur, 17 May 2013, at footnote 55.

<sup>42</sup> *Ibid.*

<sup>43</sup> While non-binding, it is important to mention that these instruments and the standards enshrined therein can at times become legally-relevant for the purpose of international and national law-making processes.

## 8. Structure

The thesis is structured as follows.

Chapter 2 provides an overview of why international human rights law has been looked to over the past two decades to overcome the legal obstacles encountered at the national level with respect to the regulation of corporate conduct, in particular but not solely extraterritorial corporate conduct, and to the adjudication of corporate actors for conduct giving rise to adverse human rights impacts. To this end, the chapter discusses the legislative and adjudicative limitations deriving from established principles of public and private international law as they apply in respect of the conduct of transnational corporations (TNCs), limitations that are a consequence of the complex way in which TNCs are structured and operate. In order to do this, the chapter first introduces two principles characteristic of domestic company law, namely separate legal personality and limited liability, as well as the concept and identity of corporate nationality.

The purpose of Chapter 3 is twofold. First, the chapter introduces in general terms the international human rights law framework. It outlines the systems of international human rights protection developed at the universal and regional levels and provides an overview of the sources of international human rights law. It then explores the geographical scope of states' obligations under universal and regional international human rights treaties. Secondly, the chapter examines international human rights law in the specific context of business activities as this law stood prior to the adoption in 2011 of the UNGPs. It examines the scope of application and content of states' human rights obligations in respect of the activities of business actors like transnational corporations.

Chapter 4 provides an account of the development and adoption of the 2011 UNGPs, which today constitute the most authoritative non-binding standards in the area of business and human rights. The first half of the chapter examines the mandate of the SRSG on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. The second half of the chapter examines the provisions, organized into three 'pillars', of the UNGPs.

Chapter 5 explores the international legal developments inspired by the UNGPs, specifically the current efforts to elaborate a universal multilateral treaty, or so-called 'Legally Binding Instrument', on business and human rights. Put differently, the chapter is concerned with the move from non-binding international standards to binding international law in the area of business and human

rights. The first half of the chapter discusses the reasons behind the call for the elaboration of a treaty on business and human rights that eventually led to the ongoing treaty-making process under the auspices of the UN. It then considers the beginning of the treaty process, including the alternative proposed to the elaboration of a treaty, and analyzes the first two rounds of treaty consultations where proposals on substantive aspects of the proposed treaty were put forward and discussed among relevant stakeholders, including states, business representatives, civil society and NGOs. The second half of the chapter is concerned with a substantive analysis of the text of the most recent draft of the treaty at the time of writing, the so-called 2023 Updated Draft of the treaty. It examines key provisions of the draft, their alignment with the principles enshrined in the UNGPs and their potential to address obstacles encountered when applying established principles of public and private international law in the context of business and human rights.

Chapter 6 is concerned with the move in the area of business and human rights from non-binding international standards to binding national law, examining the role of the UNGPs in three selected domestic lawmaking processes. The first half the chapter sketches the emerging trend of national legislation imposing domestic legal obligations on corporations with respect to business and human rights. It introduces both the main sorts of national laws dealing with business and human rights issues and the three specific national laws that form the focus of subsequent investigation. The second half of the chapter analyzes how the three selected national laws respectively reflect specific elements of the UNGPs.

Chapter 7 is concerned with the move in the area of business and human rights from non-binding international standards to binding EU law. Specifically, it examines the latest efforts to negotiate and adopt legislation on business and human rights under EU law, in the form of the 2024 Corporate Sustainability Due Diligence Directive (CSDDD). The first half of the chapter discusses the reasons for and the objectives of Union-level legislation on business and human rights, and presents the substantive aspects and obligations set forth in the CSDDD. The second half of the chapter examines the extent to which the CSDDD and the obligations it sets forth are informed by and reflect specific elements of principles enshrined in the three Pillars of the UNGPs.

Chapter 8 recapitulates the analysis undertaken in the substantive chapters of the thesis and, specifically, sums up the move back and forth from the national to the international and from non-binding to binding, as well as the interaction of 'soft' law with the two levels of law-making processes examined. It concludes with some final remarks.



**PART I: THE NATIONAL LEVEL**

## CHAPTER 2

### The Obstacles at the National Level

#### **1. Introduction**

The impunity of private business actors, including transnational corporations (TNCs), for the harmful impacts of their activities on individuals' enjoyment of their human rights has been a recurrent pattern due to national governments' unwillingness or inability to regulate and to enforce the regulation of corporate conduct with respect to human rights. As for unwillingness, states hosting the activities of corporations have on some occasions decided not to regulate corporate conduct. As for inability, a number of legal obstacles have traditionally prevented states from regulating effectively the conduct of TNCs with regard to human rights and from adjudicating such conduct when adverse human rights impacts occur. In both of these lights, the last thirty years have witnessed attempts of interested parties to resort to international law as a tool to close corporate regulatory and accountability gaps at the national level.

The present chapter discusses the reasons behind the unwillingness and the obstacles behind the inability of national governments in respect to the regulation of corporate conduct and adjudication of corporate actors, including TNCs. The obstacles discussed in the chapter arise out of the application of established principles of public and private international law to private actors like TNCs and as a direct consequence of the complex way in which these actors are structured and operate. The following sections first introduce the company law principles of separate legal personality and limited liability, as well as the concept of corporate nationality under international law, as a point of departure for the analysis of the limitations stemming from the confluence of traditional principles of company law and established public and private international law principles of general application<sup>44</sup>.

The purpose of this chapter is not to give an account of the current legal situation with respect to the regulation and adjudication of corporate actors but to provide instead an overview of the reasons why international law has been looked to over the past three decades both to overcome the obstacles preventing national governments from addressing the negative externalities of

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<sup>44</sup> The issues looked at in the following sections can be overcome. However, the aim of the present chapter is to provide an understanding of the limitations encountered at the domestic level prior to the development of international regulatory standards, in particular the UNGPs, specifically targeting TNCs for harms stemming from their global business activities.

corporate globalization and to compel unwilling states to regulate corporate conduct in their territory and, where possible, abroad.

## 2. The Legal Nature and Structure of TNCs

In order to understand why obstacles have traditionally been encountered in the attempt to regulate corporate conduct and adjudicate corporate actors, one must first understand the legal nature and structure of TNCs.

Companies, also known as corporations, are not natural persons, but rather legal persons. Under municipal law, they enjoy a personality separate from that of the respective natural persons that are their directors, employees, and shareholders. That is, they are able to hold legal rights and to bear legal obligations and liabilities in their own right. *A fortiori*, they enjoy a legal personality separate from that of all other companies, holding legal rights and bearing legal obligations and liabilities separately from them, even when those companies may be shareholders.

In the context of English common law, the classic account of the principle of separate legal personality of a company is provided in *Salomon v Salomon & Co Ltd.*, where the House of Lords held<sup>45</sup>:

The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by [legislation].

At the international level, in the 1970 *Barcelona Traction* judgment, the International Court of Justice (ICJ) stated<sup>46</sup>:

Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the

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<sup>45</sup> See *Salomon v Salomon & Co Ltd* [1897] UKHL 1 (AC 22, 16 November 1987) at 51.

<sup>46</sup> *Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain)*, Judgment, 5 February 1970, ICJ Rep. 1970, p. 3, paras. 41-47.

company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction.

Linked to the principle of the separate legal personality of a company is the corporate law principle of limited liability, meaning that ‘the claims made by creditors of a firm are limited to the assets owned or held by the corporation; creditors cannot pursue claims against any assets held by the corporation’s shareholders’<sup>47</sup>. The separate legal personality of a company and the limited liability of its directors and shareholders together comprise what is known in corporate law as the ‘corporate veil’<sup>48</sup>.

One particular type of corporate actor, the TNC, is structured and operates in a particular way. TNCs undertake activities not within a single national jurisdiction but across borders, meaning in multiple national jurisdictions, through a complex web of foreign entities. The company at the apex of the TNC, the so-called ‘parent’ company, is established by way of domestic incorporation under the laws of a given state, referred to as the ‘home state’ or ‘home country’. For the purpose of expanding its business operations abroad, the parent company will tend to establish by way of

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<sup>47</sup> Choudhury B, 'Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough' (2023) 8 *Business and Human Rights Journal* 180, at 185.

<sup>48</sup> International and domestic courts have on occasion chosen not to give effect to the principle of the separate legal personality of companies, engaging instead in what is referred to as the act of ‘piercing’ or ‘lifting’ the corporate veil, whereby the legal separation of the company and its shareholders is disregarded and the rights and obligations of the company are treated as the rights and obligations of its members. See, in this regard, Cheng-Han T, 'Piercing the Separate Personality of the Company: A Matter of Policy?' (1999) *Singapore Journal of Legal Studies* 531, at 533. Although there does not exist a ‘common, unifying principle’ (*Briggs v James Hardie & Co Pty Ltd* [1989] NSWLR 16 (NSWCA, 28 June 1989) at 567) as to when courts might pierce the corporate veil, the limited circumstances allowing them to do so have included wrongful use of the corporate form for purposes such as fraud and an excessive degree of control exercised by the parent company over a subsidiary which is seen as a ‘mere agent’. Piercing the corporate veil is, however, of little use in the context of transnational corporate harms, which generally do not revolve around issues of fraud or complete control of the parent company over the subsidiary. In tort litigation, a way in which the obstacle of the corporate veil can be overcome without formally piercing the veil is through the more recent application of the common law ‘duty of care’ doctrine, which postdates. The ‘duty of care’ doctrine has recently been applied, *inter alia*, in the UK. In *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 (SC, 10 April 2019), among others, the UK Supreme considered whether a parent company could owe a duty of care in relation to the acts of a foreign subsidiary without formally having to disregard the legal separation between the parent company and its subsidiary, that is, without having to pierce the corporate veil. The Court stated that ‘parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case’ (para. 50). The Court further held that the imposition on the parent company of a duty of care in relation to the actions of its foreign subsidiary depends ‘on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations [...] of the subsidiary’ (para. 49).

incorporation under the laws of other states separate companies, referred to as subsidiaries, which will undertake business activities in those other states, referred to as ‘host states’ or ‘host countries’. The parent company will tend to exercise a degree of control over the subsidiary, often by way of holding more than fifty percent of the latter’s shares<sup>49</sup>. In turn, ‘subsidiaries may hold shares in or be intermediary holding companies for other subsidiaries’<sup>50</sup>. In light of the separate legal personality and limited liability principles, the parent company and its subsidiaries remain separate legal persons, each incorporated under the law of a different state and each enjoying rights and bearing obligations and liabilities separately from the other. Even in circumstances where the parent company is the controlling shareholder in a subsidiary, it is generally not liable for any of the debts of the subsidiary.

### **3. Prescriptive Jurisdiction under Public International Law and the Regulation of TNCs**

The unwillingness and inability of states to exercise their prescriptive jurisdiction to regulate and enforce the regulation of corporate conduct are among the relevant reasons why international law has been looked to in the field of business and human rights.

The international law of jurisdiction, and specifically prescriptive jurisdiction, provides the rules to determine the lawful reach *ratione loci*, as a matter of international law, of a state’s laws. Prescriptive jurisdiction refers to the authority of states under international law to promulgate legislation, executive orders, administrative rules, or other regulatory measures applicable to, *inter alia*, the conduct of natural and legal persons<sup>51</sup>. The various bases of prescriptive jurisdiction under customary international law are merely permissive, not mandatory. That is, as a matter of customary rules on such jurisdiction, states may but are not obliged to prescribe laws on any of the bases in question.

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<sup>49</sup> The majority of US and UK TNCs are organized according to the ‘pyramid’ model, ‘which consists of a parent company which owns and controls a network of wholly—or majority-owned—subsidiaries. The result is a ‘pyramid’ with the parent company at its apex. When the ‘pyramid’ crosses borders, it creates the ‘classic’ MNE’. See Muchlinski P, *Multinational Enterprise and the Law* (3rd edn, 2021) at 54.

<sup>50</sup> Choudhury B, ‘Corporate Law’s Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough’ (2023) 8 *Business and Human Rights Journal* 180, at 186.

<sup>51</sup> Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015), at 9. See also Shaw, *International Law* (6th edn, Cambridge University Press 2008), at 649 and International Bar Association (Legal Practice Division), ‘Report of the Task Force on Extraterritorial Jurisdiction’, 28 September 2008, at 7.

The most fundamental basis under international law for the assertion by a state of prescriptive jurisdiction is territoriality<sup>52</sup>. A state may prescribe laws in respect of all conduct that takes place in its territory. The territoriality principle applies in relation to all fields of national law<sup>53</sup>.

Assertions of prescriptive jurisdiction not based on the territoriality principle are referred to collectively as 'extraterritorial' prescriptive jurisdiction. Assertions of such jurisdiction entail, by definition, the adoption by a state of laws in respect of conduct taking place outside its territory<sup>54</sup>, in practice usually in respect of conduct taking place in another state's territory. The mainstream approach to prescriptive jurisdiction under international law prohibits a state from asserting jurisdiction over conduct that takes place in the territory of another state unless a permissive rule of international law allows it to do so<sup>55</sup>.

Of the existing permissive grounds of extraterritorial prescriptive jurisdiction only nationality (or 'active personality') provides a general basis for such jurisdiction. The other existing grounds for the exercise of extraterritorial prescriptive jurisdiction are restricted to specific sorts of conduct.

The nationality principle permits a state to regulate any conduct of its nationals that takes place outside the state's territory<sup>56</sup>. Although it has been generally invoked in the context of criminal jurisdiction over natural persons, the nationality principle has also been resorted to in other areas

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<sup>52</sup> Ryngaert, *supra note 51*, Chapter 3; Shaw, *supra note 51*, at 652-658; Crawford J, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) at 440; Akehurst M, 'Jurisdiction in International Law' (1973) 46 *British Yearbook of International Law* 145, at 152-156; Jennings R and Watts A, *Oppenheim's International Law*, vol 1 Peace (9th edn, 2008) at 458-461; Lowe V, *International Law* (Clarendon Law Series, 2007) at 172-173; International Bar Association, *supra note 51*, at 11-13.

<sup>53</sup> Malcolm Shaw, *supra note 51*, at 652-653.

<sup>54</sup> Ryngaert, *supra note 51*, Ch 4. See also Higgins R, 'Allocating Competence: Jurisdiction', *Problems and Process: International Law and How We Use It* (Oxford University Press 1995), at 73.

<sup>55</sup> Ryngaert, *supra note 51*, at 29 and 35. The permissive principle approach has substituted the more liberal approach on jurisdiction developed in the *Lotus* case by the PCIJ, which provides that States have freedom to exercise prescriptive jurisdiction outside their territory unless there exists a prohibitive rule to the contrary. While the statements of the PCIJ in the *Lotus* judgement point to the confirmation that 'the rules of law binding upon states emanate from their own free will', they nonetheless ignore the importance of customary international law principles of sovereign equality of states and non-intervention, as they clearly confer States a wide range of powers to exercise jurisdiction at the expenses of foreign states which might feel offended by the jurisdictional assertions of the State attempting to regulate matters on their territories. The *Lotus* judgement has been highly criticized, as well as turned down by the subsequent development of customary international law, which has in fact affirmed the permissive principle approach. For a discussion on this, see, *inter alia*, Ryngaert, *supra note 51*, at 33. See also PCIJ, *SS Lotus (France v Turkey)*, Judgment No. 9, PCIJ Series A No. 10 [1927] at 18-19; Shaw, *supra note 51*, at 656; International Bar Association, *supra note 51*, at 8-9.

<sup>56</sup> See e.g., Ryngaert, *supra note 51*, at 109. See also Shaw, *supra note 51*, at 659-664; Akehurst, *supra note 52*, at 156.

of law<sup>57</sup> and in relation to legal persons. In the latter regard, in the eyes of international law, corporations generally possess the nationality of their state of incorporation<sup>58</sup>.

### 3.1. Territorial Regulation of TNCs

Host states are free under international law to prescribe rules applicable to corporate activities that take place within their territory. That is, no international legal obstacle prevents a host state from regulating corporate conduct carried out in its territory. At the same time, the international law of prescriptive jurisdiction does not oblige a state to regulate such conduct.

In certain circumstances, host states may choose not to regulate or not to enforce the regulation of the territorial activities of foreign corporations or their local subsidiaries. There may exist a power imbalance between a host government and a TNC. Some corporate entities 'have managed to muster enough economic power to dwarf the power of certain States'<sup>59</sup>. Particularly in developing host states, business actors that contribute to economic development<sup>60</sup> may be in a position to influence the local government by providing jobs and investments in exchange for permissive environments with low regulatory standards and favorable pro-business policies<sup>61</sup>. Against the backdrop of corporate globalization, 'many host governments have done away with regulations in order to attract transnational business'<sup>62</sup>, fearful that 'imposing higher standards of accountability might [have] an adverse effect [on] the economic growth of their countries'<sup>63</sup>.

In sum, while host states are permitted by international law to regulate the conduct of TNCs within their territory, they may choose not to, and the international law of prescriptive jurisdiction does not oblige them to do so.

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<sup>57</sup> See, *inter alia*, Ryngaert, *supra* note 51, at 106-110.

<sup>58</sup> This was stated, *inter alia*, in *Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain)*, Judgment, 5 February 1970, ICJ Rep. 1970, p. 3, para. 70.

<sup>59</sup> Karavias M, *Corporate Obligations Under International Law* (Oxford University Press 2013) at 2.

<sup>60</sup> Skinner GL, Chambers R and McGrath S, *Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy* (Cambridge University Press 2020), at 32. This is also noted in Deva S, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?' (2004) 5 *Melbourne Journal of International Law* 37, at 50: host states might be in a disadvantaged position in terms of bargaining power with TNCs, as they might be primarily interested in 'more investment-driven developments, so they would be willing to barter their power of regulation in exchange for short-term economic gains'.

<sup>61</sup> Birchall D, 'Corporate Power over Human Rights: An Analytical Framework' (2021) 6 *Business and Human Rights Journal* 42, at 52.

<sup>62</sup> Skinner GL, Chambers R and McGrath S, *supra* note 60, at 28.

<sup>63</sup> Prihandono I, 'Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries' (2011) 3 *Journal of Law and Conflict Resolution* 89, at 100.

### 3.2. Extraterritorial Regulation of TNCs

The possible unwillingness of host states effectively to regulate corporate activities carried out in their territories brings into relief the potential exercise by the home state of a parent company of a TNC of extraterritorial prescriptive jurisdiction on the basis of nationality.

Under customary international law, the nationality of a corporation is that of its state of incorporation, meaning the state under the legal system of which the entity is established<sup>64</sup>. In other words, the nationality of the state ‘to which the entity owes its legal existence’ is usually conferred on the corporation<sup>65</sup>.

Each distinct corporate entity that makes up a TNC is usually incorporated under a different national legal system. The parent company will be incorporated under the laws of its home state and so it will generally possess the nationality of that state, while the multiple subsidiaries through which the parent company operates abroad will each generally be regarded as a national of the state in which it is incorporated<sup>66</sup>. That is, the parent company and its subsidiaries will have different nationalities for the purposes of the international law of prescriptive jurisdiction.

The exercise by the home state of a TNC of prescriptive jurisdiction over the conduct of the TNC’s subsidiaries remains problematic. Home states do not enjoy prescriptive jurisdiction under international law over the extraterritorial conduct of such subsidiaries since the latter are incorporated in the respective host states and, as such, are considered nationals of those host states,

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<sup>64</sup> Crawford, *supra note* 52, at 528. In the context of diplomatic protection, the case law of international courts has also confirmed the approach that nationality of corporations be generally derived from the place of incorporation. For the purpose of diplomatic protection of legal persons, the ICJ stated in *Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain)*, Judgment, 5 February 1970, ICJ Rep. 1970, p. 3, para. 70: ‘In allocating corporate entities to States for the purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments’. See *Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo)*, Judgment, 24 May 2007, ICJ Rep 2007, p. 582, paras. 88-94. While the ICJ in *Barcelona Traction* recognized two distinct criteria to establish the nationality of corporate entities in the context of diplomatic protection, namely place of incorporation and registered office, the International Law Commission (ILC) has adopted a different approach, where the sole criterion for establishing the nationality of a corporation is the legal system under which the corporation is incorporated. In other words, a corporation enjoys the nationality of the state where it is incorporated. See Article 9 of ILC’s Draft Articles on Diplomatic Protection with Commentaries. The additional requirement of having a registered office, as envisaged by the ICJ, was regarded unnecessary, as ‘the laws of most States require a company incorporated under its laws to maintain a registered office in its territory’ (Fourth Report on Diplomatic Protection, by John Dugard, Special Rapporteur, UN Doc. A/CN.4/530 and Add.1, at 16.)

<sup>65</sup> At times, to the requirement of the place of incorporation may be added the requirement of a registered office or seat of management in the state of incorporation. See Jennings and Watts, *supra note* 52, at 859.

<sup>66</sup> At times subsidiaries might be incorporated in the same state as their parent company, however, in most cases they are incorporated in the foreign countries where they conduct business.

not of the home state, under international law<sup>67</sup>. In short, international law does not permit a home state to require a foreign subsidiary to conduct itself a certain way in the territory of the host state. Even in those limited cases in which a TNC is a single corporate entity or a relevant subsidiary is incorporated other than in the host state, the home state may be unwilling to regulate the extraterritorial conduct of its corporate national. In this respect, under the customary international law of prescriptive jurisdiction a home state is under no obligation to regulate the extraterritorial conduct of a corporate national.

#### 4. Rules of Private International Law and Adjudication of the Conduct of TNCs

The application of certain rules of private international law to TNCs have in the past given rise to additional obstacles for states at the national level. The analysis of these obstacles is equally relevant to highlight why interested parties have resorted to public international law. In keeping with the aim of this chapter, the purpose of the following analysis is not to describe the current legal situation with respect to the adjudication of corporate actors but to provide instead an overview of the reasons why international law has been looked to over the past three decades in this context.

Private international law, or conflict of laws, constitutes the body of each state's municipal law<sup>68</sup> which applies when courts are faced with civil claims with elements in different jurisdictions<sup>69</sup>. It is concerned with the adjudicative competence under municipal law of a state's courts in respect to civil disputes involving a foreign element<sup>70</sup>; with the determination of the substantive law, local or

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<sup>67</sup> Schutter O, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations', at 31: '[I]t may be difficult to apply the law of the home state to all entities in a multinational group, as the principle of active personality – that would confer states [prescriptive] jurisdiction over nationals of that state, including legal persons – might not give jurisdiction for the extraterritorial reach of the legislation over foreign subsidiaries of companies incorporated in their territory'. While international law does not permit a home state to require a foreign subsidiary to conduct itself a certain way in the territory of the host state, home states are free to require their corporate nationals to conduct themselves in ways that nonetheless may have implications for the extraterritorial activities of subsidiaries and other business entities incorporated in a host state. These measures, which do not represent the exercise of extraterritorial prescriptive jurisdiction properly so called, are commonly referred to instead as 'domestic measures with extraterritorial implications'. The distinction between 'extraterritorial prescriptive jurisdiction properly so called' and 'domestic measures with extraterritorial implications' is discussed in more detail in Chapter 4.

<sup>68</sup> Municipal rules of private international law may derive from international sources, such as treaties under the Hague Conference on Private International Law, whose purpose is 'to work for the progressive unification of the rules of private international law'. See Article 1 of the Statute, available at: <https://perma.cc/5G78-EE2E>.

<sup>69</sup> Torremans P and Fawcett J, *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) at 3; Collier J, *Conflict of Laws* (Third edn, Cambridge University Press 2004) at 3; Harrison F, *On Jurisprudence and the Conflict of Laws* (Clarendon Press 1919) at 99; Fowler H, *Conflict of Laws: Cases and Materials* (Bobbs-Merrill 1950) at 1; Minor R, *Conflict of Laws; or, Private International Law* (1985) at 3. The terminology 'conflict of laws' is commonly used in the United States and some other jurisdictions.

<sup>70</sup> Crawford, *supra note* 52, at 458.

foreign, to be applied to such disputes<sup>71</sup>; and with the recognition and enforcement of foreign judgements. In the context of civil disputes arising out of corporate harms occurring in foreign territory, rules of private international law determine whether a court may exercise jurisdiction over a corporate defendant and, if jurisdiction is established, which law, local or foreign, applies to the dispute.

The following subsections analyze the relevant private international law principles typically applicable in different national jurisdictions worldwide and those applicable in EU Member States, first in general terms, then in their application to the conduct of TNCs. The following analysis aims to highlight the limitations that have traditionally arisen in the attempt to adjudicate the conduct of TNCs.

#### 4.1. General

Under rules of private international law typically applicable in national jurisdictions worldwide, for a national court to be able to adjudicate a civil case involving a foreign element, it must first have personal jurisdiction over the defendant<sup>72</sup>. For the purposes of establishing personal jurisdiction, national courts tend to rely on the existence of certain contact points or connecting factors between the forum state and the defendant. In the case of a defendant legal person, the domicile of the legal person<sup>73</sup> typically constitutes one such connecting factor. The domicile of a corporation is generally the state of incorporation rather than the state where its shareholders reside<sup>74</sup>. The domicile of a corporation remains unchanged, no matter where the company does business<sup>75</sup>. In some circumstances, when corporations are not domiciled in the forum state, courts may rely on the alternative and broader connecting factor of the place of business, considering whether the legal person carries out business within the forum state,<sup>76</sup> in order to establish personal jurisdiction<sup>77</sup>.

In common law jurisdictions such as the US and Canada, the place of business is considered a relevant connecting factor for the purpose of establishing personal jurisdiction over a defendant. In the US, personal jurisdiction over non-domiciled corporate defendants can be established only

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<sup>71</sup> Fowler, *supra* note 69, at 1; see also Harrison, *supra* note 69, at 104; Lipstein K, *Principles of the Conflict of Laws, National and International* (Martinus Nijhoff Publishers 1981) at 1.

<sup>72</sup> Leflar R, *Law of Conflict of Laws* (New Bobbs-Merrill Co. 1959) at 43.

<sup>73</sup> Fowler, *supra* note 69, at 3; Leflar, *supra* note 83, at 45; Minor, *supra* note 69, at 61.

<sup>74</sup> Minor, *supra* note 69, at 130. See also Torremans & Fawcett, *supra* note 69, at 1306. See also Collier, *supra* note 69, at 57.

<sup>75</sup> Minor, *supra* note 69, at 130.

<sup>76</sup> Collier, *supra* note 69, at 82. See also Leflar, *supra* note 72, at 67.

<sup>77</sup> Muchlinski, *Multinational Enterprise and the Law* (3rd edn, 2021) at 128.

if the corporation undertakes business in the territory<sup>78</sup>. Along similar lines, in Canada, personal jurisdiction can be established over corporations by applying the general rule of the domicile or, in case of legal persons domiciled outside the state, by considering whether the corporation carries out business in the forum state<sup>79</sup>. In other words, under the common law approach, while domicile remains the key contact point for purposes of jurisdiction, the undertaking of business in the forum state is the other relevant option available for courts to exercise jurisdiction over corporate defendants domiciled in a state other than the forum jurisdiction.

In EU Member States, the domicile of a corporate defendant again generally constitutes the principal connecting factor between the forum state and the defendant, allowing the latter to be sued in the country of domicile. In the EU, the rules of the *Brussels I Regulation*<sup>80</sup> provide that legal persons domiciled in EU Member States shall be sued before the courts of those EU Member States, whatever their nationality<sup>81</sup>. In cases of defendants not domiciled in EU Member States personal jurisdiction ranges and is generally determined on the basis of each EU Member State's municipal rules of private international law<sup>82</sup>. The domicile of a legal person is determined on the basis of its 'statutory seat, central administration, or principal place of business'<sup>83</sup>.

Even when a national court may be competent to exercise personal jurisdiction over a defendant on the basis of a relevant connecting factor, it may decline to exercise jurisdiction on the basis of the common law doctrine of *forum non conveniens* or one of its equivalents<sup>84</sup>. The doctrine allows courts 'to decline to hear a case where another forum is available and more appropriate'<sup>85</sup>. In other words, the court may determine that a different national jurisdiction is 'where trial will [better] serve the convenience of the parties and the ends of justice'<sup>86</sup>. This has not, however, been the case

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<sup>78</sup> See, *inter alia*, Crawford, *supra* note 52, at 457; Leflar, *supra* note 69, at 67: 'A corporation may be brought under the judicial jurisdiction of a state other than that of its incorporation only by the fact of its engaging in activities in the state'. See also Winship, 'Personal Jurisdiction and Corporate Groups: *Daimlerchrysler AG v Bauman*' (2013) 9 *Journal of Private International Law* 431.

<sup>79</sup> Collier, *supra* note 69, at 139. See also Skinner GL, Chambers R and McGrath S, *supra* note 60, at 59-61.

<sup>80</sup> The Brussels Convention of 1968, later superseded by Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001 Brussels Regulation) and then by Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) applies *ratione materiae* to all civil and commercial disputes and *ratione personae* to all persons domiciled in one of the EU Member States.

<sup>81</sup> Regulation (EU) No 1215/2012, Article 4(1).

<sup>82</sup> *Ibid.*, Article 6(1).

<sup>83</sup> *Ibid.*, Article 63(1).

<sup>84</sup> The doctrine of *forum non conveniens* has traditionally been applied in common law legal systems like the US and the UK.

<sup>85</sup> See Crawford, *supra* note 52, at 458; Muchlinski, *supra* note 77, at 145. Blumberg P, 'Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems' (2002) 50 *American Journal of Comparative Law* 493, at 501.

<sup>86</sup> Blumberg P, *supra* note 85, at 502.

in the EU since 2005, when the European Court of Justice (ECJ) clarified that ‘the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction [...] on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action’<sup>87</sup>.

When personal jurisdiction is established and *forum non conveniens* is not applied or not applicable, the subsequent choice-of-law stage entails the selection of the body of substantive law applicable to the dispute<sup>88</sup>. In the context of the harmful activities of corporations, the focus is on the-choice of-law rules applicable to torts or, in the language of the civil law, delicts. The applicable law in tort cases is commonly the law of the place where the tort is alleged to have occurred, the so-called *lex loci delicti commissi* (*‘lex loci’*)<sup>89</sup>. In EU Member States ‘it is the law of the [state] in which the damage occurs (*lex loci damni*) that in principle applies’<sup>90</sup>. Courts of Member States may only exceptionally decline to apply the *lex loci damni* when it ‘is manifestly incompatible with the public policy (*ordre public*) of the forum’<sup>91</sup>.

## 4.2. Application to TNCs

When applying the aforementioned rules of private international law to TNCs obstacles may arise in the attempt by domestic courts to assert jurisdiction over corporate defendants and in the choice of applicable law in disputes involving corporate defendants.

### 4.2.1. Asserting Personal Jurisdiction over TNCs

In the context of transnational civil litigation against TNCs, the legal separation of parent companies and subsidiaries might limit the extent to which national courts can assert, or at least meaningfully assert, personal jurisdiction in relevant cases. In light of the typical rule whereby the domicile of a legal person constitutes a relevant connecting factor for the purpose of adjudicative jurisdiction under private international law, asserting personal jurisdiction will not be an issue when a local subsidiary is sued before the courts of its state of domicile, which is to say the host state<sup>92</sup>, where the harmful conduct usually occurs. In a similar vein, asserting personal jurisdiction will not

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<sup>87</sup> ECJ, *Andrew Owusu v N.B. Jackson*, C-281/02, 1 March 2005, para 46.

<sup>88</sup> Fowler, *supra note* 69, at 2.

<sup>89</sup> Minor, *supra note* 69, at 6 and 191: ‘a tortious liability may be briefly described as private liability that is not contractual; it may consist in an injury done to a person or property’. See also Leflar, *supra note* 72, at 207.

<sup>90</sup> See Article 4 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (‘Rome II Regulation’), OJ L 199, 31.7.2007.

<sup>91</sup> *Ibid.*, Article 26.

<sup>92</sup> Skinner GL, Chambers R and McGrath S, *supra note* 60, at 52.

be an issue in cases where parent companies are sued in their home states for the harmful conduct of their foreign subsidiaries. In such cases, the domestic courts of the home state will generally have personal jurisdiction over parent companies<sup>93</sup>, but the more fundamental, substantive question will be whether there exists a claim against the parent company in the first place in relation to the conduct of a subsidiary<sup>94</sup>.

Establishing personal jurisdiction will be much more challenging, however, where the parent company and a foreign subsidiary are sued in the home state of the parent company. In these circumstances, courts of the home state may find that they have jurisdiction over the parent company, a national domiciled in the home state, but not over the foreign subsidiary allegedly responsible for the harm. In common-law states, courts may consider in the alternative whether the foreign subsidiary undertakes business in the forum<sup>95</sup> for the purpose of establishing personal jurisdiction over the foreign entity. In the EU context, the jurisdiction of a court of a Member State over a non-EU-domiciled subsidiary might exceptionally be determined on the basis of the EU Member State's internal rules of private international law. The Netherlands, for instance, allows its civil courts to exercise jurisdiction over a foreign defendant on the basis of the 'connected claims' principle, which permits a Dutch court 'to exercise jurisdiction over a foreign subsidiary when the claims against parent and subsidiary are so closely connected as to justify the joining of defendants for reasons of process efficiency'<sup>96</sup>.

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<sup>93</sup> Skinner GL, Chambers R and McGrath S, *supra* note 60, at 52.

<sup>94</sup> The question will be whether the corporate veil can be pierced to attribute the harmful conduct of the subsidiary to that parent company or, alternatively, whether that parent company can be said to have owed a 'duty of care' or some legal obligation in its own rights in relation to that conduct. In tort litigation, a way in which the obstacle of the corporate veil can be overcome without formally piercing the veil is through the recent application of the common law 'duty of care' doctrine, which however postdates the adoption of the UNGPs. By way of example, the 'duty of care' doctrine has recently been applied, *inter alia*, in the UK in *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 (SC, 10 April 2019). The case concerned the alleged adverse impacts of the activities of Vedanta's Zambian subsidiary on local communities. The defendants were both sued in the UK and the UK Supreme Court considered, among other things, whether the parent company could owe a duty of care in relation to the acts of its Zambian subsidiary without formally having to disregard the legal separation between the parent company and its subsidiary, that is, without having to pierce the corporate veil. The Court observed that 'parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case' (para. 50). The Court further held that the imposition on the parent company of a duty of care in relation to the actions of its foreign subsidiary depends 'on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations [...] of the subsidiary' (para. 49).

<sup>95</sup> Collier, *supra* note 69, at 82. See also Muchlinski, *supra* note 77, at 128.

<sup>96</sup> Augenstein D and Jägers N, 'Judicial Remedies: The Issue of Jurisdiction' in Rubio JJÁ and Yiannibas K (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 7, at 33. The 'connected claims' principle has been applied by Dutch courts in *Four Nigerian Farmers and Milieudefensie v Royal Dutch Shell plc and another*, where the Dutch court accepted jurisdiction over Royal Dutch Shell and its Nigerian subsidiary both sued for adverse human rights impacts related to oil spills in Nigeria. See Macchi C, *Business, Human Rights and the Environment: The Evolving Agenda* (Asser Press 2022) at 125-127.

Even in the rare event that a foreign subsidiary, sued in the state of domicile of the parent company, 'is amenable to the personal jurisdiction of the forum'<sup>97</sup> or a substantive cause of action exists against the parent company sued in the same state, the domestic courts of certain states may decline to exercise jurisdiction on the basis of common law doctrine of *forum non conveniens* or an equivalent doctrine, reasoning that a foreign court, usually a court of the state where the harm has occurred, is the more appropriate forum<sup>98</sup>. But, while the courts of the state where the harm occurred may be the more appropriate forum in some circumstances, they may not provide satisfactory conditions for the legal pursuit of harms by TNCs.

#### 4.2.2. Determining the Applicable Law

In transnational civil cases against corporate defendants, once personal jurisdiction is established, courts are faced with the choice of law question. National courts will have 'to select, on the basis of the domestic rules of private international law that apply in the forum state, which of the legal systems of the states connected to the dispute should govern the claims'<sup>99</sup>. In the context of TNCs, harms stemming from the conduct of a TNC's subsidiaries generally occur in host states, whereas claims are usually brought in the state of domicile of the parent company of the TNC. The question of the applicable law, therefore, entails that forum courts will have to determine whether to apply the substantive law of the state of domicile or of the host state.

Claims for harms stemming from the activities of TNCs are usually claims in tort or, in civil-law parlance, delict. In such cases, 'the home state courts will have to formulate their judgement with respect to the alleged wrongfulness of the corporate conduct in question [...] on the basis of

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<sup>97</sup> Muchlinski, *supra* note 77, at 145..

<sup>98</sup> Duval-Major J, 'One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff' (1992) 77 *Cornell Law Review* 650, at 650. Although courts of certain forum states ultimately have discretion to decide whether or not to decline to exercise jurisdiction over a case, it is worth mentioning that, at times, *forum non conveniens* has been used to delay or avoid liability by corporations sued in their home countries for the adverse human rights impacts stemming from their activities in host countries. The most-referred-to case in this regard is perhaps the *Bhopal* case. Following the gas leakage that resulted in one of the worst industrial catastrophes in history, the Indian government sought remediation for the environmental and human rights adverse impacts by suing the parent company incorporated in the US, Union Carbide Corporation, before US courts alongside its Indian subsidiary, Union Carbide India Limited. The Indian government argued the 'general incompetence of Indian courts and the legal system to handle effectively a case of such magnitude'. Notwithstanding this, the case was subsequently dismissed on grounds of *forum non conveniens*, in part due to the US parent company's claim that Indian courts were 'in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability'. For a rather thorough analysis of the facts of the *Bhopal* case see Deva S, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012) Chapter 2 'Understanding Bhopal Afresh'.

<sup>99</sup> Enneking LFH, 'Judicial Remedies: The Issue of Applicable Law' in Rubio JJÁ and Yiannibas K (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 38, at 49. See also Fowler, *supra* note 69, at 2.

foreign rules of tort law<sup>100</sup>. To recall, according to typical principles of private international law, the applicable law in tort cases is generally the law of the place where the tort is alleged to have occurred, the so-called *lex loci delicti*. In the EU context, the substantive law of the place where the harm occurs, or *lex loci damni*, generally applies to claims brought before the courts of Member States<sup>101</sup>. In the case therefore of torts stemming from business activities of subsidiaries located in host states, a domestic court of the state of domicile of the parent company will generally apply the law of the host state<sup>102</sup>. The point, however, is that the tort law or equivalent of the host state, may embody a lower standard of liability than that of the state of the forum, which is to say the state of domicile of the parent company. In other words, the law of the host state may be less favorable to claimants alleging actionable harm caused by the business activities of the TNC.

There exist exceptions, when the rule of the *lex loci* is displaced on account of strong reasons for applying the law of a state other than that where the harmful activity occurred. A common exception to the rule, both in common-law and civil-law jurisdictions, provides that the *lex loci* may be disapplied when it is in clear contravention of the law of the forum state<sup>103</sup>. In the EU context, courts of Member States may exceptionally refuse to apply the *lex loci damni*, which will usually be the law of the host state, when this law ‘is manifestly incompatible with the public policy (*ordre public*) of the forum’<sup>104</sup>. In such cases, ‘there has to be a conflict with fundamental legal principles for the court seized on the matter to be allowed to refuse to apply a host country regulation on the basis of the public policy exception...and [to] apply its own law instead’<sup>105</sup>.

Leaving aside these exceptions, the courts of the forum state generally abide by the traditional *lex loci delicti* or *lex loci damni* rules and apply the substantive law of the host state when harms stemming from corporate activities occur in that host state.

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<sup>100</sup> Enneking LFH, *supra note 99*, at 49. See also Torremans & Fawcett, *supra note 69*, at 3-4: ‘The recognition of a foreign law in a case containing a foreign element may be necessary for at least two reasons. In the first place, the invariable application of the law of the forum, i.e. the local law of the place where the court is situated, would often lead to gross injustice. Secondly, if the court is to carry out in a rational manner the policy to which it is now committed—that of entertaining actions in respect of foreign claims—it must, in the nature of things, take account of the relevant foreign law or laws’.

<sup>101</sup> Enneking LFH, *supra note 99*, at 50.

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

<sup>103</sup> Minor, *supra note 69*, at 193-194. See also Torremans & Fawcett for a discussion on the public policy doctrine in English common law, *supra note 69*, at 132-135; Hirschboeck M, ‘Conceptualizing the Relationship between International Human Rights Law and Private International Law’ (2019) 60 *Harvard International Law Journal* 181, at 191-192. At the EU level, Article 26 of the Rome II Regulation states: ‘the application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum’.

<sup>104</sup> Regulation (EC) No 864/2007 (‘Rome II Regulation’), Article 26.

<sup>105</sup> Enneking LFH, *supra note 99*, at 60.

## 5. Conclusion

The impunity of TNCs for the adverse impacts of their activities on individuals' enjoyment of their human rights has been a recurrent pattern due to national governments' unwillingness or inability to regulate and to enforce the regulation of corporate conduct with respect to human rights. As for unwillingness, states hosting the activities of corporations have on some occasions decided not to regulate corporate conduct. As for inability, a number of legal obstacles have traditionally prevented states from regulating effectively the conduct of TNCs with regard to human rights and from adjudicating such conduct when adverse human rights impacts occur, as a consequence of the separate legal personality that parent companies and their subsidiaries enjoy, each incorporated in a different state and, as such, each a national of a different state.

With respect to the exercise of extraterritorial prescriptive jurisdiction, international law does not permit home states of TNCs to require a foreign subsidiary of its corporate nationals to conduct itself a certain way in the territory of the host state. Nonetheless, home states are free to require their corporate nationals to conduct themselves in ways that nonetheless may have implications for the extraterritorial activities of subsidiaries and other business entities incorporated in a host state.

With respect to the adjudication of corporate conduct when adverse human rights impacts occur, additional obstacles may arise in the attempt by national courts to establish personal jurisdiction over certain corporate defendants. Specifically, where the parent company and a foreign subsidiary are sued in the home state of the parent company, courts of the home state may find that they have jurisdiction over the parent company, a national domiciled in the home state, but not over the foreign subsidiary allegedly responsible for the harm. Even in the rare event that a foreign subsidiary, sued in the state of domicile of the parent company, 'is amenable to the personal jurisdiction of the forum'<sup>106</sup>, the domestic courts of certain states may decline to exercise jurisdiction on the basis of common law doctrine of *forum non conveniens* or an equivalent doctrine. Finally, once personal jurisdiction is established, in transnational civil cases for harms stemming from corporate conduct in host states brought before the national courts of the state of domicile of the parent company of a TNC, national courts will generally apply the law of the host state, which might, however, embody a lower standard of liability than that of the state of the forum.

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<sup>106</sup> Muchlinski, *supra* note 77, at 145.

In light of both the unwillingness and inability of national governments to regulate and enforce the regulation of corporate conduct with respect to human rights, the last thirty years have witnessed attempts of interested parties to search for solutions in international law to close the corporate regulatory and accountability gaps at the national level.



## **PART II: THE INTERNATIONAL LEVEL**

## CHAPTER 3

### States' Obligations under International Human Rights Law in the Context of Corporate Activities

#### **1. Introduction**

Against the background of the existing limitations in the national regulation of transnational corporate conduct, international human rights law has been looked to in order to compel states to protect individuals' enjoyment of their human rights in the context of the business activities of TNCs.

International human rights law places on states positive obligations to ensure that third parties, including transnational corporations, do not interfere with individuals' enjoyment of their human rights. Universal and regional international human rights courts and, of less strictly legal value, universal international human rights treaty-monitoring bodies have elaborated on what is required of states parties in this regard.

But while international human rights law in principle obliges states parties to the various international human rights treaties to protect individuals' human rights against corporate interferences, the content of the relevant obligations remains vague and underdeveloped in this context. Additionally, in its application to TNCs, international human rights law has significant limitations with respect to extraterritoriality. Generally speaking, a state party is not currently obliged under international human rights law to protect individuals in foreign territory against interferences with their human rights, even where the interference is caused by corporate conduct within the state party's own territory or where the interfering corporation is a national of that state party.

The purpose of this chapter is twofold. First, it introduces in general terms the international human rights law framework. Second, it examines international human rights law in the specific context of business activities as this law stood prior to the adoption of international non-binding instruments on business and human rights, specifically the UNGPs. In this respect, the chapter seeks to highlight the limitations of international human rights law in its specific application to the activities of business actors like TNCs.

The chapter is organized as follows. Section 2 provides an overview of the sources of international human rights law and briefly introduces the systems of international human rights protection developed at the universal and regional levels. Section 3 examines the content of states' general obligations under international human rights law in the universal human rights system and the regional human rights systems. Section 4 addresses the geographical scope of states' human rights obligations in the universal and regional human rights systems. Section 5 examines international human rights law in the specific context of business activities as this law stood prior to the adoption in 2011 of the UNGPs. It examines the scope of application and content of states' human rights obligations in respect of the activities of business actors like TNCs.

## 2. The Sources and Systems of International Human Rights Law

International human rights law constitutes the body of international law concerned with the protection of the human rights of individuals and, to a much lesser extent, of peoples. To this end, it lays down obligations binding on states under international law to act in certain ways, which may and often does involve refraining from certain conduct. Under international human rights law as it currently stands, individuals hold rights only in relation to states and states are conversely the sole bearers of obligations<sup>107</sup>. Private parties, among them private corporations, currently owe no obligations under international human rights law.

### 2.1. Sources of Human Rights Law

The obligations binding upon states under international law derive from a wide variety of sources<sup>108</sup>. The international human rights obligations of states arise under treaties, in relation to states parties, and customary international law, in relation to all states except persistent objectors.

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<sup>107</sup> The fact that private actors like TNCs are currently not bound by international human rights law does not prevent international law from developing in this direction. Because TNCs have become powerful entities, at times more powerful than national governments, and have increasingly been involved in harmful human rights impacts, the academic literature has long argued for a reformulation of the traditional doctrine according to which states are the sole bearers of international human rights obligations so to encompass private actors like TNCs. See, among others, Ratner SR, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443.

<sup>108</sup> Martin FF and others, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge University Press 2006), at 22: Article 38 of the Statute of the International Court of Justice (ICJ) sets forth the formal sources of law 'universally recognized as constituting a basic description of the general sources of international law'. These include international treaties or conventions, customary international law, general principles of law, as well as subsidiary means, namely, judicial decisions and teachings of the most highly qualified publicists. See, in this regard, Shaw M, *International Law* (6th edn, Cambridge University Press 2008), Chapter 3; Crawford J, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) Chapter 2; Lowe V, *International Law* (Clarendon Law Series, 2007), Chapter 2; Thirlway H, *The Sources of International Law*, vol 2nd (Oxford University Press 2019). Article 38 of the ICJ Statute has been overly criticized and considered inadequate as a manifestation of the sources of international law. Furthermore, it has also been suggested that the list itself is non-exhaustive and that new sources of

### 2.1.1. *Treaties*

International human rights law is primarily based on treaties. Treaties are understood as written agreements which ‘set down a series of propositions which are then regarded as binding upon the parties’<sup>109</sup>. They can be bilateral or multilateral. Their functioning, interpretation and application is regulated by the customary international law of treaties, as largely codified in the Vienna Convention on the Law of Treaties (VCLT) of 1969<sup>110</sup>.

Among the sources of international human rights law, the focus for present purposes is primarily on international human rights treaties, since it is in the context of these instruments that the obligations of states relevant to corporate activities have been elaborated. It is also in the context of international human rights treaties that mechanisms for the enforcement of these obligations exist.

### 2.1.2. *Decisions of International Courts*

A second relevant source of international human rights law comes from judicial decisions, which are considered ‘subsidiary means’ among the general sources of international law<sup>111</sup>. The decisions of international courts ‘can provide valuable evidence of the status and content of norms through their interpretation in a given case’<sup>112</sup>. International courts have oftentimes been called upon to elaborate on human rights questions and their rulings have had a direct bearing on international human rights law<sup>113</sup>.

### 2.1.3. *General Comments and Recommendations of International Human Rights Treaty-monitoring Bodies*

A third relevant source of international human rights law comes from the views of international treaty-monitoring bodies established under the universal and regional human rights instruments. These bodies issue, *inter alia*, ‘general comments’ and recommendations, where they elaborate and provide guidance on issues related to specific treaty provisions. While general comments and

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international law should be accepted. See in this regard Thirlway H, *The Sources of International Law*, vol 2nd (Oxford University Press 2019), at 24-36.

<sup>109</sup> Shaw M, *International Law* (6th edn, Cambridge University Press 2008), at 93-95. See also Lowe V, *International Law* (Oxford University Press 2007) at 64-65; Bantekas I and Oette L, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020), at 53-56; Martin FF and others, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge University Press 2006), at 23-25.

<sup>110</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155.

<sup>111</sup> See Article 38 of the Statute of the International Court of Justice (ICJ).

<sup>112</sup> Bantekas I and Oette L, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020) at 64.

<sup>113</sup> *Ibid*, at 65.

recommendations may contribute to the interpretation and application of human rights treaty provisions, they do not formally constitute law and should not be given excessive evidentiary weight.

#### 2.1.4. Customary International Law

A final relevant source of states' obligations under international human rights law comes from customary international law. Customary international law is defined in the ICJ Statute as 'a general practice accepted as law'.<sup>114</sup> The elements required for the development of customary international rules comprise consistent and widespread state practice (either acts or omissions), as well as the *opinio juris* element that the practice is undertaken with a sense of customary international legal right or obligation<sup>115</sup>.

In the area of human rights, it is generally accepted that the majority of human rights principles enshrined in the UDHR have, in some form or other, acquired the status of rules of customary international law. References to the principles enshrined in the UDHR are common in universal and regional human rights treaties, in various national constitutional provisions<sup>116</sup> and in the practice of international and national courts<sup>117</sup>.

International judicial and quasi-judicial bodies have on occasion addressed the subject of the customary status of human rights. The ICJ, *inter alia*, has recognized on a case-by-case basis the

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<sup>114</sup> Statute of the International Court of Justice, San Francisco, 18 April 1946, [1993] UNTS [33], Article 38(1)(b).

<sup>115</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands)*, Judgment, 20 February 1969, ICJ Rep. 1969, p. 3, para. 77: 'not only must the acts concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'. See also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Rep. 2012, p. 99, para. 55. See also UN Doc. A/73/10, 'Draft Conclusions on Identification of Customary International Law with Commentaries', 2018, Conclusion 2 and Commentary. For a discussion on the sources of international law, including customary international law, see e.g. Shaw M, *International Law* (6th edn, Cambridge University Press 2008), at 72-89; Lowe V, *International Law* (Oxford University Press 2007) at 36-41; Bantekas I and Oette L, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020), at 60-63; Martin FF and others, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge University Press 2006), at 28-30.

<sup>116</sup> For an account of constitutional provisions containing references to the Universal Declaration of Human Rights, see Hurst H, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 *Georgia Journal of International and Comparative Law* 287.

<sup>117</sup> Bantekas I and Oette L, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020), at 63. By way of example, Article 9 of the Declaration prohibits arbitrary arrest, detention or exile. Perhaps the most authoritative reference to the UDHR with regards to freedom from detention is that by the ICJ in the *Hostages* case, where the court affirmed that 'wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights'. See *United States Diplomatic and Consular Staff in Tebran (United States v Iran)*, Judgment, 24 May 1980, ICJ Rep. 1980, p. 3, para. 9.

customary status of some human rights guarantees enshrined in international human rights instruments, including the right to self-determination<sup>118</sup> and the freedom from racial discrimination<sup>119</sup>. Human rights treaty-monitoring bodies have also at times considered the customary status of certain international human rights. By way of example, in its General Comment No. 24, the Human Rights Committee (HRC) has enumerated the various human rights enshrined in the ICCPR which reflect customary international law<sup>120</sup>. Another example is provided by the Committee established under CEDAW, which has highlighted that the prohibition on gender-based violence, as laid down in Article 1 of the Convention, ‘has evolved into a principle of customary international law’<sup>121</sup>, as suggested by the *opinio juris* and practice of states parties. In the regional human rights systems, the African Commission on Human and People’s Rights has highlighted that, *inter alia*, the right to life, enshrined in Article 4 of the African Charter, ‘is recognized as part of customary international law’<sup>122</sup>.

## 2.2. The Universal and Regional Human Rights Systems

Since the establishment of the UN and the adoption of the Universal Declaration of Human Rights<sup>123</sup> (UDHR) in 1948, a fast process of standard-setting in the area of international human rights law has taken place at both the universal and regional levels.

In the universal human rights system, the principles set forth in the UDHR, which was adopted in the form of a non-binding resolution, inspired the corpus of human rights guarantees of the two international covenants adopted in 1966, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights

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<sup>118</sup> *East Timor Case (Portugal v Australia)*, Judgment, 30 June 1995, ICJ Rep. 1995, p. 90, para. 29.

<sup>119</sup> *Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain)*, Judgment, 5 February 1970, ICJ Rep. 1970, p. 3, at 32; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 21 June 1971, ICJ Rep. 1971, p. 16, at 57.

<sup>120</sup> ‘Provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language’. See UN Human Rights Committee (HRC), ‘General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant’, 4 November 1994, Un Doc. CCPR/C/21/Rev.1/Add.6, para. 8.

<sup>121</sup> CEDAW, ‘General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19’, 26 July 2017, UN Doc. CEDAW/C/GC/35, para. 2.

<sup>122</sup> African Commission on Human and Peoples’ Rights, ‘General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)’, 18 November 2015, para. 5.

<sup>123</sup> Universal Declaration of Human Rights, UN General Assembly resolution 217 A (III), 10 December 1948.

(ICESCR). Later on, further multilateral treaties were adopted to deal with specific sets of rights and to offer protection to specific categories of individuals. These latter instruments are often referred to as ‘sectoral treaties’ and focus on the promotion and protection of human rights in the areas of racial discrimination<sup>124</sup>, women<sup>125</sup>, victims of torture<sup>126</sup>, children<sup>127</sup>, migrant workers and their families<sup>128</sup> and persons with disabilities<sup>129</sup>. In addition to the core treaties, a number of optional protocols to the existing universal human rights treaties have been adopted. Under each of the UN human rights treaties, a non-judicial treaty-monitoring bodies has been established. Treaty-monitoring bodies monitor state parties’ compliance with the human rights obligations enshrined in the respective treaties, issue ‘general comments’ and recommendations on issues related to specific treaty provisions, and, provided that a state is party to the relevant optional protocol, receive and make recommendations in respect of individual complaints against states parties.

Under the regional systems, relevant mechanisms for the promotion and protection of human rights were also established<sup>130</sup>. In Europe, the Council of Europe adopted the European Convention on Human Rights (ECHR) in 1950, which established the now-abolished European Commission on Human Rights<sup>131</sup> and an adjudicative mechanism in the form of a European Court of Human Rights (ECtHR). The ECHR sets forth key political and civil rights, some of which are of an absolute nature, meaning that they cannot be derogated from in times of war or public emergency, as clarified in Article 15. These include the prohibition on deprivation of life (Article 2), the prohibition of torture (Article 3), slavery and forced labor (Article 4), as well as the prohibition on punishment without law (Article 7).

The Organization of American States adopted the American Declaration on the Rights and Duties of Man in 1948, followed by the American Convention on Human Rights (ACHR) in 1969 and its

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<sup>124</sup> International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, 660 UNTS 195.

<sup>125</sup> Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979, 1249 UNTS 13.

<sup>126</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 1465 UNTS 85.

<sup>127</sup> Convention on the Rights of the Child, New York, 20 November 1989, 1577 UNTS 3.

<sup>128</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, 18 December 1990, 2220 UNTS 3.

<sup>129</sup> Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, 2515 UNTS 3.

<sup>130</sup> For a detailed illustration of the historical process of development of regional human rights mechanisms see Shutter OD, *International Human Rights Law* (Cambridge University Press 2010) at 20-31.

<sup>131</sup> The Commission was abolished by Protocol 11 of the ECHR, see [https://www.echr.coe.int/Documents/Library\\_Collection\\_P11\\_ETSI155E\\_ENG.pdf](https://www.echr.coe.int/Documents/Library_Collection_P11_ETSI155E_ENG.pdf)

Additional Protocol (Protocol of San Salvador) in 1988, and established the Inter-American Commission and Inter-American Court of Human Rights. The ACHR recognizes mainly civil and political rights. However, the Convention also recognizes economic, social and cultural rights and their progressive development under Article 26, as well as rights of the child under Article 19. The Additional Protocol deals entirely with economic, social and cultural rights, including the right to health, the right to a healthy environment, and the right to food. Additional treaties were later adopted to provide additional protection to specific categories of individuals, such as victims of torture<sup>132</sup> and of forced disappearances<sup>133</sup>, as well as women<sup>134</sup>.

In Africa, proposals for the adoption of a regional human rights instrument culminated with the establishment of the African Commission on Human and People's Rights and the adoption of the African Charter on Human and People's Rights (ACHPR) in 1981. The Charter<sup>135</sup> recognizes both civil and political rights and economic, social, and cultural rights. Additionally, it is the only human rights treaty to include a set of rights of peoples, such as the right of people to self-determination (Article 20), the right of peoples to freely dispose of their wealth and natural resources (Article 21), and the right of peoples to a general satisfactory environment favourable to their development (Article 24). The 1998 Protocol to the Charter established the African Court on Human and People's Rights (ACtHPR).

### **3. General Obligations under International Human Rights Law**

The international human rights obligations of states have what are informally characterized as both negative and positive dimensions<sup>136</sup>. The negative dimension of international human rights obligations requires states to refrain from measures that would impermissibly interfere with individuals' enjoyment of their human rights. The positive dimension of international human rights

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<sup>132</sup> Inter-American Convention to Prevent and Punish Torture, Cartagena de Indias, 9 December 1985, OASTS No. 67.

<sup>133</sup> Inter-American Convention on Forced Disappearance of Persons, Belém do Pará, 9 June 1994.

<sup>134</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará'), Belém do Pará, 9 June 1994.

<sup>135</sup> African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, 1520 UNTS 217.

<sup>136</sup> The terminology of 'negative' and 'positive' dimensions of international human rights obligations is used in the present chapter for explanatory purposes. It is not found in the texts of human rights treaties themselves. Additionally, UN treaty monitoring bodies have at times elaborated on the human rights obligations of states parties to the respective treaties by distinguishing among obligations to 'respect', 'protect', and 'fulfil'. This tripartite categorization is not found in the texts of human rights treaties either, although note the more general use of the term 'respect'. Nor is it reflected in the case-law of the regional human rights courts. The obligation to 'respect' corresponds to the negative dimension of international human rights obligations and the obligations to 'protect' and 'fulfil' to the positive dimension of those obligations. For the purpose of the present chapter, the 'fulfil' aspect is not relevant. The focus is on the 'respect' and 'protect' aspects of states' human rights obligations.

obligations requires states to take affirmative steps to secure individuals' enjoyment of their human rights, including by taking any necessary and reasonable steps to protect individuals from adverse impacts by third parties, which, if performed by the state, would amount to an impermissible interference with those individuals' enjoyment of their human rights<sup>137</sup>.

### 3.1. The Negative Dimension of States' Human Rights Obligations

The negative dimension of human rights obligations requires that states respect human rights, that is, refrain from interfering with the enjoyment of the recognized human rights of individuals.

#### 3.1.1. *The Universal Human Rights System*

In the universal system of human rights, treaty provisions establish the content of the negative obligation of states parties to respect human rights. No particular differences are found in the language of the core human rights instruments at the UN level. In all treaties, the negative dimension of human rights obligations, or obligation to respect, translates into a requirement to refrain from certain acts.

Article 2 of ICCPR requires states parties 'to respect [...] the rights' recognized in the Covenant, without discrimination of any kind, meaning to refrain from measures that would impermissibly interfere with individuals' enjoyment of the rights enshrined therein<sup>138</sup>. The HRC, the treaty body which monitors the implementation and states' compliance with the ICCPR, observes that the legal obligation under Article 2 of the Covenant is primarily negative in nature<sup>139</sup>. As far as the negative aspect of the obligation is concerned, the Committee clarifies that 'a general obligation is imposed on States parties to respect Covenant rights'<sup>140</sup>, which entails refraining from interfering with

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<sup>137</sup> See generally De Schutter OD, *International Human Rights Law* (Cambridge University Press 2010), at 3; Skogly S, 'Extraterritoriality: Universal Human Rights without Universal Obligations?' in Joseph S and McBeth A (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 71, at 73-74; Shelton D and Gould A, 'Positive and Negative Obligations' in Shelton D (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 562, at 563; Bantekas I and Oette L, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020), at 79. As a consequence of the positive dimension, interferences by third parties with the enjoyment of human rights that is not attributable to the state can nonetheless give rise to the responsibility of the state under international law, on account of the failure of the state to take the necessary and reasonable steps to prevent it.

<sup>138</sup> Article 2(1) of ICCPR.

<sup>139</sup> UN Human Rights Committee (HRC), 'General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant', 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 6.

<sup>140</sup> *Ibid.*, para. 3.

individuals' enjoyment of Covenant rights, while 'any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant'<sup>141</sup>.

Along similar lines, under the UN sectoral human rights treaties, states parties are required to refrain from measures that would impair individuals' enjoyment of human rights enshrined in the respective treaties. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) do not contain overarching general provisions like Article 2 of the ICCPR. Under CERD, the negative dimension of human rights obligations of states parties can be inferred from the requirement under Article 2(1), *inter alia*, 'to engage in no act or practice of racial discrimination against persons, groups of persons or institutions'<sup>142</sup>. In the context of women's rights, the treaty-monitoring body established under CEDAW highlights that states parties' obligation to respect entails not only not discriminating against women through acts or omissions but also a requirement to refrain from 'making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights'<sup>143</sup>. Article 2 of the Convention on the Rights of the Child (CRC) binds states parties 'to respect [...] the rights' set forth in the Convention without discrimination of any kind. The same language, *mutatis mutandis*, is found in Article 7 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW).

### 3.1.2. *The Regional Human Rights Systems*

Under Article 1 of the ECHR, states parties are required to 'secure' to individuals the rights and freedoms enshrined in the Convention<sup>144</sup>. The language used has been interpreted to encompass, *inter alia*, the negative dimension of states' human rights obligations, which is to say a requirement of non-interference with individuals' enjoyment of human rights.

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<sup>141</sup> *Ibid.*, para. 6.

<sup>142</sup> International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, 660 UNTS 195, Article 2(1).

<sup>143</sup> CEDAW, 'General Recommendation No. 28 on the core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', 16 December 2010, UN Doc. CEDAW/C/GC/28, paras. 9-10.

<sup>144</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS No. 5 ('European Convention on Human Rights'), text as amended by Protocols Nos. 11 and 14, Article 1.

In the Inter-American human rights system, under the ACHR states parties' obligations are provided for in Article 1, which requires states parties, first, 'to respect the rights and freedoms' recognized in the Convention. The jurisprudence of the IACtHR has confirmed that the obligation to respect human rights binding on states parties under the Convention is essentially negative in nature<sup>145</sup>.

In the African human rights system, states parties to the ACHPR shall 'recognize' the rights, duties and freedoms set forth in the Charter. The requirement to 'recognize' Charter rights has been interpreted to encompass, *inter alia*, the negative dimension of the human rights obligations of states parties – that is, an obligation not to impair the enjoyment of Charter rights<sup>146</sup>.

### 3.2. The Positive Dimension of States' Human Rights Obligations

While the negative dimension of states' human rights obligations is a requirement to refrain from certain acts, the positive dimension of states' obligations requires taking certain affirmative steps to secure the enjoyment of human rights. The positive dimension of human rights obligations itself has two aspects, corresponding to what, in the jargon of the universal human rights treaty-monitoring bodies, are referred to informally as the obligations to 'fulfill' and 'protect'. In the context of business and human rights, the focus is on the 'protect' aspect, which is analyzed hereinafter.

The 'protect' aspect of the positive dimension of international human rights obligations requires states to take any necessary and reasonable steps to protect individuals against interferences by

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<sup>145</sup> In *Velásquez v Honduras*, for instance, the Court was requested to decide on the alleged violations by Honduras of the right to life (Article 4), the right to inhumane treatment (Article 5) and the right to personal liberty (Article 7) under the Convention. The case involved the alleged violations by Honduras of the abovementioned provisions with regards to the violent apprehension without arrest warrant and alleged torture of student Angel Manfredo Velásquez Rodríguez by members of the national armed forces. In examining the obligations assumed by states parties in relation to each of the rights protected by the Convention, the Court held that 'Article 1 [...] charges the States parties with the fundamental duty to respect the rights recognized in the Convention and [...] the exercise of public authority has certain limits which derive from the facts that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the state'. See *Velásquez v Honduras*, Inter-American Court of Human Rights, Series C No. 4, 29 July 1988, paras. 164-165.

<sup>146</sup> The nature of the negative obligation to respect Charter rights was highlighted in the landmark case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (SERAC v. Nigeria)*, where the right to adequate housing, the right to food and the right to life of the Ogoni community were addressed. Before addressing each one of these rights, the Commission reiterated that all internationally accepted human rights, including those enshrined in the African Charter, generate different levels of duties for a state. The very first level requires states to refrain from interfering with the enjoyment of all fundamental rights. In other words, the primary level entails states' obligation to respect Charter rights. See *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria (SERAC v Nigeria)*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 27 May 2002, paras. 44-67.

third parties, whether third-state or non-state actors, with those individuals' enjoyment of their human rights. The obligation arises where the state is confronted with conduct by third parties, which, if performed by a state, would amount to an impermissible interference with the individuals' enjoyment of their human rights<sup>147</sup>. A state is obliged in such circumstance to take all necessary and reasonable steps to prevent such interferences<sup>148</sup>. Putting it in another way, a state must exercise due diligence to prevent interference by third parties with individuals' enjoyment of their human rights. The obligation is one of conduct, not result. The mere occurrence of interference by third parties does not presuppose a state party's breach of its positive obligation.

### 3.2.1. *The Universal Human Rights System*

States parties to the ICCPR are required under Article 2(1) to 'ensure to all individuals the rights' enshrined in the Covenant. In accordance with Article 2(2), states parties undertake 'to take the necessary steps [...] to give effect to the rights recognized' in the Covenant<sup>149</sup>. The HRC has observed that the requirement to 'ensure' translates into an obligation for a state party to protect individuals 'not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'<sup>150</sup>. By way of example, as regards the right to life under the Covenant, states parties must not only abstain from arbitrarily taking life but must also adopt measures to protect the lives of individuals against life-threatening acts by third parties, among others non-state actors<sup>151</sup>.

Under the ICESCR, the content of the positive obligations of states parties is somewhat particular. Article 2(1) of the ICESCR creates an obligation for states parties of 'progressive realization'<sup>152</sup>, which requires them 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means'. While the full realization of rights might be achieved only over time, the

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<sup>147</sup> The expression 'interferences by third parties with the individuals' enjoyment of their human rights' will be used as shorthand for the more accurate formulation.

<sup>148</sup> Shutter OD, *International Human Rights Law* (Cambridge University Press 2010), at 365.

<sup>149</sup> Article 2(1) and 2(2) of ICCPR.

<sup>150</sup> UN Human Rights Committee (HRC), 'General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant', 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>151</sup> *Ibid.*

<sup>152</sup> Bantekas I and Oette L, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020), 413. See also Alston P and Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, at 159.

requirement to ‘take steps’ constitutes an immediate obligation. The qualification as to the resources translates into an obligation on a state party to utilize ‘to the maximum...its available resources’ to realize economic, social and cultural rights<sup>153</sup>.

The sectoral treaties also embody positive human rights obligations. In the context of children, migrant workers, and persons with disabilities, the treaties adopt a language which echoes that of the ICCPR with regards to the nature and content of states parties’ positive obligations. Specifically, under Article 2 of CRC states parties shall ‘ensure the rights’ set forth in the Convention to all children without discrimination of any kind. This entails an obligation to protect children against interferences by third parties with the enjoyment of their human rights, including in the private sphere<sup>154</sup>. Along similar lines, Article 7 of CMW requires states to ‘ensure’ to all migrant workers and members of their families the rights set forth in the Convention without any kind of discrimination. Under CRPD, states parties undertake to ‘ensure’ all Convention rights to persons with disabilities without discrimination based on disability<sup>155</sup>.

In the context of non-discrimination, CERD and CEDAW do not contain overarching provisions on the general nature and content of the positive dimension of the international human rights obligations of states parties. Under CERD, states parties undertake to adopt measures to eliminate racial discrimination and to guarantee to all individuals, without discrimination of any kind, the enjoyment of human rights included in Article 5. The treaty-monitoring body established under CERD clarifies that the rights and freedoms included in Article 5 shall be protected by states parties with the ultimate aim of ensuring that neither public nor private institutions create or perpetuate racial discrimination<sup>156</sup>. Along similar lines, under CEDAW, states parties agree to adopt measures to eradicate discrimination against women, as well as to ensure the full development and advancement of women ‘for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men’<sup>157</sup>. The Committee under

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<sup>153</sup> It follows that states’ ability to fulfill the resource requirement under Article 2(1) will vary according to the state of their economies. The Committee on ESC rights has clarified that the category includes not only resources available within a state, but also those that the international community might provide through international cooperation and assistance. See UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)’, 14 December 1990, UN Doc. E/1991/23, para. 13.

<sup>154</sup> The human rights obligation of states to protect against interferences by private entities (specifically corporate actors such as transnational enterprises) will be dealt with in Section 5 of this chapter.

<sup>155</sup> Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, 2515 UNTS 3, Article 4.

<sup>156</sup> UN Committee on the Elimination of Racial Discrimination (CERD), ‘General Recommendation XX on Article 5 of the Convention’, 1996, paras. 1 and 5.

<sup>157</sup> Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979, 1249 UNTS 13, Article 2 and Article 3.

CEDAW elaborates on the content of states parties' obligations to protect women from discrimination by private actors<sup>158</sup>.

### 3.2.2. *The Regional Human Rights Systems*

Under Article 1 of the ECHR, states parties are required to 'secure' to every individual the rights and freedoms enshrined in the Convention<sup>159</sup>. The requirement to 'secure' convention rights has been generally accepted to encompass not only the negative dimension of states parties' human rights obligations, but also the positive dimension of those obligations – that is, an obligation to protect individuals against interferences by third parties, including private actors, with the enjoyment of the rights and freedoms recognized in the Convention. The ECtHR has elaborated on the scope and content of positive obligations under a number of provisions of the Convention. At a minimum, Article 2 (the right to life)<sup>160</sup>, Article 3 (prohibition of torture)<sup>161</sup>, Article 8 (right to respect for private and family life)<sup>162</sup>, Article 10 (freedom of expression)<sup>163</sup> and Article 11 (freedom of assembly and association)<sup>164</sup> are understood by the Court to impose positive obligations on states parties.

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<sup>158</sup> CEDAW, 'General Recommendation No. 28 on the core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', 16 December 2010, UN Doc. CEDAW/C/GC/28, para. 9.

<sup>159</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS No. 5 ('European Convention on Human Rights'), text as amended by Protocols Nos. 11 and 14, Article 1.

<sup>160</sup> See, among others, *Öner Yıldıız v Turkey*, European Court of Human Rights, Application No. 48939/99, 30 November 2004, para. 89: 'The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 [...] entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.

<sup>161</sup> See, among others, *Bouyid v Belgium*, European Court of Human Rights, Application No. 23380/09, 28 September 2015, para. 108: 'Furthermore, Article 3 of the Convention establishes a positive obligation on the State to train its law-enforcement officials in such a manner as to ensure their high level of competence in their professional conduct so that no one is subjected to torture or treatment that runs counter to that provision'.

<sup>162</sup> See, among others, *Lozovyye v Russia*, European Court of Human Rights, Application No. 4587/09, 24 April 2018, para. 36: 'The Court reiterates that although the object of Article 8 is essentially that of protecting an individual against an arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life'.

<sup>163</sup> See, among others, *Khadija Ismayilova v Azerbaijan*, European Court of Human Rights, Applications Nos. 65286/13 and 57270/14, 10 January 2019, para. 158: 'In particular, the positive obligations under Article 10 of the Convention require States to create, while establishing an effective system of protection of journalists, a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear [...]'.<sup>164</sup>

<sup>164</sup> See, among others, *Öllinger v Austria*, European Court of Human Rights, Application No. 76900/01, 26 June 2006, paras. 35-37: 'As regards the right to freedom of peaceful assembly as guaranteed by Article 11, the Court reiterates that it comprises negative and positive obligations on the part of the Contracting State [...] On the one hand, the State is compelled to abstain from interfering with that right, which also extends to a demonstration that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote [...] On the other hand, States may be required under Article 11 to take positive measures in order to protect a lawful demonstration against counter-demonstrations'.

In the Inter-American human rights regime, the basis for states parties' positive obligations under the ACHR is found in Article 1 of the Convention, under which states parties undertake 'to ensure' to all persons the free and full exercise of those rights and freedoms recognized in the Convention. Article 1 requires states parties to prevent any interference with the enjoyment of Convention rights by third parties<sup>165</sup>. In order to prevent interference by third parties with the enjoyment of human rights enshrined under the Convention, states parties must exercise effective due diligence by way of adopting 'all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts'<sup>166</sup>.

Under the African Charter, states parties are required to 'recognize' Charter rights to all individuals within their jurisdiction and to adopt legislative or other measures to give effect to them<sup>167</sup>. The requirement to 'recognize' has been generally accepted to cover states parties' positive human rights obligations under the Charter. The African Commission on Human and Peoples' Rights has played a key role in outlining the scope of positive obligations. In one of its leading cases, *SERAC v. Nigeria*, the Commission observed that all Charter rights generate several levels of obligations binding upon states parties<sup>168</sup>. Specifically, under the secondary level of obligations, a state party is obliged to protect human rights from interferences by third parties by way of adopting policies and other measures to protect right-holders from interferences of any political, economic or social character<sup>169</sup>.

#### 4. The Geographical Extent of States' Human Rights Obligations

The geographical scope of application of the human rights obligations enshrined in universal and regional legal instruments is generally provided for in each individual instrument. The scope of

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<sup>165</sup> *Velásquez Rodríguez Case*, Inter-American Court of Human Rights, Series C No. 4, 29 July 1988, para. 166.

<sup>166</sup> *Ibid.*, paras. 174-175.

<sup>167</sup> African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, 1520 UNTS 21, Article 1.

<sup>168</sup> *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria (SERAC v Nigeria)*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 27 May 2002, para. 44. The primary level entails the negative undertaking to refrain from interferences with Charter rights, whereas the second and third levels of obligations generate positive requirements for states parties. The third and final level of obligations which Charter rights generate requires States to 'to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realization of the rights' (para. 47). In *SERAC v. Nigeria*, the Commission determined the scope of positive obligations of, *inter alia*, Charter rights to health under Article 16 and the right to a clean environment under Article 24. The Commission observed that both rights generate positive obligations on States parties to ensure that third parties do not infringe upon the individual enjoyment of these rights, for instance, by way of contributing to pollution and ecological degradation and, as a direct consequence, violating the integrity and endangering the health of individuals.

<sup>169</sup> *Ibid.*, para. 46.

application of human rights treaties is primarily understood to be territorial. That is, human rights treaties primarily apply within the territorial boundaries of states parties. At times, however, conduct of states parties may have a bearing on the enjoyment of human rights by individuals located outside their territory. This raises the issue of the extraterritorial application of human rights treaties.

#### 4.1. General

A number of human rights treaties contain clauses which provide for the geographical scope of application of the instrument in question. Under the universal human rights system, Article 2 of the ICCPR requires each state party to respect and ensure civil and political rights to all individuals ‘within its territory and subject to its jurisdiction’.

As clarified by the ICJ and by the Human Rights Committee (HRC) in its General Comment No. 31, the two limbs of Article 2 of the ICCPR are disjunctive, with the consequence that the Covenant applies in respect of all individuals either located within a state party’s territory or subject to its jurisdiction, in the latter case even if located outside its territory<sup>170</sup>. For its part, Article 2 of the CRC binds state parties to respect and ensure to each child ‘within their jurisdiction’ the rights set forth in the Convention. Under the regional human rights treaties, Article 1 of the ECHR and Article 1 of the ACHR require states parties to secure to everyone ‘within their jurisdiction’ the rights and freedoms enshrined in the Conventions. In contrast, the ICESCR, CEDAW and the African Charter are silent on their geographical scope of application.

#### 4.2. The ‘Territorial Dimension of States’ Human Rights Obligations

The ICCPR applies to, *inter alia*, all individuals located within the territory of a state party. The ICJ has confirmed that the geographical scope of the ICCPR is primarily territorial<sup>171</sup>. Along similar lines, the treaty-monitoring body of the CRC has affirmed that states parties must respect and ensure human rights under the CRC to all children located within their territorial jurisdiction<sup>172</sup>.

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<sup>170</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 136, para. 109. See also *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, ICJ, 19 July 2024, para. 99. See also UN Human Rights Committee (HRC), ‘General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant’, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13. The extraterritorial application of human rights treaties, including the ICCPR, is discussed in Section 4.3.

<sup>171</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 136, para. 109.

<sup>172</sup> UN Committee on the Rights of the Child (CRC), ‘General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights’, 17 April 2013, UN Doc. CRC/C/GC/16, Section V.C.

In a similar vein, the ECHR and ACHR apply primarily in respect of all individuals located within the national territory of states parties. With respect to the ECHR, in *Banković v Belgium*<sup>173</sup>, the ECtHR considered whether the applicants and their deceased relatives fell within the ‘jurisdiction’ of the respondent states within the meaning of Article 1 of the ECHR. The Court observed that ‘from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial’<sup>174</sup>. With specific regard to the notion of jurisdiction within the meaning of Article 1 of the Convention, the Court held that the provision ‘must be considered to reflect the ordinary and essentially territorial notion of jurisdiction’<sup>175</sup>. With respect to the ACHR, the Inter-American Commission, referring to the case law of the ICJ and the ECtHR, as well as the ‘general comments’ of UN treaty-monitoring bodies, has stated that each state party to the ACHR is obliged to respect and secure the rights enshrined in the Convention to, *inter alia*, all persons within their national territories<sup>176</sup>.

As for the ICESCR, the ICJ has stated that it ‘guarantees rights which are essentially territorial’<sup>177</sup>. When it comes to CEDAW, the relevant treaty-monitoring body has observed that the obligations of states parties are primarily territorial<sup>178</sup>. In the African human rights context, the African Commission on Human and People’s Rights addressed the geographical scope of application of the African Charter in *Mohamed Abdullah Saleh Al-Asad v the Republic of Djibouti*. It held that the human rights obligations of states parties to the Charter apply primarily within the territorial jurisdiction of those states<sup>179</sup>.

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<sup>173</sup> *Banković and Others v Belgium and Others*, European Court of Human Rights, Application No. 52207/99, 12 December 2001. The case concerned the alleged violation of Article 2 (the right to life), Article 10 (freedom of expression) and Article 13 (the right to an effective remedy) by 17 member states of NATO (also states parties to the ECHR) after the bombing of the Radio Television (RTS) headquarters in Belgrade during the Kosovo conflict.

<sup>174</sup> *Banković and Others v Belgium and Others*, European Court of Human Rights, Application No. 52207/99, 12 December 2001, para. 59.

<sup>175</sup> *Ibid.*, para. 61. It is important to specify, however, that in *Banković*, the Court also recognized the possibility, under certain exceptional circumstances, of the extraterritorial application of the Convention with respect to state conduct performed outside the territory of states parties. This is discussed in Section 4.3.

<sup>176</sup> *Franklin Guillermo Aisalla Molina (Ecuador) v Colombia*, Inter-American Commission on Human Rights, Report No. 112/10, 21 October 2010, para. 91.

<sup>177</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 136, para. 112. The Court, however, has also stressed that under certain circumstances ESC rights are applicable in respect to individuals located outside the national territory of states parties. This is discussed in Section 4.3, which deals with the extraterritorial scope of application of human rights treaties.

<sup>178</sup> CEDAW, ‘General Recommendation No. 28 on the core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’, 16 December 2010, UN Doc. CEDAW/C/GC/28, para. 12.

<sup>179</sup> *Mohamed Abdullah Saleh Al-Asad v Republic of Djibuti*, African Commission on Human and Peoples’ Rights, Comm. No. 383/10, 12 May 2014, para. 134. In the case the African commission considered the alleged violations of a number of Charter provisions by the respondent state with respect to the alleged abduction, detention and torture of Yemeni citizen Mohammed Saleh Al-Asad. According to the Commission, the jurisdiction of state is primarily territorial ‘because the sovereignty of states with which they undertake international obligations is territorial, and the jurisdiction they exercise in discharge of those obligations is equally primarily territorial’.

#### 4.3. The Extraterritorial Dimension of States' Human Rights Obligations

The question of the extraterritorial application of human rights treaties concerns situations where the individual whose rights have allegedly been violated by a state party is not located within the territory of the state party at the time of the conduct in question<sup>180</sup>.

The HRC has observed that the ICCPR is applicable in the case of occupied territories and other areas over which a state party to the Convention exercises effective control<sup>181</sup>. In the *Wall* case, the ICJ reiterated that 'the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'<sup>182</sup>. In addition to effective control exercised over territory, the HRC has made clear in its General Comment No. 31 that the rights enshrined in the ICCPR must be respected and ensured to every individual within the power or effective control of a state party, even outside that state party's territory<sup>183</sup>.

With respect to the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that the obligations under the Covenant apply in respect of all territories under the effective control of states parties<sup>184</sup>. The ICJ has affirmed that the ICESCR applies both to the national territory of states parties and to foreign territories over which states parties exercise jurisdiction<sup>185</sup>. In the context of CEDAW, the relevant treaty-monitoring body has found that the obligations of states parties apply to all individuals under the effective control of those parties, even in foreign territory<sup>186</sup>.

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<sup>180</sup> Milanovic M, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011), at 8. Jurisdiction under international human rights treaties denotes the power and effective control of states exercised over areas or individuals, rather than the general power of states to prescribe rules and enforce them under public international law (at 33).

<sup>181</sup> Concluding Observations of the Human Rights Committee: Israel, 18 August 1998, UN Doc. CCPR/C/79/Add.93, para. 10. In determining the existence of such control, the HRC highlighted factors such as the long-standing presence of Israel in the territories in question, as well as the exercise of effective jurisdiction by Israeli security forces therein.

<sup>182</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 136, paras. 110-111.

<sup>183</sup> UN Human Rights Committee (HRC), 'General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant', 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10. This applies also to individuals under the effective control of forces of a state party which however undertake operations outside the territory of the state party, regardless of the circumstances in which the effective control was obtained.

<sup>184</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, UN Doc. E/C.12/1/Add.27, 4 December 1998, para. 8.

<sup>185</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 136, para. 112.

<sup>186</sup> CEDAW, 'General Recommendation No. 28 on the core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', 16 December 2010, UN Doc. CEDAW/C/GC/28, para. 12.

In Europe, the ECtHR has several times addressed the extraterritorial application of the ECHR. In *Banković v Belgium*, referring to its previous pronouncements<sup>187</sup>, the Court recognized that ‘the exercise of extra-territorial jurisdiction by a Contracting State is exceptional’<sup>188</sup>. This exception concerns those circumstances where ‘the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government’<sup>189</sup>. With respect to effective control exercised over individuals located outside the territory of a Contracting State, in *Issa and Others v. Turkey*<sup>190</sup>, the Court asserted that ‘a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State’<sup>191</sup>. In *Al-Skeini et al v. United Kingdom*<sup>192</sup>, while reiterating the ‘effective control’ standard of *Banković*, the Court went further in clarifying that existence of effective control over an area can be determined not only by reference to the strength of the military presence of a state party in a given area but also by ‘the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region’<sup>193</sup>.

In the Inter-American context, the Inter-American Court has stated that ‘jurisdiction’ in Article 1 of the American Convention is to be understood as ‘not limited to the national territory of a State but contemplates circumstances in which the extraterritorial conduct of a State constitutes an exercise of its jurisdiction’<sup>194</sup>. The Court has found that ‘a person is subject to the “jurisdiction” of

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<sup>187</sup> Among others, the Court refers to the case of *Loizidou v. Turkey*, where it stated that ‘the responsibility of a Contracting Party may arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration’. See *Loizidou v Turkey*, European Court of Human Rights, Application No. 15318/89, 18 December 1996, para. 62.

<sup>188</sup> *Banković and Others v Belgium and Others*, European Court of Human Rights, Application No. 52207/99, 12 December 2001, para. 71.

<sup>189</sup> *Ibid.*

<sup>190</sup> The Court was asked to consider whether extraterritorial jurisdiction existed in relation to allegations of human rights violations of ECHR by Turkey as a result of the deaths of Iraqi shepherds killed by Turkish soldiers in Iraq.

<sup>191</sup> *Issa and Others v Turkey*, European Court of Human Rights, Application No. 31821/96, 16 November 2004, para. 71.

<sup>192</sup> The case was brought by the relatives of six Iraqi citizens killed in southern Iraq, an area over which the UK had temporary authority, and concerned the alleged violation of Article 2 of ECHR by the UK in the context of the Iraqi invasion in 2003.

<sup>193</sup> *Al-Skeini and Others v United Kingdom*, European Court of Human Rights, Application No. 55721/07, 7 July 2011, para 139.

<sup>194</sup> Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion, 15 November 2017, OC-23/17, 2017, para. 78. In the Advisory Opinion the Court also refers to the views of the Inter-American

a State in relation to an act committed outside the territory of that State [...] or with effects beyond this territory, when the said State is exercising authority over that person or when that person is under its effective control, either within or outside its territory<sup>195</sup>.

In the African context, the African Court has not pronounced on the extraterritorial applicability of the African Charter. The African Commission on Human and People's Rights, however, has stressed that, under certain circumstances, a state party to the African Charter may assume obligations which apply extraterritorially. Specifically, these circumstances include the exercise of effective control over areas of a territory of another state, or exercise of effective control or authority over an individual located in the territory of another state<sup>196</sup>.

## 5. States' Obligation to Protect in the Context of Corporate Activities

In the context of business and human rights, the obligation to protect requires states parties to the relevant international human rights treaties to safeguard individuals against the interferences by business actors with the enjoyment of their human rights. The substantive requirements of this obligation, however, remain vague and underdeveloped. Additionally, the obligation to protect against interferences by businesses does not apply in respect of individuals located in foreign territory. In other words, international human rights law does not oblige states parties to universal and regional international human rights instruments to exercise extraterritorial prescriptive jurisdiction to regulate the conduct of their corporate nationals abroad.

The following subsections shed light on the content of the obligation to protect in the context of corporate activities, examining the substantive requirements of this obligation, and discuss the limitations of current international human rights law in its application to TNCs.

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Commission on the meaning of 'jurisdiction'. In *Saldano v. Argentina*, the Commission considered that states parties' jurisdiction is not limited to their national territory but, under certain circumstances, a state party to the Convention may be responsible for the acts and omissions of its agents which produce effects or are undertaken outside the territory of the state (see *Saldano v. Argentina*, Inter-American Commission on Human Rights, Report No. 38/99, 11 March 1999, paras. 15–17). In a more recent case, *Ecuador v. Colombia*, the Commission made clear that under Inter-American human rights law, American states are required to respect the rights of all individuals present in the territory of another state but subject to the effective control of their state agents (see *Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia*, Inter-American Commission on Human Rights, Report No. 112/10, 21 October 2010, para. 91).

<sup>195</sup> Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion, 15 November 2017, OC-23/17, para. 81.

<sup>196</sup> *Mohamed Abdullah Saleh Al-Asad v Republic of Djibuti*, African Commission on Human and Peoples' Rights, Comm. No. 383/10, 12 May 2014, para. 134.

### 5.1. The Content of Host States' Obligation to Protect against Corporate Abuse

None of the universal or regional human rights treaties refers expressly to the positive obligations of states parties to prevent interferences by private corporations with the enjoyment by individuals of the rights guaranteed under the treaty. Logically, however, the positive obligation to 'protect' implies that a host state takes all necessary and reasonable measures to ensure that business entities operating within its territory do not interfere with the enjoyment by individuals within that territory of their human rights<sup>197</sup>. This would require that the host state adopts effective legislation to regulate business activities in its territory with a view to preventing interference by businesses with individuals' enjoyment of their human rights, as well as permitting the adjudication of civil claims for any adverse human rights impacts stemming from such activities<sup>198</sup>.

Various UN human rights treaty-monitoring bodies have purposed in a number of general comments, recommendations and individual communications to clarify the content of states parties' obligation to protect in the context of business activities in their territory.

According to CESCR, states parties are required by the right to water in Articles 11 and 12 of the ICESCR to adopt measures to prevent third parties, including businesses, from 'denying equal access to adequate water, polluting and inequitably extracting from water resources'<sup>199</sup>. With respect to the manufacturing and extractive business sectors, the right to the highest attainable standard of health under Article 12 of the Covenant has been said by the CESCR to oblige states parties to prevent pollution of water, air and soil by private actors engaged in the extractive and manufacturing industries<sup>200</sup>. Along similar lines, the Committee has suggested that states parties

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<sup>197</sup> To reiterate, TNCs cannot violate human rights law *per se*. Interferences by corporate actors with the individuals' enjoyment of their human rights are understood as the engagement of these actors in conduct which, if engaged in by a state, would constitute a breach of the state's obligations under international human rights law.

<sup>198</sup> HRC, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: an Overview of Treaty Body Commentaries', 13 February 2007, UN Doc. A/HRC/4/35/Add.1, para. 7 and 42: treaty bodies have also confirmed that adopting legislation to prevent and address interferences by third parties is among states' minimum obligations under the treaties in order to discharge their duty to protect. See also HRC, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie', 19 February 2007, UN Doc. A/HRC/4/35, para. 10.

<sup>199</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)', 20 January 2003, UN Doc. E/C.12/2002/11, para. 23.

<sup>200</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)', 11 August 2000, UN Doc. E/C.12/2000/4, para. 51.

must take appropriate steps to ensure that the activities of the business sector are in conformity with the right to food guaranteed by Article 11 of the Covenant<sup>201</sup>.

The Committee on the Rights of the Child has observed that the private sector, including businesses, can have a serious impact on the recognition and realization of children's rights<sup>202</sup> and has emphasized that states parties' obligation to protect children's rights is of primary importance in the context of business activities. A host state 'must ensure that all business enterprises operating within its borders are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child'<sup>203</sup>. For its part, the Committee on the Elimination of Discrimination against Women (CEDAW) has observed that states parties' obligation to protect entails ensuring that women are protected against discrimination by business enterprises<sup>204</sup>.

The detrimental impact of corporate globalization on the rights of indigenous people and ethnic minorities has been extensively documented, especially in the context of business activities undertaken in the infrastructure and extractive sectors. In this regard, the Committee established under CERD has noted that 'in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to [...] commercial companies'<sup>205</sup>. The HRC has several times addressed the content of states parties' obligation to protect the minority rights guaranteed by Article 27 of the ICCPR against corporate interference. In this context, the Committee has noted that, while 'a state may understandably wish to encourage development or allow economic activity by enterprises' in its territory, its freedom to do so should be assessed against the human rights obligations it has undertaken under the ICCPR<sup>206</sup>. According to the HRC,

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<sup>201</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)', 12 May 1999, para. 27.

<sup>202</sup> UN Committee on the Rights of the Child (CRC), 'General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child', 27 November 2003, UN Doc. CRC/GC/2003/5, paras. 43-44.

<sup>203</sup> UN Committee on the Rights of the Child (CRC), 'General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights', 17 April 2013, UN Doc. CRC/C/GC/16.

<sup>204</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), 'General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures', 2004, para. 7.

<sup>205</sup> UN Committee on the Elimination of Racial Discrimination (CERD), 'General Recommendation No. 23, Rights of indigenous peoples', 18 August 1997, UN Doc. A/52/18, para. 5.

<sup>206</sup> See, e.g., *Human Rights Committee: Länsman et al. v. Finland*, Communication No. 511/1992 (8 November 1994), para. 9.4.

states parties must protect minority rights against the potential impact of corporate activities carried out in their territory<sup>207</sup>.

The obligation to protect individuals against interference by business actors with the enjoyment of their human rights is an obligation of conduct, not of result. The occurrence of such interference does not as such imply that the host state has breached its obligation. However, the failure by the state to adopt measures with a view to preventing interference by corporate entities operating within its territory with the enjoyment by individuals within that territory of their human rights may result in a breach by the state of its obligation to protect<sup>208</sup>. While the case law in this context is particularly scant, regional human rights mechanisms on occasion found host states to have breached the positive dimension of their international human rights obligations through their failure to adopt preventive measures in relation to business activities in their territory.

In the African regional human rights system, the claimants in *SERAC v. Nigeria*, before the African Commission on Human and People's Rights, alleged the failure of the Nigerian government to prevent interference with the human rights of the local Ogoni community by private oil-companies involved in the exploration and exploitation of the Niger Delta. These rights included the right to property, the right to the highest attainable health, the right to freely dispose of wealth and natural resources, and the right to a satisfactory environment, all as recognized under the African Charter. In addressing the alleged violations, the Commission observed that

[States] have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties and [...] when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognized, it would be in clear violation of its obligations to protect the human rights of its citizens<sup>209</sup>.

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<sup>207</sup> *Ibid.*, para. 9.8.

<sup>208</sup> UN Human Rights Committee (HRC), 'General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant', 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8. HRC, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: an Overview of Treaty Body Commentaries', 13 February 2007, UN Doc. A/HRC/4/35/Add.1, para. 7. See also Shutter OD, *International Human Rights Law* (Cambridge University Press 2010), at 366-367.

<sup>209</sup> *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria (SERAC v Nigeria)*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 27 May 2002, para. 57.

The Commission concluded that Nigeria was in breach of various Charter provisions because it facilitated, rather than sought to prevent, human rights violations by giving the green light to the oil companies in question<sup>210</sup>.

Cases involving the adverse impact of corporate development and the failure of host states to protect the rights of members of indigenous communities have also come before the IACtHR. In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the IACtHR found Nicaragua in breach of its obligations under Article 21 of the ACHR, for failing to protect the right to property of an indigenous community by granting concessions to a company ‘to utilize the property and resources located in an area’ belonging to that community<sup>211</sup>. Along similar lines, the case of *Kichwa Indigenous People of Sarayaku v. Ecuador* concerned the granting of a permit by Ecuador to a private oil company to undertake oil exploration and exploitation in the territory of the Kichwa Indigenous People of Sarayaku. The IACtHR found Ecuador in violation of the rights to communal property and cultural identity of the members of the indigenous community, as enshrined in Article 21 of the ACHR. It held that ‘the State must ensure that the rights of indigenous peoples are not disregarded in any activity or agreement reached with private or third parties, or in the context of public sector decisions that would affect their rights and interests’<sup>212</sup>. Finally, in *Kaliña and Lokono People v. Suriname*, the IACtHR found the state of Suriname in violation of the right to collective property of members of indigenous community, as guaranteed by Article 21 of the ACHR, for granting mining concessions to private companies without, *inter alia*, a social and environmental impact assessment<sup>213</sup>.

## 5.2. An Extraterritorial Duty to Protect Human Rights Against Corporate Abuse<sup>214</sup>?

The fulfillment by the host state of its obligation to protect the enjoyment by individuals in its territory of their human rights against the adverse impacts of corporate activities in that territory has oftentimes been unsatisfactory. Moreover, the host state may choose not to regulate or not to enforce the regulation of the activities of corporations operating in its territory. In response to the unwillingness of host states effectively to discharge their international human rights obligations to

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<sup>210</sup> *Ibid.*, para. 58.

<sup>211</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, Case No. 79, 31 August 2001, para. 153.

<sup>212</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-American Court of Human Rights, Series C No. 245, 27 June 2012, para. 167.

<sup>213</sup> *Kaliña and Lokono Peoples v. Suriname*, Inter-American Court of Human Rights, Series C No. 309, 25 November 2015, para. 115.

<sup>214</sup> The purpose of the present section is to provide an overview of the legal background on extraterritorial regulation of TNCs prior to the process leading to the adoption of the UNGPs.

protect the enjoyment of human rights by persons within their territory from the adverse impacts of corporate activities there, it has been argued that ‘the home state has the duty to prevent and mitigate the risk [...]’<sup>215</sup>. In other words, it has been argued that home states should be required to regulate the extraterritorial activities of business entities incorporated under their laws. This raises the question whether, as a matter of international human rights law, home states are permitted and, more importantly, obliged to regulate the extraterritorial activities of their corporate nationals. The competence of a state to regulate the extraterritorial conduct of its corporate nationals is well established under international law. A home state is permitted to prescribe laws to regulate the activities in foreign territory of corporations incorporated under its laws. But home states are not obliged as a matter of international human rights law to do so<sup>216</sup>.

With respect to extraterritoriality, the limitations of international human rights law in its application to the business and human rights context appear evident. While prescribing laws to regulate the activities in foreign territory of corporate nationals, ‘whose behavior a State may decisively influence and on whom it may impose certain obligations in conformity with international law’<sup>217</sup>, is certainly permitted<sup>218</sup>, it is not obliged<sup>219</sup>.

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<sup>215</sup> McCorquodale R and Simons P, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *The Modern Law Review* 598, 619. See also Deva S, 'Acting Extraterritorially to Take Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat?'' (2004) 5 *Melbourne Journal of International Law* 37.

<sup>216</sup> HRC, 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy Framework"', 22 April 2009, UN Doc. A/HRC/11/13, para. 15; See De Shutter O, *International Human Rights Law* (Cambridge University Press 2010), at 162: 'the 'mainstream view is that there exists no general obligation imposed on States, under international human rights law, to exercise extra-territorial jurisdiction (understood here as a combination of adjudicative and prescriptive jurisdiction) in order to contribute to the protection and promotion of internationally recognized human rights outside their national territory'. See also Berkes A, 'Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights' in Radi Y (ed.), *Research Handbook in Human Rights and Investment* (Edward Elgar 2018) 304, at 17: 'The majority opinion holds that States are not obliged under positive international law to establish their extraterritorial jurisdiction over private actors operating outside their national territory'.

<sup>217</sup> HRC, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: an Overview of Treaty Body Commentaries', 13 February 2007, UN Doc. A/HRC/4/35/Add.1, para. 84. See also Berkes A, 'Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights' in Radi Y (ed.), *Research Handbook on Human Rights and Investment* (Edward Elgar 2018) 304, at 4.

<sup>218</sup> HRC, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: an Overview of Treaty Body Commentaries', 13 February 2007, UN Doc. A/HRC/4/35/Add.1, para. 84.

<sup>219</sup> *Ibid.* It should be noted, however, that a number of UN treaty-monitoring bodies have recommended, as opposed to required, that states parties exercise their extraterritorial prescriptive jurisdiction to prevent the adverse human rights impacts of their corporate nationals in foreign territory. See, in this regard, the following general comments by the Committee on Economic, Social and Cultural Rights: 'Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights' UN Doc. E/C.12/2011/1 (20 May 2011), para. 5: 'States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant'; 'General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/2000/4 (2000), para. 39: 'States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties

## 6. Conclusion

Against the background of the existing limitations in the national regulation of transnational corporate conduct, international human rights law has been looked to in order to compel states to protect individuals' enjoyment of their human rights in the context of business activities of TNCs. As a matter of international human rights law, states are obliged to take all necessary and reasonable measures to safeguard the enjoyment by individuals within their territory or jurisdiction of their human rights, including from interference by private business enterprises.

References to business enterprises, however, are not found in the texts of the respective universal and regional human rights treaties. International human rights courts and treaty-monitoring bodies have sought to an extent to clarify the requirements of host states parties' 'obligations to protect' when confronted with conduct by corporations that might negatively affect the enjoyment by individuals in their territory of their human rights. But while international human rights law obliges states parties to the relevant universal and regional international human rights treaties to protect the enjoyment by individuals in their territory of their human rights against interference by businesses in that territory, the substantive requirements of this obligation remain vague and underdeveloped.

Additionally, international human rights law has important limitations with respect to extraterritoriality. States parties are not obliged under international human rights law to protect individuals in foreign territory against interferences caused either by the conduct of any corporation within their territory or by the conduct of their corporate nationals in foreign territory. In other words, international human rights law does not oblige states parties to universal and regional international human rights instruments to exercise extraterritorial prescriptive jurisdiction to regulate the conduct of TNCs.

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from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law'; 'General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/2002/11 (26 November 2002), para. 33: 'Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries'. See also UN Committee on the Rights of the Child (CRC), 'General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights', 17 April 2013, UN Doc. CRC/C/GC/16, para. 43: 'Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned'. While these bodies may recommend exercising extraterritorial jurisdiction, this recommendation should not be taken as implying the existence of an international extraterritorial human rights obligation of this kind binding on states. The formal sources of international law do not justify placing excessive evidentiary weight on, among others, general comments and recommendations by non-judicial human rights monitoring bodies.



## CHAPTER 4

### The UN Guiding Principles on Business and Human Rights

#### 1. Introduction

In light of the existing limitations of both national and international human rights law in relation to the harmful conduct of corporate actors, a number of attempts have been at the international level since the 1970s to address the negative externalities of corporate globalization by way of, first, elaborating in more detail on the obligations of states in this regard and, secondly, laying down principles of expected behaviour with respect to human rights directly applicable to corporations. Regulatory initiatives directly targeting the negative externalities of corporate globalization on human rights have proliferated at the international level. Such initiatives have to date been developed in the form of so-called soft-law, or legally non-binding, instruments. The UN has been the chief institutional forum for the development of international regulatory instruments in the area of business and human rights.

In 2005, the UN Secretary-General appointed Professor John Ruggie as Special Representative (SRSG) on the issue of human rights and transnational corporations and other business enterprises, with the task of researching and clarifying a number of issues in the area of business and human rights. The mandate of the SRSG was created in response to division over a previous regulatory attempt under the aegis of the UN in the field of business and human rights, namely the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (UN Norms)<sup>220</sup>. The UN Norms were presented to the UN Commission on Human Rights in 2004 but failed to gather the necessary support of states and the business sector on account of being too ambitious. Between 2005 and 2008, the SRSG conducted extensive research in the area of business and human rights, releasing important reports. In 2008, he proposed a policy framework<sup>221</sup> on business and human rights, which was later operationalized in the form of the United Nations Guiding Principles on Business and Human Rights (UNGPs), which were unanimously endorsed by the UN Human Rights Council (HRC) in 2011<sup>222</sup>.

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<sup>220</sup> UN Commission on Human Rights, 'Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights', 13 August 2003, UN Doc. E/CN.4/Sub.2/2003/L.11.

<sup>221</sup> HRC, 'Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie', 7 April 2008, UN Doc. A/HRC/8/5.

<sup>222</sup> OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights

The main objective of the present chapter is to highlight the key features of the process that led to the adoption of the UNGPs in 2011 and to examine substantive aspects of the UNGPs themselves. The chapter does not directly engage in a critique of substantive aspects of the instrument. The critique of certain aspects is indirectly addressed in the following chapters of the thesis, where subsequent developments inspired by the UNGPs are discussed.

The chapter is structured as follows. Section 2 is concerned with the 2003 UN Norms. Given that the mandate of the SRSG began as a direct consequence of the doctrinal excesses of the UN Norms, it is pertinent to provide an overview of this instrument. Section 3 delves into the ‘Ruggie process’, discussing the SRSG’s stand on the UN Norms and the methodology adopted to achieve the objectives of his mandate. Section 4 examines the final product of the SRSG’s mandate, the 2011 UNGPs, by looking at each of the three sets of principles, or ‘Pillars’, envisaged therein.

## **2. The 2003 UN Norms**

The UN Norms represent a failed attempt to go beyond existing international human rights law by way of imposing human rights obligations under international law on businesses themselves, in particular TNCs.

### **2.1. The Instrument and its Doctrinal Excesses**

The UN Norms were drafted by the UN Working Group on the Working Methods and Activities of TNCs over a period of four years and were originally approved by the Sub-Commission on the Promotion and Protection of Human Rights in 2003<sup>223</sup>. They were not intended to be legally non-binding, as were the other existing international regulatory standards<sup>224</sup> in business and human

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and Transnational Corporations and Other Business Enterprises, John Ruggie’, 21 March 2011, UN Doc. A/HRC/17/31.

<sup>223</sup> UN Commission on Human Rights, ‘Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights’, 13 August 2003, UN Doc. E/CN.4/Sub.2/2003/L.11. For a thorough account of the drafting history of the UN Norms, see Weissbrodt D and Kruger M, ‘Human Rights Responsibilities of Business as Non-State Actors’ in Alston P (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 315.

<sup>224</sup> Including the 1976 Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, later revised in 2000 and updated in 2011; the 1977 International Labor Organization (ILO) Tripartite Declaration of Principles concerning MNEs and Social Policy, later amended in 2000, 2006 and 2017; and the 2000 United Nations Global Compact.

rights that predated them. To the contrary, the UN Norms were originally conceived of as imposing binding obligations on corporations under international human rights law<sup>225</sup>.

The first sentence of Article 1 ('General Obligations') of the UN Norms recognized that states 'have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights'<sup>226</sup>. The second sentence provided:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups<sup>227</sup>.

In addition to this general obligation, the UN Norms provided for specific corporate human rights obligations relating to the right to equal opportunity and non-discriminatory treatment<sup>228</sup>, the right to security of persons<sup>229</sup>, the rights of workers<sup>230</sup>, respect for national sovereignty and human rights<sup>231</sup>, and consumer and environmental protection<sup>232</sup>.

Proponents of the UN Norms welcomed the instrument for its potential to clarify the obligations of corporations in the context of human rights. Supporters of the Norms considered that the instrument provided 'a common set of standards for all business in relation to human rights'<sup>233</sup>, establishing a clear balance between the fundamental roles of states and corporations in the context

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<sup>225</sup> It is because of this ambition to be legally-binding on corporations that the instrument failed to 'garner wide-ranging support'. See Bilchitz D, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7 *Revista Internacional de Direitos Humanos* 198, at 201.

<sup>226</sup> UN Commission on Human Rights, 'Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights', 13 August 2003, UN Doc. E/CN.4/Sub.2/2003/L.11, Section A, Article 1.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*, Section B.

<sup>229</sup> *Ibid.*, Section C.

<sup>230</sup> *Ibid.*, Section D.

<sup>231</sup> *Ibid.*, Section E.

<sup>232</sup> *Ibid.*, Sections F and G.

<sup>233</sup> UN Commission on Human Rights, 'Report of the Sub-Commission on the Promotion and Protection of Human Rights: Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights', 15 February 2005, UN Doc. E/CN.4/2005/91, para. 21.

of human rights<sup>234</sup>. Along similar lines, it was observed that the Norms did not challenge the primary role of states when it came to respecting, protecting and fulfilling human rights, but that at the same they acknowledged the secondary, albeit important, role of corporations in relation to human rights in their respective spheres of influence and activities<sup>235</sup>. Additional arguments made in support of the Norms concerned the specific human rights that were proposed to be applicable to corporations and the scope of the proposed corporate human rights obligations. In terms of the former, the UN Norms were welcomed for including ‘a comprehensive list of human rights obligations’<sup>236</sup>. With regards to the latter, the UN Norms were praised for proposing a requirement for companies not only to refrain from interferences with individuals’ enjoyment of their human rights but also to take affirmative steps towards the promotion and protection of human rights<sup>237</sup>.

Notwithstanding these positive reactions to the instrument, the business community and the majority of states strongly opposed the adoption of the UN Norms, specifically because of what they saw as the Norms’ doctrinal excesses regarding the proposed human rights obligations of TNCs.

The main criticism of the UN Norms concerned the attempt to impose binding obligations under international human rights law on TNCs and other business enterprises. For a start, the proposed departure from voluntary business adherence to non-binding international standards, as had prevailed in the area of business and human rights to that point, was thought unnecessary. More fundamentally, providing for obligations under international human rights law for corporate actors was considered a problematic misstatement of international law, under which states alone bore obligations as a matter of international human rights law. To make matters worse, the UN Norms claimed that imposing legal obligations on corporations simply reflected existing principles of international law<sup>238</sup>. As it was later observed by the SRSRG, if the UN Norms were intended simply

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<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> Deva S, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012), at 101.

<sup>237</sup> *Ibid.*

<sup>238</sup> See Weissbrodt D and Kruger M, 'Human Rights Responsibilities of Business as Non-State Actors' in Alston P (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 315. David Weissbrodt was involved in the drafting process of the UN Norms. In this article, he observes that: ‘The Norms represent a landmark step in holding businesses accountable for their human rights abuses and provide a succinct, but comprehensive restatement of the international legal principles applicable to businesses with regard to human rights, humanitarian law, international labour law, environmental law, consumer law, anti-corruption law, etc’ (at 325). The author also observes that ‘the Norms draw upon the existing web of international obligations which already apply, either directly or indirectly, to business entities and pull them together into one document which clearly and directly states the human rights standards applicable to business. The Norms make clear which human rights standards correctly and appropriately apply to businesses’ (at 328). David Weissbrodt explains that evidence for the existence of the proposed human rights obligations of corporations was drawn from the analysis and interpretation of relevant provisions and principles

to reflect existing international law, they could not envisage obligations binding on corporations under international human rights law<sup>239</sup>. Conversely, if the UN Norms were indeed to place such legal obligations on corporations, they would not reflect existing international law but would create new international law<sup>240</sup>.

A second criticism of the UN Norms concerned the employment of the concept of corporate ‘spheres of influence’<sup>241</sup> in relation to the proposed human rights obligations of businesses. The UN Norms provided that, within their respective spheres of activity and influence, corporations were obliged to ‘promote, secure the fulfillment of, respect, ensure respect of, and protect’ human rights<sup>242</sup>. The concept of the ‘sphere of influence’ was first introduced into corporate social responsibility discourses by the UN Global Compact<sup>243</sup> ‘as a spatial metaphor’<sup>244</sup> to enable companies to consider ‘their adverse human rights impacts beyond their workplace’<sup>245</sup>. Conceived of as a tool for corporate policymaking, it had never been employed before in a legal context<sup>246</sup>. The UN Norms introduced the concept in a proposed legally binding instrument as the basis for establishing the human rights obligations of companies, in which context the notion of ‘corporate spheres of influence’ was criticised as ‘undefined’<sup>247</sup>.

In the end, on account of their excessive ambition, the UN Norms ‘fell short [...] in gaining the required support of states as well as businesses’<sup>248</sup> and were never adopted by the UN.

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enshrined in international treaties and other human rights documents, *inter alia*, the preamble to the Universal Declaration of Human Rights, and a number of general comments by UN treaty-monitoring bodies that had elaborated on the specific human rights responsibilities of legal persons under relevant human rights. Overall, the author observes that this body of law constituted the normative foundation for drafting the Norms, as it demonstrated that ‘there is no conceptual barrier to applying international obligations to non-state actors such as businesses and [...] many international obligations already apply to businesses directly and through the duties of states’ (at 334).

<sup>239</sup> UN Commission on Human Rights, ‘Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, 22 February 2006, UN Doc. E/CN.4/2006/97, para. 60.

<sup>240</sup> *Ibid.*

<sup>241</sup> The concept is discussed by the SRSR in the context of corporate human rights due diligence under Pillar II of the UNGPs, as will be discussed later in this chapter.

<sup>242</sup> UN Norms, Article 1.

<sup>243</sup> Recall Introduction.

<sup>244</sup> HRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 7 April 2008, UN Doc. A/HRC/8/5, para. 66.

<sup>245</sup> *Ibid.*, para. 67.

<sup>246</sup> Ruggie J, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101 *The American Journal of International Law* 819, at 825 and fn. 33.

<sup>247</sup> *Ibid.*, at 826.

<sup>248</sup> Deva S, ‘The UN Guiding Principles on Business and Human Rights and Its Predecessors: Progress at a Snail’s Pace?’ in Bantekas I and Stein MA (eds), *The Cambridge Companion to Business and Human Rights* (Cambridge University Press 2021) 145, at 157.

### 3. The ‘Ruggie Process’

Against the backdrop of the failure of the UN Norms, in 2005 Professor John Ruggie was eventually appointed as Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, with the task of researching a number of outstanding issues in the field of business and human rights.

#### 3.1. The Objectives of the SRSG’s Mandate

In its 2005 report<sup>249</sup> on the responsibilities of TNCs and related business enterprises with regard to human rights, the UN Sub-Commission on Human Rights, the main subsidiary body of the former UN Commission on Human Rights, presented a number of outstanding issues concerning the expectations on business actors in relation to human rights. These outstanding issues were identified on the basis of three general considerations. First, it was observed that business actors should operate responsibly, by way of respecting human rights, which is to say avoiding interfering with individuals’ enjoyment of their human rights<sup>250</sup>. Second, corporations were recognized as a double-edged sword for human rights. On the one hand, the potential of corporations to contribute to the provision of the conditions necessary for the enjoyment of human rights was highlighted, in terms of investment, the creation of employment opportunities and, more generally, economic growth<sup>251</sup>. On the other hand, the Sub-Commission recognized the risk of adverse human rights impacts directly stemming from the worldwide activities of business actors, as well as from those circumstances where companies are involved in the adverse impacts of third actors<sup>252</sup>. Third, there

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<sup>249</sup> UN Commission on Human Rights, ‘Report of the Sub-Commission on the Promotion and Protection of Human Rights: Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights’, 15 February 2005, UN Doc. E/CN.4/2005/91.

<sup>250</sup> *Ibid.*, para. 23.

<sup>251</sup> *Ibid.*, para 24. See also Andreassen B and Vinh K, ‘Business’ Duties across Borders: The Human Rights Frontier’ in Andreassen B and Vinh K (eds), *Duties Across Borders: Advancing Human Rights in Transactional Business* (Intersentia 2016) 1, at 2-3. For more discussion on the role of business actors as ‘socially responsible’ see, *inter alia*, Sjaafjell, *Dismantling the Legal Myth of Shareholder Primacy: The Corporation as a Sustainable Market Actor* (2017).

<sup>252</sup> UN Commission on Human Rights, ‘Report of the Sub-Commission on the Promotion and Protection of Human Rights: Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights’, 15 February 2005, UN Doc. E/CN.4/2005/91, para. 24. The UN Global Compact, specifically, has distinguished between forms of direct and indirect complicity: see <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>. Direct complicity entails that a company knowingly assists another actor in carrying out an adverse human rights impact by providing a good or a service. Within the category of forms of indirect complicity, on the other hand, one can distinguish between beneficial and silent complicity. The former entails that a company benefits from the adverse human rights impacts of third actors, even when it does not directly assist or cause them. The latter entails that a company fails to speak up in the face of continuous and systematic adverse human rights impacts carried out by third actors. Out of all forms of corporate complicity, direct complicity is the most likely to result in legal liability. Under international criminal law, natural persons might be held liable for ‘aiding and abetting’ the commission of violations of international law that amount to international crimes. Natural persons within companies, such as corporate officials, might be held liable in their individual capacity for providing assistance or encouragement which has a substantial

remained substantial gaps to be addressed with respect to the nature and scope of business human rights responsibilities<sup>253</sup>.

On the basis of these general considerations, the Sub-Commission identified a number of outstanding issues in the area of business and human rights. The first was the clarification of what the human rights responsibilities of business entities entailed in practice<sup>254</sup>. In this respect, it was observed that the human rights responsibilities of business entities had to be specified separately from the human rights obligations of states. This departed from the UN Norms, which proposed simply to apply the human rights obligations of states to corporations. The second issue was the clarification of the scope of the human rights responsibilities of companies, which in turn required taking into account a number of factors, including the size of the company, the relationship of the company with its business partners, the nature of its business activities and the proximity of people to its operations<sup>255</sup>. A third issue was how corporate human rights responsibilities could be enforced. The particular contexts in which this was addressed were those situations in which host states were unwilling or unable to regulate effectively corporate activities and to hold companies to account for their adverse human rights impacts, as a direct result of weak governance structures and absence of the rule of law. In light of the documented failure by host states to regulate corporate conduct in the context of human rights and enforce the regulation of business entities, the Sub-Commission explored the possibility of extraterritorial regulation and adjudication by home states of TNCs. However, it was observed that home states too often faced legal obstacles in the extraterritorial regulation and adjudication of TNCs, especially of the foreign subsidiaries of their corporate nationals<sup>256</sup>.

Against the background of the outstanding issues in relation to business and human rights identified by the UN Sub-Commission, the UN Commission on Human Rights adopted Resolution 2005/69<sup>257</sup>, in which it requested the UN Secretary-General to appoint a Special Representative on

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effect on the commission of a crime. See Article 25(3)(c) of the ICC Statute, Rome Statute of the International Criminal Court (last amended 2010), Rome, 17 July 1998, 2187 UNTS 3.

<sup>253</sup> UN Commission on Human Rights, 'Report of the Sub-Commission on the Promotion and Protection of Human Rights: Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights', 15 February 2005, UN Doc. E/CN.4/2005/91, para. 25.

<sup>254</sup> *Ibid.*, paras. 27-35.

<sup>255</sup> *Ibid.*, para. 36.

<sup>256</sup> *Ibid.*, para. 47. Recall obstacles encountered at the domestic level in the extraterritorial regulation of TNCs' activities, discussed in Chapter 2.

<sup>257</sup> UN Commission on Human Rights, 'Human Rights and Transnational Corporations and Other Business Enterprises', 20 April 2005, UN Doc. E/CN.4/RES/2005/69.

the issue of human rights and transnational corporations and other business enterprises and laid out the core objectives of this SRSG's mandate<sup>258</sup>, namely:

- a. To identify and clarify standards of corporate responsibility and accountability for TNCs and other business enterprises with regard to human rights;
- b. To elaborate on the role of States in effectively regulating and adjudicating the role of TNCs and other business enterprises with regard to human rights, including through international cooperation;
- c. To research and clarify the implications for TNCs and other business enterprises of concepts such as 'complicity' and 'sphere of influence';
- d. To develop materials and methodologies for undertaking human rights impact assessments of the activities of TNCs and other business enterprises;
- e. To compile a compendium of best practices of States and TNCs and other business enterprises.

In the event, the mandate was created and John Ruggie was appointed to it.

### 3.2. The SRSG's Stand on the UN Norms and the Approach to the Mandate

In 2006, one year into his appointment, the SRSG submitted his first interim report<sup>259</sup> to the UN Commission on Human Rights. The report provided a comprehensive critique of the UN Norms, which implicitly confirmed the SRSG's intention to distance himself, at the outset of his mandate, from the approach taken by the Norms. It also presented the methodology to be adopted by the SRSG in addressing the objectives of his mandate.

#### *a. The Critique of the UN Norms*

In the course of assessing the potential and shortcomings of other existing regulatory responses in the area of business and human rights, the SRSG examined the UN Norms. According to Ruggie, the Norms had two 'particularly problematic' aspects<sup>260</sup>. The first was 'the legal authority advanced for the Norms'<sup>261</sup>, specifically the claim that they merely reflected existing international legal

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<sup>258</sup> *Ibid.*, para. 1.

<sup>259</sup> UN Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', 22 February 2006, UN Doc. E/CN.4/2006/97.

<sup>260</sup> *Ibid.*, para. 59.

<sup>261</sup> *Ibid.*

principles in applying the human rights obligations of states to corporate actors. The claim that ‘international human rights attach direct legal obligations to corporations’<sup>262</sup> was considered unfounded by the SRSG, who observed that arguments in support of imposing human rights obligations on corporations merely reflected policy preferences rather than established law<sup>263</sup>. The second main problem with the Norms, according to the SRSG, was that they ‘articulate[d] no actual principles for differentiating human rights responsibilities based on the respective social roles performed by States and corporations’<sup>264</sup>. Overall, the SRSG considered that the debates over the UN Norms had had the counterproductive effect of ‘obscur[ing] rather than illuminat[ing] promising areas of consensus and cooperation among business, civil society, governments, and international institutions with respect to human rights’<sup>265</sup>.

### *b. Principled Pragmatism*

The SRSG’s 2006 interim report introduced the methodology to be employed by the SRSG to achieve the objectives of his mandate and, most importantly, to avoid replicating the failures of the UN Norms. The methodology adopted was, above all, intended to avoid the strong opposition and lack of consensus from states and the business sector that had accompanied the UN Norms<sup>266</sup>. The SRSG explained that his methodology included evidence-based analysis and normative judgements made on the basis of a ‘principled form of pragmatism’<sup>267</sup>. This ‘[p]rincipled pragmatism’<sup>268</sup> was described as ‘an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people’<sup>269</sup>. This

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<sup>262</sup> *Ibid.*, para. 64.

<sup>263</sup> *Ibid.*, para. 65.

<sup>264</sup> *Ibid.*, para. 66.

<sup>265</sup> *Ibid.*, para. 69.

<sup>266</sup> Nolan J, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 138, at 151.

<sup>267</sup> UN Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', 22 February 2006, UN Doc. E/CN.4/2006/97, para. 81.

<sup>268</sup> *Ibid.*, see heading at 18.

<sup>269</sup> *Ibid.*, para. 81. See also Ruggie J, 'Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises' in Rodríguez-Garavito C (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017) 46, at 59; Wettstein F, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 14 *Journal of Human Rights* 162, at 175; Snyder J and Vinjamuri L, 'Principled Pragmatism and the Logic of Consequences' (2012) 4 *International Theory* 434: 'outside the business and human rights area, specifically in international relations theory, principled pragmatism aims at 'the creation of social conditions that permit desirable norms to flourish', on the basis of the assessment of costs and benefits of different strategies in achieving that aim' (at 435). The main idea behind this type of methodology is that, in order to bring about desirable social change, one should adopt a strategy that focuses first on the creation of conditions that would facilitate the social change in question (at 442).

methodology constituted the basis for the normative judgements made by the SRSG on the several complex issues that he was to explore throughout his mandate<sup>270</sup>.

#### 4. The UN Guiding Principles

In 2008, the SRSG presented what he called the ‘Protect, Respect, and Remedy’ Framework to the UN HRC, elaborated on the basis of the research conducted and stakeholders’ meetings held between 2005 and 2008. The Framework was thought to assist all social actors, including governments, companies, and civil society, in addressing and reducing the adverse human rights adverse stemming from corporate activities<sup>271</sup>. It outlined a ‘three-pillar’ approach to business and human rights, elaborating on a state duty to protect human rights, a corporate responsibility to respect human rights, and access to effective remedies for victims of adverse corporate human rights impacts. The Framework was welcomed by the HRC, which extended the mandate of the SRSG for an additional period of three years. In Resolution 8/7<sup>272</sup>, the SRSG was requested to ‘operationalize’ the Framework by way of transforming it into practical guiding principles applicable to states and businesses in the context of human rights.

The UNGPs were presented to the UN HRC in March 2011 and unanimously endorsed by the Council in July the same year<sup>273</sup>. They were adopted in the form of a legally non-binding instrument. In the words of the SRSG, the UNGPs provide not only practical guidance on responsible business conduct, but also ‘guidance informed by actual practice’<sup>274</sup>. In contrast to the UN Norms, the UNGPs do not envisage international legal obligations for businesses. Rather, they elaborate ‘the implications of existing standards and practices for States and businesses [...] integrating them within a single, logically coherent and comprehensive template [...] identifying where the current regime falls short and how it should be improved’<sup>275</sup>.

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<sup>270</sup> UN Commission on Human Rights, ‘Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, 22 February 2006, UN Doc. E/CN.4/2006/97, para. 81.

<sup>271</sup> HRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 7 April 2008, UN Doc. A/HRC/8/5, para. 17.

<sup>272</sup> HRC, ‘Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, 18 June 2008, UN Doc. A/HRC/8/7.

<sup>273</sup> HRC, ‘Human Rights and Transnational Corporations and Other Business Enterprises’, 6 July 2011, UN Doc. A/RES/17/4.

<sup>274</sup> OHCHR, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 21 March 2011, UN Doc. A/HRC/17/31, para. 11.

<sup>275</sup> *Ibid.*, para. 14.

#### 4.1. The Three Pillars

The UNGPs, in what is referred to as the ‘Protect, Respect, and Remedy’ Framework, distinguish among three sets, or Pillars, of principles, which respectively focus on the state duty to protect human rights in the context of business activities, the corporate responsibility to respect human rights, and the right to an effective remedy for victims of adverse corporate human rights impacts. The three Pillars are intended to support each other in achieving sustainable corporate progress. Each is considered equally essential to this end, ‘the state’s duty because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy because even the most concerted efforts cannot prevent all abuse’<sup>276</sup>.

##### *a. The State Duty to Protect*

The state duty to protect, under Pillar I, is operationalized through Principles 1 to 10.

Guiding Principle 1 lays out the legal obligation of states to protect human rights against adverse impacts by third parties, including business enterprises, within their territory or jurisdiction<sup>277</sup>. The obligation to protect applies to all internationally recognized rights ‘that private parties are capable of impairing, and to all types of business enterprises’<sup>278</sup>. It arises where a state is confronted with conduct by third parties such as corporations which, if performed by the state, would amount to an impermissible interference with the individuals’ enjoyment of their human rights. The obligation entails a requirement for states to ‘prevent, investigate, punish and redress’<sup>279</sup> adverse corporate human rights impacts by regulating effectively corporate conduct and, where preventative measures have failed, by adjudicating claims against corporate actors involved in such impacts.

The state obligation to protect enshrined in the UNGPs is grounded in international human rights law, according to which states are required to respect, protect, and fulfil human rights. The positive obligation to protect human rights, as elaborated by international human rights courts and treaty-monitoring bodies, encompasses an obligation to take all necessary and reasonable measures to

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<sup>276</sup> HRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 7 April 2008, UN Doc. A/HRC/8/5, para. 9.

<sup>277</sup> UNGPs, Principle 1.

<sup>278</sup> HRC, ‘Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy Framework”’, 22 April 2009, UN Doc. A/HRC/11/13, para. 13.

<sup>279</sup> UNGPs, Principle 1.

prevent interference by private actors like corporations with the enjoyment by individuals within a state's territory of their human rights<sup>280</sup>. The obligation to protect rests therefore on the state where corporate activities are carried out, or host state, irrespective of the nationality<sup>281</sup> of the corporate actor in question. The host state is under an obligation to ensure that no business entity operating in its territory interferes with individuals' enjoyment there of their human rights, be it a corporate national or a foreign business entity.

Guiding Principle 1 provides that the obligation to protect the enjoyment by individuals within a state's territory of their human rights against interference by corporations is an obligation of conduct, not of result. This entails that a state is generally not responsible for the adverse human rights impacts of business actors<sup>282</sup>. However, the failure by a state to adopt all necessary and reasonable measures to prevent interference by corporate entities with the enjoyment by individuals within its territory of their human rights may translate into a breach of its obligation to protect under international human rights law. Moreover, a state may be in breach of an international obligation when adverse corporate human rights impacts can be directly attributed to that state<sup>283</sup>. This latter situation is relevant in respect of business enterprises that are owned or controlled by a state, so called state-owned enterprises (SOEs), or that receive support from state agencies. In this case, the UNGPs envisage that a state should take additional steps to meet its obligation to protect, by way of ensuring that SOEs do not interfere with individuals' enjoyment of their human rights<sup>284</sup>. The adverse human rights impacts by these enterprises, which may be directly attributed to the owning or controlling state, may give rise to the international responsibility of the state in question for a breach of an international obligation<sup>285</sup>.

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<sup>280</sup> Recall, generally, Chapter 3.

<sup>281</sup> To recall, under customary international law, the nationality of a corporation is that of its state of incorporation, meaning the state under the legal system of which the entity is established.

<sup>282</sup> For a state to be responsible for the acts of private actors, the act itself must be attributed to the state, thus, considered to be that of the state itself. Under the international rules on state responsibility for internationally wrongful acts, only under certain circumstances, the act of a person who is not an organ of the state may be attributed to the state. These circumstances include when (a) the person or entity is empowered by the law of the state to exercise elements of governmental authority and has acted in that capacity (Article 4); (b) the person acts under the instruction, direction or control of the state in carrying out the conduct (Article 8); and (c) the state acknowledges and adopts the conduct in question as its own (Article 11). See International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries', 2001, UN Doc. A/56/10.

<sup>283</sup> UN Human Rights Committee (HRC), 'General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant', 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8. HRC, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: an Overview of Treaty Body Commentaries', 13 February 2007, UN Doc. A/HRC/4/35/Add.1, para. 7. See also Shutter OD, *International Human Rights Law* (Cambridge University Press 2010), at 366-367.

<sup>284</sup> UNGPs, Principle 4.

<sup>285</sup> Commentary to Principle 4.

Guiding Principle 2 provides that states should ‘set out clearly the expectation that all business enterprises domiciled in their territory or jurisdiction respect human rights throughout their operations’<sup>286</sup>. In response to the failures of the host state to regulate effectively corporate conduct within its territory<sup>287</sup>, it has been argued that home states of corporations should exercise their extraterritorial prescriptive jurisdiction over their corporate nationals, which is to say that they should regulate the activities of their corporate nationals abroad to ensure that they do not interfere with the enjoyment by individuals in foreign territory of their human rights. The commentary to Principle 2 observes that, while there might exist strong policy reasons<sup>288</sup> for home states to regulate the activities of their corporate nationals abroad, they are not obliged to do so under international human rights law, although nor are they prohibited from doing so, provided that a recognized jurisdictional basis exists<sup>289</sup>. The approach of the UNGPs to extraterritoriality is in line with international human rights law as this law stood prior to the adoption of the UNGPs<sup>290</sup>. It is true that a number of treaty-monitoring bodies have at times recommended that states parties to international human rights treaties exercise extraterritorial prescriptive jurisdiction to regulate the conduct of their corporate nationals abroad in order to prevent adverse human rights impacts by these actors in other states<sup>291</sup>; but while these bodies may recommend exercising extraterritorial prescriptive jurisdiction, this should not be taken to imply the existence to this effect of an

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<sup>286</sup> UNGPs, Principle 2.

<sup>287</sup> Recall, generally, Chapter 3.

<sup>288</sup> ‘Especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages and preserving the State’s own reputation’: see commentary to Principle 2.

<sup>289</sup> Commentary to Principle 2.

<sup>290</sup> Recall, generally, Chapter 3.

<sup>291</sup> UN treaty-monitoring bodies have at times considered that states should prevent the adverse human rights impacts by third parties in other countries, if they are able to exert influence on these actors. See, in this regard, the following general comments by the Committee on Economic, Social and Cultural Rights: ‘General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)’, UN Doc. E/C.12/2000/4 (2000), para. 39; ‘General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)’, UN Doc. E/C.12/2002/11 (26 November 2002), para. 31. With specific regards to corporate actors, the Committee has observed that states parties to the ESC Covenant should prevent adverse human rights impacts by their corporate nationals abroad, ‘without infringing the sovereignty and diminishing the obligations of host states under the Covenant’. See Committee on Economic, Social and Cultural Rights, ‘Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural rights’ UN Doc. E/C.12/2011/1 (20 May 2011), para. 5. The UN Human Rights Committee, which monitors the implementation of the ICCPR, has touched upon BHR-related issues in the context of extraterritoriality. In *Yassin et al. v Canada*, Communication No. 2285/2013 (October 2017), although the case was declared inadmissible, the Committee noted that: ‘While the human rights obligations of a State on its own territory cannot be equated in all respects with its obligations outside its territory, the Committee considers that there are situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction’ (para. 6.5). Along similar lines, the Committee on the Rights of the Child has noted that ‘home states have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect, and fulfill children’s rights in the context of businesses’ extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned’. See in this respect UN Committee on the Rights of the Child (CRC), ‘General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights’, 17 April 2013, UN Doc. CRC/C/GC/16, para. 43.

international legal obligation binding on states parties. In addition to the exercise, where permitted, of extraterritorial prescriptive jurisdiction properly so called, the commentary to Principle 2 observes that one approach whereby states ‘set out clearly the expectation that businesses respect human rights throughout their operations’ is the enactment of ‘domestic measures with extraterritorial implications’<sup>292</sup>. Examples of the latter include domestic legislative measures that place on parent companies ‘obligations to report in the regulating state on the global activities of the entire enterprise’<sup>293</sup>, including on the activities of entities operating in the territory of states other than the regulating state.

Guiding Principle 7 provides that states should help to ensure that corporate actors are not involved in adverse human rights impacts in conflict-affected areas, where ‘the human rights regime cannot be expected to function as intended’<sup>294</sup>, and the risk of adverse human rights impacts by private entities is heightened. In conflict-affected areas, it may be that corporations either directly cause adverse human rights impacts or become involved in the adverse impacts of third parties by way of what is generally referred to as corporate complicity<sup>295</sup>. In such areas, the commentary to Guiding Principle 7 observes, where the host state may be unable to meet its obligation to protect against the adverse human rights impacts of TNCs due to lack of effective control over its territory, the home states of the TNCs have a fundamental role to play in terms of assisting ‘both those corporations and host States to ensure that businesses are not involved with human rights abuse’<sup>296</sup>.

#### *b. The Corporate Responsibility to Respect*

The corporate responsibility to respect, under Pillar II, is operationalized through Principles 11 to 24. The two following subsections will first examine this responsibility in general, drawing some comparisons with the UN Norms, and then the mechanism envisaged by the UNGPs to enable corporations to meet this responsibility, namely, human rights due diligence.

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<sup>292</sup> Commentary to Principle 2.

<sup>293</sup> *Ibid.*

<sup>294</sup> Commentary to Principle 7.

<sup>295</sup> Recall definition of ‘complicity’ in the Introduction.

<sup>296</sup> Commentary to Principle 7.

## General

Guiding Principle 11 lays out in general terms the responsibility<sup>297</sup> of corporate actors to respect human rights. This is an independent responsibility, in the sense that it applies to companies ‘independently of States’ abilities and/or willingness to fulfil their own human rights obligations [...] and it exists over and above compliance with national laws and regulations protecting human rights<sup>298</sup>. Corporations, Guiding Principle 11 states, regardless of their size, sector or structure<sup>299</sup>, should respect human rights, which is to say they should refrain from interfering with individuals’ enjoyment of their human rights. The corporate responsibility to respect represents the core of corporate self-regulation and is considered a ‘global standard of expected conduct’<sup>300</sup>.

Guiding Principles 12 and 13 elaborate on Guiding Principle 11. Guiding Principle 12 provides that the corporate responsibility to respect human rights covers, at a minimum, the human rights principles set forth in what it calls the ‘International Bill of Human Rights’ (meaning the UDHR; the ICCPR, and the ICESCR), as well as in the ILO’s Declaration on Fundamental Principles and Rights at Work<sup>301</sup>. Guiding Principle 13 provides that, as part of their responsibility to respect, businesses should avoid causing or contributing to adverse human rights impacts in the context of their own activities on the one hand, and should seek to prevent and mitigate adverse human rights impacts directly linked to their operations, products or services by their business relationships, on the other<sup>302</sup>.

While the state obligation to protect human rights in the context of business activities, elaborated under Pillar I, is grounded in international human rights law, the corporate responsibility to respect

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<sup>297</sup> The SRSG has observed that ‘the term ‘responsibility’, rather than ‘duty’, is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly in companies, although element may be reflected in domestic laws. At the international level, the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility’. See HRC, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Business and Human Rights: Further Steps towards the Operationalization of the “Protect, Respect and Remedy” Framework’, 9 April 2010, UN Doc. A/HRC/14/27, para. 55.

<sup>298</sup> Commentary to Principle 11. This has been reiterated in the case law of domestic courts. In particular, the Hague District Court has highlighted that it is not enough for businesses simply to comply with the measures that states adopt in this regard. Businesses have an independent responsibility in relation to human rights. See *Milieudefensie v. Royal Dutch Shell*, C/09/571932/HA ZA 19-379 (District Court of the Hague, 26 May 2021), para. 4.4.13. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>.

<sup>299</sup> UNGPs, Principle 14.

<sup>300</sup> UNGPs, Principle 11.

<sup>301</sup> UNGPs, Principle 12. The commentary to this principle clarifies that, depending on circumstances, companies might need to consider the human rights enshrined in additional standards. For instance, companies operating in conflict-affected areas might need to comply with the requirements of international humanitarian law.

<sup>302</sup> UNGPs, Principle 13.

human rights is framed under Pillar II as belonging to the non-legal realm. The responsibility is said to be grounded in ‘social expectations’<sup>303</sup>. Under the UNGPs, it is said, businesses should respect human rights primarily because responsible corporate behavior in the context of human rights is what society expects of them<sup>304</sup>, as part of what the SRSG called businesses’ ‘social license to operate’<sup>305</sup>. The concept of the ‘social license to operate’ represents an element of corporate social responsibility (CSR). It refers to the ‘ability of a company to conduct its business operations without special hindrance [...] from governments or from local communities neighboring its business operations’<sup>306</sup>. It follows that, whenever a company falls short of the expectation to operate in a socially responsible manner, it may face obstruction to its business activities<sup>307</sup>.

The choice in the UNGPs to ground the corporate responsibility to respect human rights in social norms, rather than legal norms, is a clear example of the SRSG’s attempt to distance himself from the doctrinal excesses of the UN Norms which sought to impose human rights obligations on corporations. Moreover, the UN Norms proposed to impose on corporations the entire range of the existing obligations binding on states to ‘promote, secure the fulfillment of, respect, ensure respect of, and protect human rights’<sup>308</sup>. In contrast, the UNGPs frame the responsibility of companies in respect of human rights only in terms of a responsibility to ‘respect’ human rights – that is, a responsibility to refrain from causing or contributing to adverse human rights impacts – what the SRSG referred to as a principle of ‘do no harm’. At the same time, in his 2008 Report,

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<sup>303</sup> HRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 7 April 2008, UN Doc. A/HRC/8/5, para. 54. In 2007, Ruggie and Sherman indeed asserted that the corporate responsibility to respect human rights under the UNGPs is ‘neither based on nor analogizes from state-based law. It is rooted in a transnational social norm, not an international legal norm’. See, in this regard, Ruggie J and Sherman J, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’ (2017) 28 *European Journal of International Law* 921, 923.

<sup>304</sup> It is important to highlight that companies are still bound to comply with the domestic laws of the countries in which they operate.

<sup>305</sup> HRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 7 April 2008, UN Doc. A/HRC/8/5, para. 54. See also López C, ‘The ‘Ruggie Process’: from Legal Obligations to Corporate Social Responsibility?’ in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 58, at 65; Deva S, ‘Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles’ in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 78, at 94.

<sup>306</sup> Aras G, ‘The Business Case for Taking Human Rights Obligations Seriously’ in Andreassen B and Vinh K (eds), *Duties Across Borders: Advancing Human Rights in Transnational Business* (Intersentia 2016) 91, at 105.

<sup>307</sup> *Ibid.*

<sup>308</sup> UN Commission on Human Rights, ‘Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights’, 13 August 2003, UN Doc. E/CN.4/Sub.2/2003/L.11, Article 1.

the SRSG observed that this ‘do no harm’ principle ‘is not merely a passive responsibility<sup>309</sup> but might entail a requirement for companies to take positive steps depending on circumstances. Overall, nonetheless, the UNGPs ‘narrow the focus of corporate human rights responsibilities largely to the negative task of avoiding harm to fundamental human rights<sup>310</sup>. Additionally, the UNGPs frame the corporate responsibility to respect human rights as independent of the state duty to protect human rights. The UN Norms, in contrast, framed the proposed human rights obligations of corporations as secondary to the primary obligations of states. In the view of the SRSG, there was no need to engage in the slippery distinction between primary obligations and secondary responsibilities because the responsibility of corporations in relation to human rights would apply at all times, ‘irrespective of whether states are living up to their commitments<sup>311</sup>.

### *Human Rights Due Diligence*

Guiding Principle 17 provides that, in order to meet their responsibility to respect human rights, businesses should exercise human rights due diligence. Human rights due diligence, the Principles elaborate, ‘provides the backbone of the day-to-day activities of a business enterprise<sup>312</sup> and enables companies to identify, prevent, mitigate, and account for how they address adverse human rights impacts<sup>313</sup>.

As noted in Guiding Principle 13, companies can cause or contribute to adverse human rights impacts either through their own activities, or through their business relationships. In light of these different degrees of involvement in adverse human rights impacts, Guiding Principle 17 provides that due diligence processes should cover, on the one hand, any adverse human rights impacts which the company might cause or to which it might contribute through its own activities and, on the other, any adverse human rights impacts which may be directly linked via its business relationships to its operations, products or services. Additionally, human rights due diligence was

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<sup>309</sup> HRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 7 April 2008, UN Doc. A/HRC/8/5, para. 55. The example included by the SRSG concerns the adoption of workplace anti-discrimination policies, which might require the business to take positive steps in terms of adopting specific recruitment and training programmes.

<sup>310</sup> Bilchitz D, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’ (2010) 7 *Revista Internacional de Direitos Humanos* 198, at 207.

<sup>311</sup> Ruggie J, *Just Business. Multinational Corporations and Human Rights* (W.W. Norton & Company, Inc. 2013), at 83.

<sup>312</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, 16 July 2018, UN Doc. A/73/163, para. 10.

<sup>313</sup> UNGPs, Principle 17.

envisaged by the SRSG as helping companies to avoid contributing to the adverse human rights impacts of third parties by way of corporate complicity<sup>314</sup>.

According to the UNGPs, the human rights due diligence process should include a number of steps, which are respectively dealt with by separate principles under Pillar II. Businesses should identify and assess actual and potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships<sup>315</sup>. In order to prevent and mitigate these adverse impacts, they should integrate the findings of their human rights impact assessments into relevant internal functions and processes, and take appropriate action<sup>316</sup>. They should track the effectiveness of their responses to ensure that adverse human rights impacts are adequately addressed<sup>317</sup>. Finally, they should account for how they address actual and potential adverse human rights impacts by way of communicating this to affected stakeholders<sup>318</sup>.

The UNGPs construe human rights due diligence by employing a concept of due diligence familiar to business actors. Guiding Principle 17 provides that human rights due diligence can be included within broader enterprise risk-management processes<sup>319</sup>. Under traditional enterprise risk-management systems, due diligence is employed as a risk management tool<sup>320</sup>. In commercial

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<sup>314</sup> In the 2008 Framework, the SRSG looks at the issue of corporate complicity by distinguishing complicity in non-legal and legal contexts. In non-legal contexts, the SRSG defines complicity in line with the different forms of corporate complicity addressed by the UN Global Compact, namely direct and indirect (beneficial and silent) complicity. In legal contexts, the SRSG observes that the meaning of complicity generally corresponds to the standard of ‘aiding and abetting’ the commission of international crimes under international criminal law. See UN Doc. A/HRC/8/5, Section D.

<sup>315</sup> UNGPs, Principle 18.

<sup>316</sup> UNGPs, Principle 19.

<sup>317</sup> UNGPs, Principle 20.

<sup>318</sup> UNGPs, Principle 21.

<sup>319</sup> HRC, ‘Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy Framework”’, 22 April 2009, UN Doc. A/HRC/11/13, para. 51: ‘Businesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them, such as changes in government policy, shifts in consumer preferences, and even weather patterns. Controllable or not, human rights challenges arising from the business context, its impacts and its relationships can pose material risks to the company and its stakeholders, and generate outright abuses that may be linked to the company in perception or reality. Therefore, they merit a similar level of due diligence as any other risk’. See also HRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 7 April 2008, UN Doc. A/HRC/8/5, para. 56: ‘comparable processes [to human rights due diligence] are typically already embedded in companies because in many countries they are legally required to have information and control systems in place to assess and manage financial and related risks’. While HRDD is understood in the UNGPs as a risk-management process, scholars have highlighted how John Ruggie has on occasion referred to HRDD as a standard of conduct and more specifically as the ‘diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation’. According to critics, this contributes to confusion as to the import of HRDD in the UNGPs. See, in this respect, Bonnitcha J and McCorquodale R, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights’ (2017) 28 *The European Journal of International Law* 899, at 908-911.

<sup>320</sup> Ruggie J, ‘Global Governance and “New Governance Theory”: Lessons from Business and Human Rights’ (2014) 20 *Global Governance* 5, at 14. Ruggie observed that his aim was ‘to prescribe practical ways of integrating human rights concerns within enterprise risk management systems’.

contexts, due diligence ‘precedes contract negotiation and is performed with the aim of reducing commercial risks stemming from information asymmetries between contracting parties’<sup>321</sup>. In other words, in commercial contexts, the company engages in due diligence not to meet a responsibility towards others, but to prevent itself from ‘entering into transactions or making business decisions that result in disadvantageous consequences to the corporation’<sup>322</sup>. The UNGPs, however, warns companies that human rights due diligence can be included in corporate risk-management processes only insofar as the company addresses not material risks to the company itself but, more importantly, actual and potential risks to rights-holders<sup>323</sup>.

Guiding Principle 17 and its commentary elaborate on the relationship between the exercise of human rights due diligence and the risk of legal liability under national law for the failure by businesses to prevent adverse human rights impacts<sup>324</sup>. The commentary asserts that exercising human rights due diligence should help companies address ‘the risk of legal claims against them’ by showing that they took all necessary steps to prevent and mitigate actual and potential adverse human rights impacts resulting from their own operations or business relationships. At the same time, the commentary cautions that businesses should not assume that adopting human rights due diligence processes will automatically absolve them from potential liability for adverse human rights impacts.

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<sup>321</sup> Fasterling B and Demuijnck G, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116 *Journal of Business Ethics* 799, at 809; Karp DJ, 'Fixing Meanings in Global Governance? “Respect” and “Protect” in the UN Guiding Principles on Business and Human Rights' (2020) 26 *Global Governance: A Review of Multilateralism and International Organizations* 628, at 634; Bonnitcha J and McCorquodale R, 'The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights' (2017) 28 *The European Journal of International Law* 899, at 901; Martin-Ortega O, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2013) 31/4 *Netherlands Quarterly of Human Rights* 44, at 51.

<sup>322</sup> Fasterling B and Demuijnck G, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116 *Journal of Business Ethics* 799, at 809.

<sup>323</sup> Commentary to Principle 17. The fundamental distinction between the human rights due diligence requirement under the UNGPs and in the traditional commercial context is that, in the UNGPs, due diligence serves the purpose of preventing adverse impacts to individuals and communities, while, in commercial transactions, due diligence is concerned solely with protecting the interests of the company.

<sup>324</sup> Although it is beyond the purpose of the present chapter to engage in a critique of the UNGPs, it should be noted that the mixing of the legal and non-legal dimensions of human rights due diligence under the UNGPs has been extensively criticized in the scholarly literature. See, *inter alia*, Bonnitcha J and McCorquodale R, 'The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights' (2017) 28 *The European Journal of International Law* 899, at 901 and 919; Quijano G and Lopez C, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword' (2021) 6 *Business and Human Rights Journal* 241, at 247; Deva S, 'Business and Human Rights, or the Business of Human Rights: Critical Reflections on Emerging Trends' in Andreassen B and Vinh K (eds), *Duties Across Borders: Advancing Human Rights in Transnational Business* (Intersentia 2016) 23, at 32.

*c. Access to Remedies*

Pillar III elaborates on the role of states and corporations in ensuring that victims have access to an effective remedy when adverse corporate human rights impacts occur. Access to an effective remedy for victims of adverse corporate human rights impacts is operationalized in Guiding Principles 25 to 31.

Guiding Principle 25 provides in general terms that, as part of their obligation to protect the enjoyment by individuals of their human rights against the adverse impacts of business actors, states are required to ensure that, when such impacts occur within their territory or jurisdiction, individuals affected have access to an effective remedy<sup>325</sup>. Any procedure providing victims' access to a remedy must, according to the accompanying commentary, be impartial and free from corruption or political influence<sup>326</sup>.

Guiding Principle 26 recognizes state-based judicial mechanisms as key to ensuring victims' access to a remedy for adverse corporate human rights impacts. The success of judicial mechanisms is said by the accompanying commentary to be dependent on their impartiality, integrity, and ability to accord due process, as well as on the removal of potential barriers that might prevent legitimate cases from being brought before the courts<sup>327</sup>. States should consider ways to reduce legal, practical, and other relevant barriers that could lead to a denial of access to remedy. As mentioned in the commentary, the legal barriers include those resulting from the application of rules of private international law to TNCs in the light of typical principles of company law, particularly those barriers commonly encountered by victims when seeking a remedy in the courts of the home state of the parent company for the alleged adverse human rights impacts of a foreign subsidiary in a host state<sup>328</sup>. The practical and procedural barriers are stated to include the 'frequent imbalances between parties to business-related human rights claims, such as their financial resources, access to information and expertise'<sup>329</sup>.

Additionally, Guiding Principle 27 provides that state-based, non-judicial grievance mechanisms can play an important role in providing victims of adverse corporate human rights impacts with an effective remedy. These mechanisms, administrative and legislative, are said to complement and

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<sup>325</sup> UNGPs, Principle 25.

<sup>326</sup> Commentary to Principle 25.

<sup>327</sup> Commentary to Principle 26.

<sup>328</sup> Recall, generally, Chapter 2.

<sup>329</sup> Commentary to Principle 26.

supplement judicial mechanisms at the national level<sup>330</sup>. Elsewhere the SRSG has considered the potential of non-judicial national human rights institutions (NHRIs) and national contact points (NCPs) to hold corporations accountable for adverse human rights impacts. NHRIs are said to be ‘well positioned to provide processes that are culturally appropriate, accessible and expeditious’<sup>331</sup>. NCPs, established under the OECD Guidelines for Multinational Enterprises and tasked with handling individual complaints against business entities for alleged violations of the Guidelines, are equally said to have an important role to play in providing remedies to victims of adverse corporate human rights impacts<sup>332</sup>.

Moving beyond state-based mechanisms, Guiding Principle 28 mentions non-state-based grievance mechanisms as a means for providing an effective remedy to victims of adverse corporate human rights impacts<sup>333</sup>. An example given in Guiding Principle 29 are company-level grievance mechanisms<sup>334</sup>. The commentary to Guiding Principle 29 considers that company-level grievance mechanisms perform key functions regarding the responsibility of companies to respect human rights, including supporting the exercise of human rights due diligence. Through the complaints brought by individuals affected by corporate activities businesses are able to identify adverse impacts in their operations and align their practices accordingly and to mitigate such impacts<sup>335</sup>.

## 5. Conclusion

In light of the existing limitations of both national law and international human rights law in relation to the harmful conduct of corporate actors and in response to the failure of the 2003 UN Norms in attempting to overcome these limitations, the UNGPs were eventually developed and adopted. The legally non-binding UNGPs distinguish among three sets of principles, or Pillars, which respectively elaborate on the duty of states to protect human rights in the context of corporate activities, the responsibility of corporations to respect, or refrain from interfering with, human rights, and access to remedies for victims of adverse corporate human rights impacts.

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<sup>330</sup> UNGPs, Principle 27.

<sup>331</sup> HRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 7 April 2008, UN Doc. A/HRC/8/5, para. 97.

<sup>332</sup> Although beyond the scope of the chapter, it is important to specify that, in evaluating the potential of NCPs, the SRSG has highlighted certain shortfalls in their performance. See UN Doc. A/HRC/8/5, para. 98.

<sup>333</sup> UNGPs, Principle 28.

<sup>334</sup> UNGPs, Principle 29.

<sup>335</sup> Commentary to Principle 29.

Since their adoption, the UNGPs have come to represent the '*lingua franca*'<sup>336</sup> of business and human rights, 'providing a globally agreed-upon authoritative standard for what states and businesses need to do to respectively protect and respect the full range of human rights across all business contexts – something which did not exist before 2011'<sup>337</sup>.

Notwithstanding this, however, they remain legally non-binding. In addition, a number of their methodological and substantive aspects have been subject to criticism<sup>338</sup>. Both limitations have led to a drive, not universally welcomed, to embody and improve on the provisions of the UNGPs in a binding multilateral treaty.

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<sup>336</sup> Deva S, 'The UN Guiding Principles on Business and Human Rights and Its Predecessors: Progress at a Snail's Pace?' in Bantekas I and Stein MA (eds), *The Cambridge Companion to Business and Human Rights Law* (Cambridge University Press 2021) 145, at 164.

<sup>337</sup> HRC, 'Guiding Principles on Business and Human Rights at 10: Taking Stock of the First Decade. Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', 22 April 2021, UN Doc. A/HRC/47/39, para. 113. See also International Bar Association, *IBA Practical Guide on Business and Human Rights for Business Lawyers* (2016), 13. Available at: <https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4>.

<sup>338</sup> Relevant criticisms are discussed in Chapter 5.



## CHAPTER 5

### From International ‘Soft Law’ to International Law: The UN Treaty Process and the 2023 Updated Draft

#### 1. Introduction

Since their endorsement by the Human Rights Council (HRC) of the United Nations in 2011, the uptake of the UNGPs, currently the global agreed-upon authoritative standard in the area of business and human rights, has been impressive. The instrument has been welcomed by states, business actors and non-governmental organizations (NGOs). States have gradually developed and adopted National Action Plans (NAPs)<sup>339</sup>, policy documents where specific measures are indicated to implement the UNGPs at the domestic level. Business actors have developed their policies and committed to aligning their business practices to the principles set forth therein, specifically the responsibility to respect human rights in the context of business activities via processes of human rights due diligence<sup>340</sup>. Last but not least, the UNGPs have influenced a number of standards on corporate social responsibility adopted at the international level, such as the 2011 Organization for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises<sup>341</sup>, the 2017 International Labor Organization (ILO) Tripartite Declaration of Principles concerning

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<sup>339</sup> The UN Working Group on the Issue of Transnational Corporations and Other Business Enterprises, established by the Human Rights Council as a follow-up to the adoption of the UNGPs, has defined a National Action Plan as ‘an evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UNGPs’. See Guidance on National Action Plans on Business and Human Rights (Geneva 2016). At the time of writing, 30 states globally have adopted a NAP, while 16 states are in the process of developing one. See NAPs Database, available at: <https://globalnaps.org/>.

<sup>340</sup> Deva S, 'Business and Human Rights: Alternative Approaches to Transnational Litigation' (2021) 17 *Annual Review of Law and Social Science* 139, at 142. See also Ruggie J, 'A UN Business and Human Rights Treaty? An Issues Brief' (2014) *Harvard Kennedy School*, at 2; Ruggie J, 'Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises' in Rodríguez-Garavito C (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017) 46, at 50.

<sup>341</sup> The OECD Guidelines are a set of voluntary and non-legally binding recommendations to multinational enterprises addressed by the 38 OECD member states and the 12 adhering non-member states. The instrument aims to assist the business sector in upholding responsible business conduct and to align business activities to the principles enshrined in the Guidelines in the areas of human rights, disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and taxation. The updated version of the OECD Guidelines, released in 2011, included a new chapter (IV) on human rights, consistent with the UNGPs. By way of example, in line with Pillar II of the UNGPs, the Guidelines provide that corporations ‘should respect human rights, which means they should avoid infringing on the human rights of others’ (Chapter IV.1). Along similar lines, they should seek to prevent and mitigate adverse human rights impacts through the exercise of human rights due diligence (Chapter IV.3 and IV.5).

Multinational Enterprises and Social Policy<sup>342</sup>, and the ISO 26000 Guidance on Social Responsibility<sup>343</sup>.

Yet while the UNGPs have established themselves as the authoritative non-binding international standard on business and human rights, the last decade has witnessed an attempt to convert the non-binding principles set forth therein into international law. The UNGPs have inspired a ‘new regulatory dynamic’ characterized by calls to develop a binding universal international legal instrument on business and human rights<sup>344</sup>. Indeed, the SRSG himself contemplated that legalization in the area of business and human rights would sooner or later become ‘an inevitable and necessary component of future developments’, including at the international level<sup>345</sup>.

The drive to convert the ‘soft’ principles on business and human rights enshrined in the UNGPs into international law – via a universal multilateral treaty – has primarily been fuelled by concerns raised by various stakeholders as to the domestic implementation of the UNGPs and their effectiveness in yielding practical results with respect to corporate actors. In addition, the elaboration and adoption of a multilateral treaty have been deemed necessary by treaty proponents in order to address perceived substantive shortcomings of the UNGPs. But the elaboration of a universal multilateral treaty on business and human rights has been met with opposition by various

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<sup>342</sup> The ILO Declaration offers guidelines to MNEs, governments, employers’ and workers’ organizations in home and host countries on labor-related aspects of corporate social responsibility. In 2017 the Governing body of the ILO decided to further amend the Declaration, taking into account the developments at the international level since the previous update in 2006. Among the international developments in question, the UNGPs were taken into account in clarifying the corporate responsibility to respect human rights and the requirement to carry out human rights due diligence (Principle 10).

<sup>343</sup> The ISO 26000 Guidance provides guidelines to companies in the area of sustainable development and corporate social responsibility. It consists of 7 core subjects, including human rights. See <https://www.iso.org/standard/42546.html>.

<sup>344</sup> Ruggie himself did not conceive the UNGPs as a static document that would foreclose future paths in business and human rights. Rather, the UNGPs were designed to generate this ‘new regulatory dynamic’, out of which international legal measures might potentially evolve. See Ruggie J, ‘Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises’ in Rodríguez-Garavito C (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017) 46, at 47, 55, and 59.

<sup>345</sup> Ruggie J, ‘Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises’ in Rodríguez-Garavito C (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017) 46, at 55. Ruggie, however, has observed that international legalization in the area of business and human rights should be seen as complementary to the UNGPs, rather than an attempt to undermine the UNGPs and the consensus behind them. See, in this regard, Ruggie J, ‘A UN Business and Human Rights Treaty? An Issues Brief’ (2014) *Harvard Kennedy School*, at 1. With specific regards to the proposed elaboration of a multilateral treaty, Ruggie has observed that the basis of the attempt to elaborate a treaty should be a ‘principled pragmatism’ approach. This is the approach or methodology that Ruggie adopted in developing the UNGPs, and that allowed him, *inter alia*, to gather the consensus of the international community on the instrument. According to Ruggie, ‘principled pragmatism’ applied to the attempt to elaborate a treaty on business and human rights would require careful considerations on how a treaty in this area would be capable of addressing perceived existing gaps in the current system. Overall, in order to yield meaningful results, Ruggie has emphasized that a treaty should be carefully crafted as a precision tool, which focuses on specific governance gaps that other existing instruments are not able to tackle. See Ruggie J, ‘A UN Business and Human Rights Treaty? An Issues Brief’ (2014) *Harvard Kennedy School*, at 5.

other stakeholders, which instead have supported enhanced implementation of the UNGPs at the national level as an alternative to the adoption of a ‘Legally Binding Instrument’<sup>346</sup>.

The present chapter explores the international legal developments inspired by the UNGPs, specifically the current efforts to elaborate a universal multilateral treaty, or so-called ‘Legally Binding Instrument’, on business and human rights. Put differently, the chapter is concerned with the move from international ‘soft’ law to international law in the area of business and human rights. Section 2 highlights the reasons behind the call for the elaboration of a treaty on business and human rights, that eventually led to the beginning of the treaty process at the UN level. Section 3 explores the beginning of the treaty process, highlighting the mandate of the open-ended intergovernmental working group (OEIGWG) established by the UN HRC to elaborate a multilateral treaty. It also discusses the alternative approach to the elaboration of a treaty supported in the UN HRC by states from the global North, namely strengthening national implementation of the UNGPs under the guidance of the existing Working Group on business and human rights. Section 4 analyzes the first two rounds of consultations held by the OEIGWG, where proposals on substantive aspects of the proposed treaty were put forward and discussed among relevant stakeholders, including states, business representatives, civil society and NGOs. Section 5 examines the text of the latest updated version of the draft treaty<sup>347</sup>. It analyzes key provisions of the draft with a view to investigating their alignment with the principles enshrined in the UNGPs and their potential to address obstacles encountered when applying established principles of public and private international law in the context of business and human rights.

## **2. The Reasons Behind the Call for a Multilateral Treaty on Business and Human Rights**

### **2.1. The Perceived Inadequacy of Non-Binding Instruments**

One of the reasons why the elaboration of a multilateral treaty on business and human rights is thought necessary by its supporters is the perceived inadequacy of the legally non-binding character for states of existing instruments in the area, particularly the UNGPs. It is argued that instruments

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<sup>346</sup> This is discussed further in Section 3.

<sup>347</sup> At the time of writing, the most recent version of the draft treaty is the one published in July 2023, which formed the basis for State-led direct substantive intergovernmental negotiations during the ninth session of the intergovernmental working group on TNCs and other business enterprises with respect to human rights, which took place between 23-27 October 2023. The draft is available at <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf>

that do not create obligations binding on states under international law are insufficient to address ongoing concerns in relation to the conduct of TNCs.

A number of states from the global South and civil society groups have witnessed how, in spite of the existing non-binding standards in the field of business and human rights, corporate actors, in particular TNCs, continue to be involved in ‘human rights violations and abuses’<sup>348</sup>. This involvement is said to point to the perceived inability of non-binding instruments to move states to take measures to deter the adverse human rights impacts of business actors. More specifically, these stakeholders have argued that, because of their non-binding character, the UNGPs – among other existing ‘soft-law’ instruments – have not only had limited impact in preventing the occurrence of adverse human rights impacts by corporations but have also fallen short of guaranteeing corporate accountability when adverse human rights impacts have occurred and of providing adequate protection to the victims of these impacts<sup>349</sup>. Non-binding standards in the area of business and human rights are regarded by these stakeholders as only a ‘partial answer’<sup>350</sup> to the negative externalities of corporate conduct with respect to human rights, a ‘first step without further consequences’<sup>351</sup>.

In this light, various states and civil society groups have deemed it is necessary to move from non-binding international standards like the UNGPs towards a universal multilateral treaty on business and human rights. According to these stakeholders, binding obligations set forth in a universal

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<sup>348</sup> Statement on behalf of a group of countries at the 24<sup>th</sup> session of the Human Rights Council, available at: <https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf>. See also See <https://www.stopcorporateimpunity.org/joint-statement-call-for-an-international-legally-binding-instrument-on-human-rights-transnational-corporations-and-other-business-enterprises/>.

<sup>349</sup> Statement on behalf of a group of countries at the 24<sup>th</sup> session of the Human Rights Council, available at: <https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf>. The arguments put forward by treaty proponents have also been extensively discussed in the academic literature. See, *inter alia*, Vargas C, 'A Treaty on Business and Human Rights? A Recurring Debate in a New Governance Landscape' in Rodríguez-Garavito C (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017) 111; Mares R, 'The United Nations Draft Treaty on Business and Human Rights: An Analysis of its Emergence, Development and Potential' in Marx A and others (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar 2022) 22; Macchi C, 'A Treaty on Business and Human Rights: Problems and Prospects' in Cernic JL and Carrillo-Santarelli N (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018) 63; Backer LC, 'Considering A Treaty on Corporations and Human Rights: Mostly Failures but with a Glimmer of Success' in Cernic JL and Carrillo-Santarelli N (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018) 89.

<sup>350</sup> Statement on behalf of a group of countries at the 24<sup>th</sup> session of the Human Rights Council, available at: <https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf>.

<sup>351</sup> *Ibid.*

multilateral treaty would, *inter alia*, help ‘regulate the work of transnational corporations and provide appropriate protection, justice and remedy to the victims of corporate human rights abuses’<sup>352</sup>.

## 2.2. The Perceived Substantive Shortcomings Specifically of the UNGPs

An additional argument behind the drive to elaborate and adopt a multilateral treaty on business and human rights is the necessity to remedy what are perceived to be substantive shortcomings in the UNGPs.

First, it has been argued by proponents that a treaty on business and human rights should provide for human rights obligations binding on corporations under international law<sup>353</sup>. The UNGPs, in contrast, posit merely a corporate ‘responsibility’ to respect human rights, a non-legal desideratum of refraining from interferences with individuals’ enjoyment of their human rights, grounded not in international law but in social norms and expectations<sup>354</sup>.

Second, a treaty should, according to its proponents, oblige states parties to regulate the activities of their corporate nationals in foreign states<sup>355</sup>. In other words, it should oblige home states of TNCs to exercise ‘extraterritorial prescriptive jurisdiction’ in order to ensure that corporations incorporated under their national legal systems do not interfere with individuals’ enjoyment of their human rights when conducting activities abroad. The UNGPs, while acknowledging that international law permits states to regulate the extraterritorial activities of their corporate nationals, recognize that states are currently not obliged by international law to do so<sup>356</sup>.

Third, according to treaty proponents, a treaty should require states parties to establish a regime of legal liability under their national law for companies whose acts or omissions cause or contribute

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<sup>352</sup> *Ibid.* See also First Joint Statement by the Treaty Alliance, available at: <https://www.stopcorporateimpunity.org/joint-statement-call-for-an-international-legally-binding-instrument-on-human-rights-transnational-corporations-and-other-business-enterprises/>. Overall, a treaty is deemed necessary to compensate for the limited impact of non-binding instruments on business and human rights, specifically the UNGPs, and to provide ‘the framework for enhanced state action to protect rights and prevent the occurrence of violations’ in the context of business activities.

<sup>353</sup> *Ibid.*

<sup>354</sup> Recall Chapter 4.

<sup>355</sup> First Joint Statement by the Treaty Alliance, available at: <https://www.stopcorporateimpunity.org/joint-statement-call-for-an-international-legally-binding-instrument-on-human-rights-transnational-corporations-and-other-business-enterprises/>.

<sup>356</sup> Commentary to Principle 2. Recall, generally, Chapter 4.

to adverse human rights impacts<sup>357</sup>. The UNGPs do not ‘equate’<sup>358</sup> adverse corporate human rights impacts with legal liability. On the contrary, they provide that ‘the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions’<sup>359</sup>.

Last but not least, a treaty should, it is argued, require states parties to strengthen the protection of victims of adverse human rights impacts stemming from business activities, especially by guaranteeing victims’ access to adequate and effective legal remedies at the national level<sup>360</sup>. It has been suggested that, although the UNGPs dedicate a set of principles to access to remedies under Pillar III<sup>361</sup>, they fall short of ‘addressing properly [...] the absence of adequate legal remedies for victims’<sup>362</sup>, thereby perpetuating ‘a gap between the promise of remedies [for victims of the adverse human rights impacts of business activities] and the reality of corporate impunity’<sup>363</sup>.

### 3. The Beginning of the Treaty Process

The beginning of the treaty process saw the emergence of debate between the global South and the global North over the necessity of a multilateral treaty on business and human rights.

The process of elaborating a so-called ‘Legally Binding Instrument’ on business and human rights officially began in 2014 with the adoption by the HRC of UN HRC Resolution 26/9<sup>364</sup>, which established an open-ended intergovernmental working group (OEIGWG) with a mandate to

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<sup>357</sup> *Ibid.* See also Statement on behalf of a group of countries at the 24<sup>th</sup> session of the Human Rights Council, available at: <https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf>.

<sup>358</sup> McCorquodale R and others, ‘Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises’ (2017) 2 *Business and Human Rights Journal* 195, at 199.

<sup>359</sup> UNGPs, Commentary to Principle 12. Recall, generally, Chapter 4.

<sup>360</sup> First Joint Statement by the Treaty Alliance, available at: <https://www.stopcorporateimpunity.org/joint-statement-call-for-an-international-legally-binding-instrument-on-human-rights-transnational-corporations-and-other-business-enterprises/>.

<sup>361</sup> With regards to judicial remedies specifically, the UNGPs provide that, in order to ensure that victims of adverse corporate human rights impacts are not denied access to judicial remedies, *inter alia*, states should take all necessary steps to reduce potential legal, practical, and procedural barriers. For examples of common legal obstacles see Commentary to Principle 26.

<sup>362</sup> Statement on behalf of a group of countries at the 24<sup>th</sup> session of the Human Rights Council, available at: <https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf>.

<sup>363</sup> Stephens B, ‘Making Remedies Work: Envisioning a Treaty-Based System of Effective Remedies’ in Deva S and Bilchitz D (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) 408, at 408.

<sup>364</sup> HRC, ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, 14 July 2014, UN Doc. A/HRC/26/9.

elaborate such an instrument<sup>365</sup>. The decision to establish the OEIGWG responded to the view expressed the previous year, during debate in the HRC, in a statement<sup>366</sup> by Ecuador on behalf of a number of states from the global South<sup>367</sup>, the so-called ‘Ecuador Declaration’. In the preamble to Resolution 26/9, the HRC stressed that, while states have obligations and the ‘primary responsibility’ to protect human rights ‘within their territory and/or jurisdiction’ against adverse corporate human rights impacts, TNCs and other business enterprises have a responsibility to respect human rights, which is to say to avoid interfering with individuals’ enjoyment of their human rights. The HRC decided in the same resolution that the first two working sessions of the OEIGWG would be dedicated to ‘conducting constructive deliberations on the content, scope, nature and form of the future international instrument’<sup>368</sup>. Resolution 26/9 was adopted with a highly divided recorded vote of 20 states in favor, 14 against and 13 abstentions. The majority of states in favor of the resolution, which is to say in favor of elaborating a multilateral treaty on business and human rights, belonged to the global South<sup>369</sup>.

At the same session in 2014 in which it established the OEIGWG, the HRC also adopted by consensus UN HRC Resolution 26/L.1<sup>370</sup>, on strengthening domestic implementation of the UNGPs under the guidance of the existing Working Group on business and human rights. Resolution 26/L.1, sponsored by Norway, proposed an alternative to the elaboration of a treaty on business and human rights. The so-called ‘Norway Resolution’ recognized that effective regulation of TNCs at the national level had the potential to contribute to ‘the promotion, protection and fulfillment of and respect for human rights’<sup>371</sup>. The resolution encouraged states to make efforts to implement fully the UNGPs at the national level, specifically through the adoption

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<sup>365</sup> *Ibid.*, para. 1.

<sup>366</sup> Statement on behalf of a group of countries at the 24<sup>th</sup> session of the Human Rights Council, available at: <https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf>.

<sup>367</sup> The African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru. It is relevant to point out that states belonging to the global South would generally host the activities of subsidiaries of TNCs based in the global North. One could argue that it is not surprising for these states to demand an international treaty in the area of business and human rights. These states have generally experienced the consequences of lax regulation of corporate conduct, and the adverse human rights impacts of TNCs have traditionally been located in the territory of host states, where unbalanced power relationships between TNCs and local governments are common, with the latter oftentimes fearful that imposing human rights and environmental accountability standards might have adverse effects on the economic growth of their countries. See, in this regard, Prihandono I, ‘Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries’ (2011) 3 *Journal of Law and Conflict Resolution* 89, at 100.

<sup>368</sup> HRC, ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, 14 July 2014, UN Doc. A/HRC/26/9. para. 2.

<sup>369</sup> Discussed in more detail in the following section.

<sup>370</sup> HRC, ‘Human Rights and Transnational Corporations and Other Business Enterprises’, 23 June 2014, UN Doc. A/HRC/26/L.1.

<sup>371</sup> *Ibid.*

of National Action Plans developed with the guidance of the existing UN Working Group on Business and Human Rights<sup>372</sup>. The resolution also extended the mandate of the Working Group and requested it to launch a consultative process with all relevant stakeholders to consider, *inter alia*, the potential benefits and limitations of a multilateral treaty on business and human rights<sup>373</sup>. Resolution 26/L.1 received wide support from states from the global North, generally home to the largest and most powerful TNCs, which had strongly opposed the proposal to elaborate a multilateral treaty on business and human rights. These states ‘prefer[red] a more conservative approach based on the UNGPs and on the primary role of the state and national laws’<sup>374</sup>.

The division between treaty supporters and treaty opponents was also reflected in the early consultations held by the OEIGWG. During the first working session<sup>375</sup> of the OEIGWG, treaty supporters reiterated that a treaty on business and human rights ‘could contribute to redressing gaps and imbalances in the international legal order that undermine human rights, and could address the lack of remedy procedures for victims of corporate human rights abuses’<sup>376</sup>, thereby strengthening human rights in the context of business activities<sup>377</sup>. State delegations that supported the treaty process observed that, while TNCs contribute to the economic development of many states, they are also capable of evading responsibilities and taking advantage of gaps in regulation, partly as a consequence of power imbalances between TNCs and host states from the global South<sup>378</sup>. Treaty opponents, on the other hand, reiterated that, instead of developing a multilateral treaty on business and human rights, enhanced national implementation of the existing UNGPs should be the priority<sup>379</sup>. It was argued that the elaboration of a treaty was ‘premature and not urgent’, and that discussions should focus instead on the gradual development of the UNGPs<sup>380</sup>.

#### **4. Early Proposals on Substantive Aspects of the ‘Legally Binding Instrument’**

While, at the time of writing, a total of nine working sessions of the OEIGWG have been held, it was the first two sessions that set the stage for the drafting process of the ‘Legally Binding

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<sup>372</sup> *Ibid.*, para. 2.

<sup>373</sup> *Ibid.*, para. 8.

<sup>374</sup> Macchi C, *Business, Human Rights and the Environment: The Evolving Agenda* (Asser Press 2022) at 142.

<sup>375</sup> HRC, ‘Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 5 February 2016, UN Doc. A/HRC/31/50.

<sup>376</sup> *Ibid.*, para. 4.

<sup>377</sup> *Ibid.*

<sup>378</sup> *Ibid.*, para. 22.

<sup>379</sup> *Ibid.*, para. 23.

<sup>380</sup> *Ibid.*, para. 26.

Instrument'. During these sessions, views were aired among relevant stakeholders on a number of substantive aspects of the proposed instrument.

#### 4.1. The Proposed Complementarity with the UNGPs

According to the views expressed by the treaty's proponents, the 'Legally Binding Instrument' must be complementary to the UNGPs with respect to its content<sup>381</sup>. On a basic level, this means that the substantive aspects of the UNGPs should be the reference point for the elaboration of the treaty<sup>382</sup>. On a further level, however, it was argued that the proposed treaty should not take the UNGPs as an 'end point'<sup>383</sup>. Rather, as suggested during the first working session of the OEIGWG, the treaty should go beyond the UNGPs<sup>384</sup>. It should not be simply a legally-binding replication of the UNGPs but should attempt to fill the perceived gaps of this earlier instrument<sup>385</sup>. In this way, the proposed treaty would 'operate as a logical extension of the UNGPs'<sup>386</sup>.

#### 4.2. Scope of the Proposed Instrument

The first and second working sessions of the OEIGWG saw discussion of the subject-matter and regulatory targets of the proposed 'Legally Binding Instrument'.

As to the subject-matter of the treaty, the discussion focused on whether the proposed instrument should cover violations in the context of business activities of all internationally recognized human rights or only gross human rights violations. The SRSG had previously stated that addressing only gross human rights 'violations' by TNCs and other business enterprises represented the only way

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<sup>381</sup> HRC, 'Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument', 5 February 2016, UN Doc. A/HRC/31/50, para. 23.

<sup>382</sup> *Ibid.*, para. 39.

<sup>383</sup> Deva S, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes on Business and Human Rights Universe: Managing the Interface' (2021) 6 *Business and Human Rights Journal* 336, at 350.

<sup>384</sup> HRC, 'Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument', 5 February 2016, UN Doc. A/HRC/31/50, para. 26

<sup>385</sup> With specific regards to Pillar II of the UNGPs, for instance, the first working session observed that the treaty 'should build on the second pillar of the Guiding Principles but not blindly copy all its content; while both processes are complementary, it is important to recognize the limitations of the principles and try to fill in the gaps'. See HRC, 'Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument', 5 February 2016, UN Doc. A/HRC/31/50, para. 79.

<sup>386</sup> Deva S, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes on Business and Human Rights Universe: Managing the Interface' (2021) 6 *Business and Human Rights Journal* 336, at 350. See also Deva S, 'Business and Human Rights: Time to Move Beyond the "Present"?' in Rodríguez-Garavito C (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017) 62, at 66.

to avoid adopting a treaty of little practical use in closing governance gaps in business and human rights<sup>387</sup>. During the first working session of the OEIGWG, however, a number of stakeholders averred that elaborating a treaty covering only gross human rights ‘violations’ would be inadequate, as the activities of businesses potentially had a negative impact on all internationally recognized human rights<sup>388</sup>. In addition, it was argued that, for the proposed treaty to reflect the universality<sup>389</sup>, indivisibility<sup>390</sup>, and interdependence<sup>391</sup> of human rights in the context of business and human rights<sup>392</sup>, it would have to cover all internationally recognized human rights.

In terms of the regulatory targets of the proposed treaty, the debate was whether the proposed treaty should cover all business entities, including domestic companies, or just TNCs. On the one hand, it was argued for a number of reasons that the proposed treaty should cover only entities with activities of a transnational character. First, TNCs specifically had mustered enough economic power to surpass that of states and, as a result, there existed unbalanced power dynamics between them specifically and states. Second, TNCs specifically were able to evade liability for adverse human rights impacts associated with their extraterritorial activities<sup>393</sup>. Third, it was said to be ‘virtually impossible to cover and control domestic enterprises in the fulfillment of human rights, owing to the huge number of such enterprises and because they would be subject to domestic systems’<sup>394</sup>. On the other hand, a number of stakeholders advocated an instrument that would cover all business entities, irrespective of the nature of the entity and the character of its business activities. They reasoned that ‘all business enterprises are susceptible of committing human rights violations and that all victims need protection and remedy regardless of the nature of the enterprise committing that abuse’<sup>395</sup>.

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<sup>387</sup> Ruggie J, ‘A UN Business and Human Rights Treaty? An Issues Brief’ (2014) *Harvard Kennedy School*, at 5.

<sup>388</sup> HRC, ‘Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 5 February 2016, UN Doc. A/HRC/31/50, para. 63.

<sup>389</sup> Human rights are universal as all human beings everywhere are entitled to them. Article 1 of the Universal Declaration of Human Rights provides that ‘all human beings are born free and equal in dignity and rights’.

<sup>390</sup> Human rights are indivisible, that is, they all have equal status and are all necessary to protect human dignity.

<sup>391</sup> Human rights are interdependent as fulfillment of one right is dependent on the fulfillment of others.

<sup>392</sup> HRC, ‘Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 5 February 2016, UN Doc. A/HRC/31/50, para. 46.

<sup>393</sup> *Ibid.*, paras. 59 and 60.

<sup>394</sup> *Ibid.*, para. 57.

<sup>395</sup> HRC, ‘Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 5 February 2016, UN Doc. A/HRC/31/50, para. 61.

### 4.3. Obligations of States Parties in the Context of Business Activities

The early working sessions of the OEIGWG touched upon the human rights obligations of states in the context of business activities, including jurisdictional obligations, obligations with respect to access to remedies for victims of adverse corporate human rights impacts and liability of corporate actors for such impacts.

#### 4.3.1. *Jurisdictional Obligations*

Discussions focused on the perceived existing gaps in states' exercise of extraterritorial prescriptive and adjudicative jurisdiction.

With respect to extraterritorial prescriptive jurisdiction, it was submitted that the proposed treaty should consider multiple options for positing extraterritorial obligations for states parties to protect against adverse human rights impacts by their corporate nationals abroad<sup>396</sup>. Some argued that the treaty should oblige home states of TNCs to exercise extraterritorial prescriptive jurisdiction to regulate the activities of their corporate nationals wherever they operated<sup>397</sup>. Others argued that a binding obligation of that kind already existed and had been recognized by UN human rights treaty-monitoring bodies<sup>398</sup>.

With respect to extraterritorial adjudicative jurisdiction, concerns were raised in relation to matters of private international law as applied in the context of business and human rights. These matters included the exercise of personal jurisdiction over certain sorts of corporate defendants and the

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<sup>396</sup> HRC, 'Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument', 5 February 2016, UN Doc. A/HRC/31/50, para. 71.

<sup>397</sup> HRC, 'Report on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 4 January 2017, UN Doc. A/HRC/34/47, para. 53.

<sup>398</sup> *Ibid.*, para. 61. See, in this regard, the following general comments by the Committee on Economic, Social and Cultural Rights, 'Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural rights' UN Doc. E/C.12/2011/1 (20 May 2011), para. 5; 'General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/2000/4 (2000), para. 39; 'General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/2002/11 (26 November 2002), para. 31. See also UN Committee on the Rights of the Child (CRC), 'General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights', 17 April 2013, UN Doc. CRC/C/GC/16. It should be recalled that, while these bodies may recommend exercising extraterritorial jurisdiction, this recommendation should not be taken as implying the existence of an international extraterritorial human rights obligation of this kind binding on states.

applicable law in transnational litigation against TNCs<sup>399</sup>, as well as the doctrine of *forum non conveniens* as applied to such litigation<sup>400</sup>.

#### 4.3.2. Obligations with Respect to Access to Remedies and Legal Liability

As to corporate liability, treaty proponents argued that a multilateral treaty should require states parties to enable access to legal remedies at the national level<sup>401</sup> and should ‘make transnational corporations legally liable for human rights violations and fundamental freedoms’<sup>402</sup>. In this context, the treaty should require states parties to tackle at the national level obstacles in holding these actors liable. The complex way in which TNCs were structured and operated<sup>403</sup> combined with the established principles of company law of separate legal personality and limited liability were said to allow corporate entities, especially parent companies of TNCs, to escape liability<sup>404</sup>. It was suggested that the proposed ‘Legally Binding Instrument’ should set out ways, such as piercing the corporate veil<sup>405</sup>, to tackle the obstacles to liability posed by the structure of TNCs.

#### 4.4. Corporate Human Rights Obligations

According to treaty proponents, the future ‘Legally Binding Instrument’ needed to depart from the ‘soft’ corporate responsibility to respect human rights enshrined in the UNGPs in favour of the establishment of corporate human rights obligations under international law<sup>406</sup>. The language of the proposed instrument should, it was said, be that of ‘legal duty’ rather than ‘voluntary

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<sup>399</sup> HRC, ‘Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 5 February 2016, UN Doc. A/HRC/31/50, paras. 69-70.

<sup>400</sup> *Ibid.*, para. 105. See also HRC, ‘Report on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, 4 January 2017, UN Doc. A/HRC/34/47, para. 83.

<sup>401</sup> HRC, ‘Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 5 February 2016, UN Doc. A/HRC/31/50, paras. 98 and 103.

<sup>402</sup> HRC, ‘Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 5 February 2016, UN Doc. A/HRC/31/50, para. 66.

<sup>403</sup> HRC, ‘Report on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 4 January 2017, UN Doc. A/HRC/34/47, para. 25. Recall, generally, Chapter 4.

<sup>404</sup> *Ibid.*, para. 27. Recall, generally, Chapter 4.

<sup>405</sup> *Ibid.*

<sup>406</sup> HRC, ‘Report on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, 4 January 2017, UN Doc. A/HRC/34/47, para. 71. It should be mentioned that, later on in the treaty process, several states and other relevant stakeholders have repeatedly pointed out that turning the non-binding corporate ‘responsibility’ to respect human rights into a binding obligation under international law represents a misstatement of international law. This aspect is further discussed in section 5.1 below.

responsibility<sup>407</sup>. According to these proponents, the legal duties placed on corporations should be in addition to the existing international obligations binding on states and would have to be tailored to the specific characteristics of corporate actors<sup>408</sup>.

## 5. The 2023 Updated Draft of the ‘Legally Binding Instrument’

The treaty negotiations held under the auspices of the OEIGWG have produced, at the time of writing, a total of five drafts of the proposed treaty, released respectively in 2018<sup>409</sup>, 2019<sup>410</sup>, 2020<sup>411</sup>, 2021<sup>412</sup> and 2023<sup>413</sup>. What follows focuses on significant provisions of the text of the most recent of these drafts, the 2023 updated draft of the treaty. The overall objective is to consider these provisions in the light of principles embodied in the UNGPs. The purpose of this analysis is to highlight the role of the UNGPs in a law-making process that would arguably have not been undertaken in the absence of the UNGPs serving as a transitional non-binding instrument. The provisions analyzed hereinafter have been selected on the basis of two criteria. The first criterion is alignment with the UNGPs. Since it has been stressed by treaty proponents that the UNGPs should serve as the starting point for the elaboration of the content of the treaty, a number of draft treaty provisions are looked at in order to consider the substantive alignment of the two instruments. The second criterion relates to going beyond the UNGPs and seeking to overcome

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<sup>407</sup> <sup>407</sup> HRC, ‘Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 5 February 2016, UN Doc. A/HRC/31/50, para. 78.

<sup>408</sup> HRC, ‘Report on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, 4 January 2017, UN Doc. A/HRC/34/47, paras. 69 and 75.

<sup>409</sup> Zero Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. 16 July 2018. Available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

<sup>410</sup> Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. 16 July 2019. Available at: [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraftLBI.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraftLBI.pdf).

<sup>411</sup> Second Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. 6 August 2020. Available at: [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf).

<sup>412</sup> Third Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. 17 August 2021. Available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>.

<sup>413</sup> Updated Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. July 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf>

the substantive shortcomings of the UNGPs. The analysis of certain other provisions aims to highlight how the treaty as currently drafted would differ from the UNGPs.

A caveat is in order. At the time of writing the process of elaborating the draft treaty is ongoing. It is still uncertain whether and when any final treaty text will be adopted, let alone whether, if adopted, it will be ratified by home states of the largest and most powerful TNCs. To recall, however, part of the overall purpose of the thesis<sup>414</sup> is to investigate the role of the UNGPs as a non-binding international instrument in ongoing law-making processes in the area of business and human rights at the international and national levels, irrespective of how long said processes take and whether they succeed.

### 5.1. Preamble to the Treaty

Draft preambular paragraph 7 to the 2023 updated draft treaty, one of the nineteen preambular paragraphs, reads:

(PP7) *Stressing* that the primary obligation to respect, protect, fulfill and promote human rights and fundamental freedoms lie[s] with the State, and that States must protect against human rights abuse by third parties, including business enterprises, and to ensure respect for and implementation of international human rights law, and to respect and ensure respect for international humanitarian law in all circumstances [...]

Draft preambular paragraph 7 reaffirms the existing human rights obligations binding on states under international law. Among these, it stresses the obligation of states to protect human rights against the adverse impacts of third parties, including corporate entities. Draft preambular paragraph 7 is in line with Pillar I of the UNGPs, which is concerned with states' obligation to protect human rights in the context of business activities<sup>415</sup>. As stressed by the SRSG, this obligation is grounded in international human rights law<sup>416</sup>.

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<sup>414</sup> Recall Introduction.

<sup>415</sup> UNGPs, Principle 1.

<sup>416</sup> HRC, 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy Framework"', 22 April 2009, UN Doc. A/HRC/11/13, para. 13.

Draft preambular paragraph 12 of the proposed treaty as currently drafted reads:

(PP12) *Underlining* that business enterprises [...] have the to respect internationally recognized human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing or mitigating human rights risks linked to their operations, products or services by their business relationships [...]

Draft preambular paragraph 12 is in line with Pillar II of the UNGPs in framing what is incumbent on business enterprises as a ‘responsibility’ to respect human rights in contrast to states’ ‘obligation’ to do so. This strongly suggests that, as under the UNGPs, the corporate responsibility to respect human rights cited in the draft preambular paragraph is a non-binding one grounded not in international human rights law but rather in ‘social expectations’<sup>417</sup>.

Draft preambular paragraph 12 of the 2023 updated draft treaty contrasts with the previous draft of the treaty, namely the 2021 Third Revised Draft, the preamble to which stated that ‘business enterprises [...] have the obligation to respect internationally recognized human rights’<sup>418</sup>. In turn, the preamble to the third revised draft had departed from the voluntary corporate ‘responsibility’ to respect human rights under Pillar II of the UNGPs, which had also been recognized in the respective preambles to the Zero Draft and the first and second revised drafts<sup>419</sup>. The suggestion of a corporate ‘obligation to respect’ in the preamble – but solely in the preamble<sup>420</sup> – to the third

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<sup>417</sup> HRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, 7 April 2008, UN Doc. A/HRC/8/5, para. 54. In 2007, Ruggie and Sherman indeed asserted that the corporate responsibility to respect human rights under the UNGPs is neither based on nor analogizes from state-based law. It is rooted in a transnational social norm, not an international legal norm. See, in this regard, Ruggie J and Sherman J, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’ (2017) 28 *European Journal of International Law* 921, at 923.

<sup>418</sup> See preambular paragraph 11 in the Third Revised Draft. In this respect, it should be recalled that many proposals have been made during the consultations held by the OEIGWG for a treaty that places human rights obligations on companies under international law, while still acknowledging that the primary obligation to protect human rights lies with states. See HRC, ‘Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument’, 5 February 2016, UN Doc. A/HRC/31/50, para. 83 and 86).

<sup>419</sup> For instance, the Preamble to the Second Revised Draft provides: ‘Underlining that all business enterprises [...] have the responsibility to respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur, as well as by preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships’.

<sup>420</sup> This was, however, included only in the Preamble to the third revised treaty and not repeated in the core text of the treaty. Notwithstanding this, the Preamble is part of the treaty’s text and, as such, forms part of the context of the

revised draft appeared to foreshadow an attempt to provide for a binding international legal obligation on corporations to avoid infringing individuals' human rights in the context of their activities and business relationships. In response, various states and other relevant stakeholders subsequently and repeatedly questioned whether by turning a non-binding 'responsibility' into a binding obligation, the draft represented a misstatement of international law<sup>421</sup>. As a consequence, draft preambular paragraph 12 to the current 2023 revised draft of the treaty readopts the language of a non-binding corporate 'responsibility' to respect human rights, in line with the UNGPs.

For its part, draft preambular paragraph 17 of the 2023 revised draft treaty reads:

(PP17) *Recognizing* the contribution and complementary role that the United Nations Guiding Principles on Business and Human Rights [...] have played in that regard and to advancing respect for human rights in the business activities [...]

Draft preambular paragraph 17 in the 2023 updated draft highlights the proposed complementarity between the treaty and the UNGPs<sup>422</sup>. It underlines how the proposed treaty is not intended to contradict or undermine the UNGPs<sup>423</sup>.

## 5.2. Scope of the Proposed Treaty

Since the beginning of the treaty process, one of the most debated aspects has been the scope of the proposed instrument. Draft Article 3 of the 2023 revised draft treaty provides for the scope of the treaty in terms of the corporate activities and the human rights principles to be covered. Draft Article 3 provides:

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operative provisions for the purposes of their interpretation, as stated in Article 31(1) and (2) of the Vienna Convention on the Law of Treaties (VCLT), 23 May 1969.

<sup>421</sup> See, in this regard, HRC, 'Annex to the Report of the Seventh Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', UN Doc. A/HRC/49/65, at 6. Recall that, in dismissing the UN Norms, similar arguments were made as to the proposed application of human rights obligations to corporations under international law. In this regard, Ruggie himself observed that there are no established international legal principles which bind businesses in the context of human rights. See UN Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', 22 February 2006, UN Doc. E/CN.4/2006/97, para. 60.

<sup>422</sup> This complementarity was recognized for the first time in the preamble to the 2021 third revised draft. In contrast, the preamble to the second revised draft of the treaty simply highlighted the role played by the UNGPs in terms of affirming the responsibilities of transnational corporations and other business enterprises with respect to human rights.

<sup>423</sup> As observed during treaty consultations, the treaty and the UNGPs would reinforce one another in the 'smart mix' of regulatory measures on business and human rights put forward by the UNGPs. See also UNGPs, Commentary to Principle 3.

3.1. This (Legally Binding Instrument) shall apply to all business activities, including business activities of a transnational character.

3.2. Notwithstanding Article 3.1. above, when imposing prevention obligations on business enterprises under this (Legally Binding Instrument), States Parties may establish in their law, a non-discriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context or the severity of impacts on human rights.

In terms of regulatory targets, the 2023 revised draft treaty covers all business activities, therefore including both the activities of businesses operating within the territory of any one state, as well as the activities carried out by businesses operating at the transnational level, such as TNCs. The scope of the 2023 revised draft treaty is broader than the scope of earlier treaty drafts. Specifically, Draft Article 3 of the Zero Draft Treaty provided that the treaty would apply only to business activities of a transnational character, therefore excluding business activities carried out within the territory of a single national jurisdiction. The choice to broaden the scope of the treaty in the 2023 revised treaty draft is made considering ethical and practical concerns and taking into account the effectiveness of the proposed treaty and its alignment with other non-binding international standards on business and human rights<sup>424</sup>. As to ethical and practical concerns, it has been argued that all business activities, irrespective of whether they are undertaken in a domestic or transnational context, can have negative impacts on individuals' enjoyment of their human rights<sup>425</sup>. As to the effectiveness of the proposed treaty, it has been noted that 'there are major risks of transnational companies structuring themselves in a way to avoid falling within the scope of the

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<sup>424</sup> Intergovernmental Working Group on TNCs and Other Business Enterprises, Annex I, Guidelines for Intersessional Work ahead of 9<sup>th</sup> Session, 23 March 2023, available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session9/igwg-9th-guidelines-intersession-mar-2023.pdf>.

<sup>425</sup> HRC, 'Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument', 5 February 2016, UN Doc. A/HRC/31/50, para. 61. Deva, among others, has argued that, from the point of view of victims of corporate human rights adverse impacts, limiting the treaty to TNCs only, therefore excluding businesses operating at the domestic level but which can equally negatively impact human rights, is problematic. Furthermore, according to Deva, distinguishing between TNCs and domestic businesses will offend the principle of non-discrimination. See Deva S, 'Scope of the Proposed Business and Human Rights Treaty: Navigating through Normativity, Law and Politics' in Deva S and Bilchitz D (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) 154, at 169. Along similar lines, in the context of treaty consultations, it was observed that it is the seriousness of the human rights impact that matters, rather than the type of business activity or nature of the company. See, in this regard, HRC, 'Report on the Fourth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument', 2 January 2019, UN Doc. A/HRC/40/48, para. 73.

instrument<sup>426</sup> should said instrument cover only activities of a transnational character. Finally, it has been noted that the scope of the 2023 revised draft, in terms of regulatory targets, should align with other non-binding international standards on business and human rights, which apply to both transnational and national business activities<sup>427</sup>. Among these standards, the scope of the 2023 revised draft aligns with the UNGPs, which provide that the responsibility to respect human rights applies to all business enterprises, regardless of whether they undertake activities of a domestic or transnational character<sup>428</sup>.

Draft Article 3 also provides:

3.3. This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms binding on the State Parties of this (Legally Binding Instrument).

Discussion<sup>429</sup> has focused on whether the proposed treaty should cover violations of all internationally recognized human rights or should be limited to gross human rights impacts by TNCs and other business enterprises. The 2023 revised draft treaty covers violations of all internationally recognized human rights, including those recognized under customary international law<sup>430</sup>. The scope, in terms of human rights principles to be covered, of the 2023 revised draft treaty aligns with the UNGPs. In this respect, Principle 12 of the UNGPs provides that the corporate responsibility to respect human rights applies to internationally recognized human rights, including but not limited to those enshrined in the International Bill of Rights, as well as those

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<sup>426</sup> Intergovernmental Working Group on TNCs and Other Business Enterprises, Annex I, Guidelines for Intersessional Work ahead of 9<sup>th</sup> Session, 23 March 2023, available at:

<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session9/igwg-9th-guidelines-intersession-mar-2023.pdf>.

<sup>427</sup> *Ibid.*

<sup>428</sup> UNGPs, General Principles: 'these Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure'. See also Commentary to Principle 11, as well as Principle 14.

<sup>429</sup> See Section 3 of the present chapter. To recall, in the context of treaty consultations during the first working session of OEIGWG, the majority of stakeholders observed that it would be inadequate to adopt a treaty addressing only gross corporate human rights impacts, as the activities of business entities could have a negative impact potentially on all human rights. See, this regard, 'Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument', 5 February 2016, UN Doc. A/HRC/31/50, para. 63. See also Deva S, 'Scope of the Proposed Business and Human Rights Treaty: Navigating through Normativity, Law and Politics' in Deva S and Bilchitz D (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) 154, at 175: 'the option of such a narrow treaty (*in terms of subject matter*) will not be very helpful because such a treaty might not cover a great majority of human rights abuses committed by companies all over the world'.

<sup>430</sup> The inclusion of human rights recognized under customary international law is important as states potentially ratifying the treaty might not be parties to certain human rights instruments.

enshrined in the ILO Declaration on Fundamental Principles and Rights at Work and the core ILO Conventions<sup>431</sup>.

### 5.3. Obligations of States Parties with Respect to the Regulation of Business Conduct

Draft Article 6 in the 2023 revised draft treaty sets forth the obligations binding on states parties with respect to the regulation of business conduct. Contrary to early proposals<sup>432</sup> on the elaboration of a treaty which imposes human rights obligations binding on business enterprises under international law, the current treaty draft places instead human rights obligations on states parties in the specific context of business activities. In this respect, it has been observed that ‘the treaty design points to continuity in international human rights law’<sup>433</sup>, meaning that it follows the state-centered model of international human rights instruments. Draft Article 6.1 provides:

6.1. States Parties shall regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises that undertake activities of a transnational character.

Draft Article 6.1 obliges states parties to regulate effectively the conduct of all business entities within their territory, jurisdiction or otherwise under their control. Draft Article 6.1 restates the existing<sup>434</sup> regulatory obligations of states under international human rights law, as part of states’ broader international obligation to protect human rights against interference by third parties, including private actors like corporations<sup>435</sup>. Draft Article 6.1 is in line with Pillar I of the UNGPs. The obligation to protect against adverse human rights impacts by businesses within their territory

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<sup>431</sup> The UNGPs, however, clarify that the list of instruments included in Principle 12 is a non-exhaustive one, specifying that ‘depending on circumstances, business enterprises may need to consider additional standards’. See Commentary to Principle 12 in the UNGPs. By way of example, when carrying out activities in conflict-affected areas, companies might be required to comply with the requirements of international humanitarian law.

<sup>432</sup> To recall, proposals for a treaty to directly bind business enterprises under international law were made, *inter alia*, in the early consultations held by the OEIGWG during its first and second working sessions, as well as by the Treaty Alliance in its first Statement. See Section 1 and Section 3 of the present chapter.

<sup>433</sup> Mares R, 'Regulating Transnational Corporations at the United Nations - The Negotiations of a Treaty on Business and Human Rights' (2022) 26 *The International Journal of Human Rights* 1522, at 1524. Discussed also in Macchi C, *Business, Human Rights and the Environment: The Evolving Agenda* (Asser Press 2022), at 143; Deva S, 'Business and Human Rights: Alternative Approaches to Transnational Litigation' (2021) 17 *Annual Review of Law and Social Science* 139, at 148; Deva S, 'Treaty Tantrums: Past, Present and Future of a Business and Human Rights Treaty' (2022) 40 *Netherlands Quarterly of Human Rights* 211, at 219; Černič JL and Bukor C, 'The Potential United Nations Business and Human Rights Treaty: Turning of the Tides of Justice?' in Bornheim JJ and Riffel C (eds), *New Zealand Yearbook of International Law* (Brill Nijhoff 2022) 97, at 109-110.

<sup>434</sup> Recall paragraph 7 in the Preamble to the 2023 updated draft.

<sup>435</sup> Recall Chapter 3.

or jurisdiction, elaborated in Guiding Principle 1, implies a requirement for states to ‘prevent, investigate, punish and redress’<sup>436</sup> adverse corporate human rights impacts by way of, *inter alia*, regulating effectively corporate conduct.

Elaborating on the obligation of States Parties under Draft Article 6.1 to regulate effectively the activities of companies operating within their territory, jurisdiction or otherwise under their control, Draft Article 6.2 provides:

6.2. States Parties shall adopt appropriate legislative, regulatory, and other measures

to:

- (a) prevent the involvement of business enterprises in human rights abuse;
- (b) ensure respect by business enterprises for internationally recognized human rights and fundamental freedoms;
- (c) ensure the practice of human rights due diligence by business enterprises; [...]

Just like the general obligation in Draft Article 6.1 on which they elaborate, the obligations provided for in Draft Article 6.2 are incumbent on any State Party within whose territory or jurisdiction or otherwise under whose control business activities are carried out, irrespective of the nationality of the entity carrying out the activities. In other words, States Parties are required under the proposed treaty to regulate and adopt measures to ensure that business entities operating within their territory, jurisdiction or otherwise under their control do not interfere with individuals’ enjoyment of their human rights.

Draft Article 6 does not oblige home states to exercise extraterritorial prescriptive jurisdiction to regulate the activities of TNCs in foreign territory. To recall, the geographical scope of a state party’s obligations under the various existing international human rights treaties is generally confined to the territory of states parties<sup>437</sup>. Excluding certain exceptional circumstances where the obligations on states parties apply extraterritorially<sup>438</sup>, current international human rights treaties

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<sup>436</sup> UNGPs, Principle 1.

<sup>437</sup> Recall, generally, Chapter 3 of the thesis.

<sup>438</sup> Human rights treaties may apply extraterritorially when the state exercises jurisdiction outside its national territory, specifically in terms of power and effective control over areas and individuals located outside its territory. Control over areas and/or individuals, however, are premised on the presence of state agents on the territory of a foreign state. In the context of business and human rights, however, the entities operating on the territory of a foreign state (or host

law do not oblige a state party to regulate the extraterritorial conduct of its corporate nationals in order to protect the enjoyment by individuals in foreign territory of their human rights<sup>439</sup>.

The regulatory obligations set forth in Draft Article 6 accord with the scope of these existing obligations. This, however, does not preclude a home state party from exercising their extraterritorial prescriptive jurisdiction in order to regulate the activities of its corporate nationals abroad, should it wish. Draft Article 6 leaves a home state party discretion in this regard<sup>440</sup>.

To achieve the ends referred to in Draft Article 6.2, which in turn elaborates on the obligation of States Parties to regulate business activities as set out in Draft Article 6.1, the chapeau to Draft Article 6.4 provides that measures adopted by States Parties ‘shall include legally enforceable requirements for business enterprises to undertake human rights due diligence’. Draft Article 1.8 of the 2023 revised draft defines ‘human rights due diligence’ as follows:

1.8. “Human rights due diligence” shall mean the processes by which business enterprises identify, prevent, mitigate and account for how they address their adverse human rights impacts. [...] These processes will in every case comprise the following elements:

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state) are companies, that is, non-state actors. See the analysis of the territorial and extraterritorial scope of international human rights treaties in Chapter 3 of the thesis.

<sup>439</sup> This was also emphasized during the Ruggie process, where it was observed that an extraterritorial obligation to protect human rights against the adverse impacts of third actors, including companies, is generally not found in international human rights instruments. See, in this respect, HRC, ‘State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: an Overview of Treaty Body Commentaries’, 13 February 2007, UN Doc. A/HRC/4/35/Add.1, para. 84. Along similar lines, Guiding Principle 2 in the UNGPs provides that, while states are under no international legal obligation to regulate the extraterritorial activities of their corporate nationals to prevent adverse impacts abroad, they are in principle allowed to do so, provided there exists a recognized jurisdictional basis to do so.

<sup>440</sup> The academic literature has extensively discussed the issue of states’ extraterritorial human rights obligations with respect to business activities and human rights, including in the context of current treaty efforts. See, *inter alia*, Shutter OD, ‘Towards a New Treaty on Business and Human Rights’ (2015) 1 *Business and Human Rights Journal* 41; Augenstein D and Kinley D, ‘When human rights ‘responsibilities’ become ‘duties’: the extra-territorial obligations of states that bind corporations’ in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business* (Cambridge University Press 2013) 271; Bernaz N, ‘Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?’ (2013) 117 *Journal of Business Ethics* 493; McCorquodale R and Simons P, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 *The Modern Law Review* 598; O’Brien C, ‘The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal’ (2018) 3 *Business and Human Rights Journal* 47; Deva S, ‘Acting Extraterritorially to Take Multinational Corporations for Human Rights Violations: Who Should ‘Bell the Cat?’ (2004) 5 *Melbourne Journal of International Law* 37; Krajewski M, ‘The State Duty to Protect Against Human Rights Violations through Transnational Business Activities’ (2018) 23 *Deakin Law Review* 13; Berkes A, ‘Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights’ in Radi Y (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar 2018) 304; Shutter OD, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, 2006; Skogly S, ‘Regulatory Obligations in a Complex World: States’ Extraterritorial Obligations Related to Business and Human Rights’ in Deva S and Bilchitz D (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) 318.

- (a) identifying and assessing any human rights impacts with which the business enterprise may be involved through its own activities or as a result of its business relationships;
- (b) taking appropriate measures to prevent and mitigate such adverse human rights impacts;
- (c) monitoring the effectiveness of its measures to address such adverse human rights impacts;
- (d) communicating how the relevant business enterprise addresses such adverse human rights impacts regularly and in an accessible manner to stakeholders, particularly to affected and potentially affected persons;

In turn, Draft Article 1.6 defines ‘business relationships’ as ‘any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, [...] or any other structure or relationship, including throughout their value chains’<sup>441</sup>. In this light, the human rights due diligence process envisaged by Draft Article 6.2(c), as elaborated on in the chapeau to Draft Article 6.4, applies to the human rights impacts with which the business enterprise may be involved as a result of its business relationships with entities potentially operating outside the territory of the regulating state, which is to say extraterritorially – entities such as foreign subsidiaries, suppliers, and other affiliates. In other words, the obligation incumbent on States Parties in Draft Article 6.2(c), as elaborated on in the chapeau to Draft Article 6.4, that is to devise human rights due diligence requirements covering the human rights impacts the business enterprise may be linked to through its business relationships with entities in its value chain, arguably translates into the adoption by States Parties of ‘domestic measures with extraterritorial implications’ over the conduct of entities potentially operating outside the regulating State Party<sup>442</sup>.

The steps of the due diligence process set forth in Draft Article 1.8 reflect the human rights due diligence steps in the UNGPs. In line with Guiding Principle 18, Draft Article 1.8(a) of the 2023 revised draft treaty speaks of businesses identifying and assessing any adverse human rights impact

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<sup>441</sup> Draft Article 1.6 of the 2023 updated draft.

<sup>442</sup> Recall the distinction between ‘exercise of extraterritorial prescriptive jurisdiction properly so called’ and ‘domestic measures with extraterritorial implications’ in Chapter 3.

arising from their own business activities and their business relationships. Along the lines of Guiding Principle 19, Draft Article 1.8(b) refers to appropriate measures to prevent and mitigate. Consonant with Guiding Principle 20 and Principle 21, Draft Article 1.8(c) refers to monitoring and tracking the effectiveness of the measures adopted to address such adverse human rights impacts, while Draft Article 1.8(d) speaks of businesses communicating regularly and in an accessible manner to affected and potentially affected stakeholders how they address such adverse human rights impacts in their activities and business relationships.

Overall, by placing legally enforceable requirements to exercise human rights due diligence on business enterprises, states would discharge their international obligation to ensure that all business enterprises respect human rights, which is to say avoiding causing or contributing to adverse human rights impacts in their business activities and business relationships with subsidiaries and entities in their global value chains. The draft provision on mandatory human rights due diligence in the 2023 revised draft treaty is arguably a significant example of the attempt at ‘hardening’ the UNGPs’ non-binding corporate responsibility to respect human rights, which is grounded in the exercise of human rights due diligence. While, according to the UNGPs, businesses should exercise human rights due diligence as a matter of ‘social norms and expectations’<sup>443</sup>, under the proposed treaty businesses would be required, albeit indirectly, to exercise human rights due diligence as a matter of domestic implementation of states parties’ international human rights obligations.

#### 5.4. Obligations of States Parties with Respect to Access to Remedies for Victims of Corporate Adverse Human Rights Impacts

To recall, the perceived gaps in access to remedy and justice for victims of adverse corporate human rights impacts are among the reasons behind the demand for the elaboration of a multilateral treaty on business and human rights<sup>444</sup>. Draft Article 7 of the 2023 revised draft treaty deals with the right to an effective remedy, a universal right recognized in a number of universal and regional human

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<sup>443</sup> As discussed in Chapter 4, the corporate responsibility to respect, together with the requirement to exercise HRDD, responds to social expectations rather than legal requirements: ‘This responsibility is neither based on nor analogizes from state-based law. It is rooted in a transnational social norm, not an international legal norm. It serves to meet the company’s social license to operate, not its legal license’. See Ruggie J and Sherman J, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’ (2017) 28 *European Journal of International Law* 921, at 923-924.

<sup>444</sup> The States subscribing to the 2013 Ecuador Declaration, *inter alia*, recognized that a treaty was necessary to ‘provide appropriate protection, justice and remedy to the victims of human rights abuses resulting from or related to the activities of some TNCs and other business enterprises’. Along similar lines, from the outset of discussions around a potential treaty on business and human rights, the Treaty Alliance pushed for a treaty which, *inter alia*, requires states parties to provide for access to an effective remedy. Also in treaty consultations held by the OEIGWG, various stakeholders made it clear that, in order for the proposed instrument to be meaningful in terms of victims’ protection, it should address existing gaps in access to remedy by way of improving victims’ access to judicial and non-judicial mechanisms when adverse human rights impacts by corporations, especially TNCs, occur.

rights instruments<sup>445</sup>. Draft Article 7 aims to strengthen this universal right in the context of business activities, especially those of a transnational character, and human rights. Draft Article 7.1 provides:

7.1. States Parties shall provide their relevant State agencies<sup>446</sup> with the necessary competence in accordance with this (Legally Binding Instrument) to enable victims' access to adequate, timely and effective remedy and access to justice, and to overcome the specific obstacles which women and groups in vulnerable and marginalized situations face in accessing such mechanisms and remedies.

Draft Article 7.1 seems to align with Pillar III of the UNGPs, which specifically deals with access to remedies for victims of adverse corporate human rights impacts. To recall, Guiding Principle 25 provides that, as part of their obligation to protect human rights, states are required to provide victims of adverse corporate human rights impacts with access to effective remedies. With regards to judicial mechanisms specifically, Guiding Principle 26 provides that states should take appropriate steps to ensure the effectiveness of these mechanisms, including by way of removing legal, practical and procedural obstacles that could lead to a denial of justice.

In line with the recommendations of Guiding Principle 26, Draft Article 7.2 provides:

7.2. States Parties shall, consistent with its domestic legal and administrative systems:

[...]

(b) progressively reduce the legal, practical, and other relevant obstacles that, individually or in combination, hinder the ability of a victim from accessing such

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<sup>445</sup> See, *inter alia*, Article 8 of the Universal Declaration of Human Rights (UDHR): 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. Article 2.3(a) of the International Covenant on Civil and Political Rights (ICCPR) provides: 'Each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy [...]'. Along similar lines, Article 13 of the European Convention on Human Rights (ECHR) provides that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority [...]'. With specific regards to human rights harms by legal persons, the UN General Assembly has observed that 'in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim [...]'. See, in this regard, OHCHR, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 21 March 2006, UN Doc. A/RES/60/147, para. 15.

<sup>446</sup> The current draft defines 'relevant State agencies' as encompassing 'judicial bodies, competent authorities and other agencies and related services relevant to administrative supervision and enforcement of the measures referred to in this (Legally Binding Instrument) to address human rights abuse, and may include courts, law enforcement bodies, regulatory authorities, administrative supervision bodies, and other State-based non-judicial mechanisms'. See Article 1.10.

State agencies [including domestic courts] for the purposes of seeking an effective remedy; [...]

Relevant measures indicated to assist states parties in reducing obstacles to access to remedy include, in line with the recommendations of the UNGPs, reducing the costs associated with bringing claims related to corporate adverse human rights impacts<sup>447</sup>, as well as ‘adopting measures to facilitate the production of evidence, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof’<sup>448</sup>. The proposed reversal of the burden of proof becomes relevant in the context of litigation where victims oftentimes struggle to access information to demonstrate that a company’s breach of a relevant duty led to the adverse human rights impact suffered.

#### 5.5. Obligations of States Parties with Respect to the Liability of Legal Persons

Civil society groups and a number of states from the global South advocate the legal liability of corporate actors whose acts or omissions infringe human rights. To this end, Draft Article 8.1 and Article 8.2 of the 2023 revised draft treaty provide:

8.1. States Parties shall adopt such measures as may be necessary to establish a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their business activities or relationships, including those of a transnational character.

8.2. [...] Each State Party shall ensure, consistent with its domestic and administrative systems, that the type of liability established under this article shall be:

- (a) responsive to the needs of victims as regards remedy; and
- (b) commensurate to the gravity of the human rights abuse.

Draft Article 8.1 obliges states parties to adopt measures to establish a domestic system of legal liability of business entities and natural persons for the adverse human rights impacts stemming from their business activities and business relationships. Draft Article 8 also addresses the potential

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<sup>447</sup> Article 7.4(a).

<sup>448</sup> Article 7.4(d).

liability of legal and natural persons for ‘conspiring to commit human rights abuse’<sup>449</sup> and for corporate complicity, meaning for ‘aiding, abetting, facilitating, and counselling the commission of human rights abuse’<sup>450</sup> by other state or non-state actors. The risk of complicity by corporations in the adverse human rights impacts of third parties is also addressed in the UNGPs<sup>451</sup>, specifically in the context of human rights due diligence processes, which are envisaged by the SRS, *inter alia*, to help companies avoid direct and indirect involvement in conduct by state actors which would amount to violations of international human rights law, as well as in conduct by non-state actors which, if engaged in by a state, would violate international human rights law.

The 2023 revised draft treaty omits two elements of Draft Article 8 of the third revised draft of the treaty.

First, Draft Article 8 of the third revised draft addressed the potential liability of companies for the breach of a legal duty to prevent<sup>452</sup> legal or natural persons with whom they have a business relationship from causing or contributing to adverse human rights impacts<sup>453</sup>. The current Draft Article 8 does not oblige states parties to take measures in this regard. At the same time, states parties remain free to establish the liability of companies for failure to prevent adverse human rights impacts resulting from their business relationships.

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<sup>449</sup> Article 8.3(a).

<sup>450</sup> Article 8.3(b).

<sup>451</sup> UNGPs, Commentary to Principle 17.

<sup>452</sup> This is now addressed in Article 6.5 of the current updated draft, which requires states parties to ‘take necessary measures to ensure that business enterprises take appropriate steps to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such abuse in appropriate cases’.

<sup>453</sup> Draft Article 8.6. of the third revised draft provided: ‘States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, including those of a transnational character, for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses, when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses [...] but failed to take adequate measures to prevent the abuse’. The relevant criteria upon which to assess the factual relationship between the company and another legal or natural person, for the purpose of establishing the liability of the former, included degree of control, management or supervision exercised by the company. With respect to this, a novelty introduced by the second revised draft of the treaty and kept in the third revised draft was that the liability of a company for the failure to prevent adverse human rights impacts might arise not only when the company controls, manages or supervises the relevant activity that caused the adverse impact, but also when it controls, manages or supervises the legal person allegedly responsible for the adverse impact. In light of this, a company could be held liable if it had overall control over another company, even if not directly involved in the specific activities giving rise to harms. This has also been considered to be ‘more in line with the reality of global supply chains, in which parent or buyer companies often do not directly control the daily activities of their subsidiaries or suppliers, but still exercise a significant degree of control or supervision, for instance by devising group-wide policies or through their purchasing practices’. See Macchi C, *Business, Human Rights and the Environment: The Evolving Agenda* (Asser Press 2022) at 146.

Secondly, Draft Article 8 of the third revised draft contemplated the possibility of adopting human rights due diligence as a defense against legal liability, when companies are able to demonstrate that they adopted all necessary measures to avoid causing or contributing to adverse human rights impacts in their business activities and business relationships, but adverse impacts nonetheless occur. In this respect, in line with the UNGPs<sup>454</sup>, the third revised draft clarified that ‘human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability [...]’<sup>455</sup>. In contrast, Draft Article 8 in the 2023 revised draft treaty does not specifically include prohibitions on certain types of defenses, including human rights due diligence. However, it has been noted that ‘the concerns underlying Article 8.7 of the 3<sup>rd</sup> revised draft (which sought to ensure that human rights due diligence would not be an automatic defense to legal liability) have been addressed in two provisions [of the 2023 revised draft] designed to ensure that the allocation of evidential burdens of proof [...] are appropriate in light of the key overarching objective of prevention of harm and access to remedy’<sup>456</sup>. One of the two provisions, Draft Article 7.4(d) provides that, in order to reduce obstacles to access to remedy, states parties shall consider the potential reversal of the burden of proof, ‘including the possible imposition of strict or absolute liability’<sup>457</sup>.

## 5.6. Obligations of States Parties with Respect to the Adjudication of Corporate Defendants

Draft Article 9 of the 2023 revised draft treaty looks at adjudicative jurisdiction, including in the context of transnational civil litigation for alleged adverse human rights impacts of TNCs. Adjudicative jurisdiction concerns the competence of states’ courts with regards to disputes involving a foreign element<sup>458</sup>. In the context of business and human rights, the foreign element might be the place where the adverse human rights impacts have occurred, that is, a state other than the state where the claim is brought, or forum state. Additionally, the foreign element might be the corporate defendant against whom the claim is brought, that is, the company allegedly

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<sup>454</sup> With respect to the possibility of using HRDD as a defense, Principle 17 of the UNGPs provides that, while exercising human rights due diligence can help businesses mitigate the risk of legal claims brought against them ‘by showing that they took every reasonable step to avoid involvement’ in adverse human rights impacts, they should not assume that exercising human rights due diligence will automatically and fully absolve them from liability for causing or contributing to adverse human rights impacts in the context of their own business activities, as well as their business relationships with third parties.

<sup>455</sup> Draft Article 8.7 of the third revised draft.

<sup>456</sup> Intergovernmental Working Group on TNCs and Other Business Enterprises, Suggested Chair Proposals for Select Articles of the LBI, available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session8/2022-11-24/igwg-8th-suggested-chair-proposals-commentary.pdf>, at 6.

<sup>457</sup> *Ibid.*

<sup>458</sup> Crawford J, *Brownlie’s Principles of Public International Law* (9th edn, Oxford University Press 2019) at 458. Recall, generally, Chapter 2 of the present thesis.

responsible for the adverse human rights impact is a national of a state other than the forum state. Draft Article 9 provides:

9.1. States Parties shall take such measures as may be necessary to establish its jurisdiction in respect of human rights abuse in cases where:

- (a) the human rights abuse took place, in whole or in part, within the territory or jurisdiction of that State Party;
- (b) the relevant harm was sustained, in whole or in part, within the territory or jurisdiction of that State Party;
- (c) the human rights abuse was carried out by [...] a legal person domiciled in the territory or jurisdiction of that State Party;
- (d) a victim seeking remedy through civil law proceedings is a national of, or has his or her habitual residence in the territory or jurisdiction of, that State Party.

Draft Article 9 gives rise to an obligation on states parties to vest jurisdiction in their domestic courts on the basis of specific grounds<sup>459</sup>. Foremost, it gives rise to an obligation on both host states and home states of TNCs to vest jurisdiction in their domestic courts to hear civil claims arising out of adverse human rights impacts of business entities. On the one hand, the courts of host states might have jurisdiction over claims against business actors for adverse human rights impacts located in their territory, irrespective of the nationality of the legal person alleged to have caused or contributed to the adverse human rights impact. On the other hand, the courts of home states of TNCs might have jurisdiction with respect to claims regarding adverse human rights impacts caused or contributed to by business actors incorporated within their domestic legal system – therefore considered corporate nationals of the home state – irrespective of where the alleged impacts have occurred. Draft Article 9.1. gives rise to an obligation on a third set of states parties to vest jurisdiction in their domestic courts, on the basis of the nationality of the victim of alleged adverse human rights impacts stemming from business activities.

Where states parties are able to assert jurisdiction as per the cases above, Draft Article 9.3 provides:

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<sup>459</sup> In the context of treaty negotiations, it was observed that granting jurisdiction to a broad range of states ‘was appropriate under international law and was desirable in order to address the access to justice challenges’ in the context of adjudicative jurisdiction. See, in this regard, HRC, ‘Report on the Sixth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, 14 January 2021, UN Doc. A/HRC/46/73, para. 34.

9.3. States Parties shall take such measures [...] to ensure that decisions by relevant State agencies relating to the exercise of jurisdiction [...] shall respect the rights of victims [...] including with respect to:

- (a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter [...].

Draft Article 9.3 attempts to ensure that the use of the doctrine of *forum non conveniens* in the context of litigation, specifically transnational litigation, respects the rights of victims, in line with Draft Article 4 of 2023 revised draft treaty. The proposed regulation of the application of the doctrine of *forum non conveniens* responds to stakeholders' early concerns about the jurisdictional obstacles generally encountered in the context of transnational litigation<sup>460</sup>. Additionally, the doctrine of *forum non conveniens* has at times been invoked by corporate defendants in the context of disputes arising out of harms stemming from their worldwide operations<sup>461</sup> as a 'delaying and obstructive tactic'<sup>462</sup>. Overall, the proposed regulation of the use of *forum non conveniens* by states parties' domestic courts seeks to tackle gaps in victims' access to remedy through judicial mechanisms<sup>463</sup>.

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<sup>460</sup> See, *inter alia*, HRC, 'Report on the Fifth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 9 January 2020, UN Doc. A/HRC/43/55, para. 13; HRC, 'Report on the Sixth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 14 January 2021, UN Doc. A/HRC/46/73, para. 34. Adverse human rights impacts stemming from the global business activities of TNCs are usually located in host states, where locally incorporated subsidiaries operate. However, victims oftentimes sue subsidiaries, parent companies or both in the courts of home states of parent companies. When these entities are sued in the home jurisdiction of the parent company, courts may decline to exercise jurisdiction on the basis of *forum non conveniens* or an equivalent doctrine, reasoning that a foreign court, usually a court of the state where the adverse human rights impact has occurred, is the more appropriate forum. While the courts of foreign states may be the more appropriate venue in certain circumstances, they may not provide optimal conditions for the legal pursuit of harms by transnational corporations. Recall, generally, Chapter 2.

<sup>461</sup> Duval-Major J, 'One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff' (1992) 77 *Cornell Law Review* 650, at 650.

<sup>462</sup> HRC, 'Report on the Third Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 24 January 2018, UN Doc. A/HRC/37/67, para. 105.

<sup>463</sup> During treaty negotiations, a number of stakeholders have strongly supported the choice of addressing *forum non conveniens*. According to civil society actors, the provision is necessary in order to tackle gaps in victims' access to remedy through judicial mechanisms. See HRC, 'Report on the Third Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 24 January 2018, UN Doc. A/HRC/37/67, para. 110; HRC, 'Report on the Fifth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 9 January 2020, UN Doc. A/HRC/43/55, para. 99; HRC, 'Report on the Sixth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 14 January 2021, UN Doc. A/HRC/46/73, para. 29.

In comparison to Draft Article 9 of the third revised draft of the ‘Legally Binding Instrument’, Draft Article 9 of the 2023 revised draft treaty omits provisions addressing the exercise of adjudicative jurisdiction in cases of connected claims<sup>464</sup> and the possibility of *forum necessitatis*<sup>465</sup>. First, with respect to connected claims, it has been noted that ‘these matters are best governed by principles of domestic conflicts of law, and there is nothing in the LBI to prevent a State from taking jurisdiction on this basis in any event’<sup>466</sup>. This mechanism is already provided for by the internal rules on private international law of some countries, which allow to exercise jurisdiction over a legal person not domiciled in the forum state, such as a foreign subsidiary, when the claims against the parent company and the foreign subsidiary are ‘so closely connected as to justify the joining of defendants for reasons of process efficiency’<sup>467</sup>. The possibility of asserting jurisdiction in the case of connected claims is worth analyzing in the broader context of existing obstacles<sup>468</sup> encountered by states when foreign subsidiaries are sued in their domestic courts along with their parent company. While not specifically provided for by Draft Article 9, states parties have the discretion to allow their domestic courts to hear claims against foreign subsidiaries when it can be demonstrated that the claims against the subsidiaries are connected with claims against the parent company domiciled in their territory.

Secondly, *forum necessitatis* is omitted in the 2023 revised draft treaty ‘on grounds of the substantial overlap of this basis of jurisdiction [...] and the bases of jurisdiction set out in Article 9.1’<sup>469</sup> discussed above. The application of the *forum necessitatis* rule generally allows domestic courts to

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<sup>464</sup> Potentially allowing parent companies of TNCs to be sued in their home state together with their foreign subsidiaries when the claims concerning alleged adverse human rights impacts are connected, Draft Article 9.4 of the third revised draft provided that ‘courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum state, if the claim is connected with a claim against a legal or natural persons domiciled in the territory of the forum state’.

<sup>465</sup> With respect to *forum necessitatis*, Draft Article 9.5 of the third revised draft provided that ‘courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum state if no other effective forum guaranteeing a fair judicial process is available and there is a connection to the state party concerned’.

<sup>466</sup> Intergovernmental Working Group on TNCs and Other Business Enterprises, Suggested Chair Proposals for Select Articles of the LBI, available at:

<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session8/2022-11-24/igwg-8th-suggested-chair-proposals-commentary.pdf>, at 7.

<sup>467</sup> Augenstein D and Jägers N, ‘Judicial Remedies: The Issue of Jurisdiction’ in Rubio JJÁ and Yiannibas K (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 7, at 31-34.

<sup>468</sup> It is common for victims of corporate adverse human rights impacts located in host states to sue locally incorporated subsidiaries in the courts of home states along with parent companies. While asserting jurisdiction over the parent company, a corporate national of the forum state, will generally not be an issue on the basis of the nationality principle, courts of the home state have traditionally been unable to assert jurisdiction over foreign subsidiaries, because the entities in question, which are legally distinct from their parent company, are incorporated and domiciled in a foreign state.

<sup>469</sup> Intergovernmental Working Group on TNCs and Other Business Enterprises, *Suggested Chair Proposals for Select Articles of the LBI*, available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session8/2022-11-24/igwg-8th-suggested-chair-proposals-commentary.pdf>, at 7.

exercise jurisdiction over legal persons not domiciled in the forum state, for instance foreign subsidiaries, where no other effective forum is available<sup>470</sup>.

#### 5.7. Obligations of States Parties with Respect to the Applicable Law in Claims against TNCs and Other Business Enterprises

Related to the issue of adjudicative jurisdiction is the question of which body of law to be applied by courts of the forum state in transnational civil claims against TNCs and other business enterprises. Once jurisdiction is established over a claim, the subsequent choice of law stage entails the selection of the body of law applicable to the dispute. With regards to the body of procedural law to be applied by courts seized on a given claim, Draft Article 11 of the 2023 revised draft treaty provides:

11.1. All matters of procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court seized on the matter.

The rule therefore provides that, for procedural matters, the body of law of that court will apply<sup>471</sup>. It is in the context of substantive rules to be applied to claims against corporate actors that the proposed treaty provides victims of alleged adverse human rights impacts the possibility to choose the most protective legislative framework. In this respect, the draft treaty provides:

11.2. All matters of substance which are not specifically regulated under this (Legally Binding Instrument) may, upon the request of the victim, be governed by the law of another State where:

- (a) the acts or omissions have occurred or produced effects; or

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<sup>470</sup> In the context of treaty negotiations, stakeholder have regarded *forum necessitatis* important to alleviate obstacles generally encountered in the context of transnational civil litigation for adverse human rights impacts by corporate actors and, as such, to improve victims' chances to have their claims heard in domestic judicial settings. See, *inter alia*, HRC, 'Report on the Fifth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 9 January 2020, UN Doc. A/HRC/43/55, para. 13; HRC, 'Report on the Sixth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 14 January 2021, UN Doc. A/HRC/46/73, para. 34.

<sup>471</sup> The text of the provision is unclear as to whether 'the law of that court' refers to the law of the forum state or foreign law. It should be noted that Article 11 altogether has been recommended to be deleted 'on the basis that it covers matters that are best left to be dealt with under prevailing domestic rules on conflicts of law'. See Intergovernmental Working Group on TNCs and Other Business Enterprises, Suggested Chair Proposals for Select Articles of the LBI, available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session8/2022-11-24/igwg-8th-suggested-chair-proposals-commentary.pdf>, at 8.

- (b) the natural or legal person alleged to have committed the acts or omissions is domiciled.

In other words, the proposed treaty would allow victims to choose a body of substantive rules to be applied to the claim other than the forum state's, including the substantive rules of the state where the corporate actor allegedly responsible for the adverse human rights impact is domiciled, including the rules of the home state where the actor is incorporated, regardless of where the harmful action was initiated, or the adverse human rights impact took place. Draft Article 11.2, by allowing to choose the substantive rules applicable to claims against corporate actors, seeks to enhance victims' protection in transnational litigation.

In the broader context of obstacles encountered in the application of rules of private international law to corporate actors, the choice of applicable law might give rise to additional hurdles for victims of adverse corporate human rights impacts. In the context of transnational civil litigation for harms stemming from business activities, the *lex loci*<sup>472</sup> is generally applied by forum courts. As observed during treaty negotiations, however, not always do the domestic rules of the place where the alleged wrongs occur, generally the host state, provide adequate protection of human rights<sup>473</sup>, as they may sometimes impose an inadequate standard of liability of corporate actors. As such, the body of substantive laws of host states might be less favorable to victims of corporate harmful activities. In this sense, therefore, Draft Article 11 of the proposed treaty seeks to fill in the gap in victims' protection when adjudicating transnational adverse human rights impacts, by specifically allowing victims to choose the system of substantive law to be applied to their case, most importantly the substantive rules of the home state of the corporate defendant, which might provide for a more protective legislative framework.

## 6. Conclusion

A process is ongoing under the auspices of the UN to elaborate a multilateral binding treaty on business and human rights. This process has been sparked by the discontent of relevant

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<sup>472</sup> Recall, generally, Chapter 2. Claims in the context of business and human rights are generally governed by tort law. In the field of tort law, torts are generally governed by the law of the place where they have occurred. The location of the tort typically determines the body of law applicable to the dispute both in common and civil law jurisdiction.

<sup>473</sup> See HRC, 'Report on the Fifth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 9 January 2020', UN Doc. A/HRC/43/55, para. 13; HRC, 'Report on the Sixth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 14 January 2021, UN Doc. A/HRC/46/73, para. 36. See also Statement by FIDH delivered during the 8<sup>th</sup> Session of the OEIGWG with regards to Article 11 of the Third Revised Draft, available at: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8>.

stakeholders both with the non-binding character of existing international standards on business and human rights, specifically the UNGPs, and with a number of methodological and substantive aspects of this instrument. Early proposals on the substantive elements of the proposed legally-binding instrument reflect the intention of developing a treaty which not only complements and aligns with the UNGPs but also acts as a logical extension of the UNGPs, in terms of filling some of the perceived gaps of the latter instrument. But the ongoing treaty process has been met with opposition by various other stakeholders, including a number of states from the global North, which argue that the elaboration of a multilateral binding treaty is unnecessary and continue to support enhanced implementation of the UNGPs at the national level instead.

The role that the UNGPs, as an international legally non-binding or ‘soft’ standard in business and human rights, continue to play in this ongoing international law-making process is undeniable. Selected provisions in the most recent draft treaty highlight the substantive alignment between the treaty draft and the UNGPs. They also highlight how the proposed treaty attempts to go beyond the UNGPs by seeking to tackle some of the perceived gaps of the latter instrument and some of the obstacles traditionally encountered by national governments in the domestic regulation of corporate conduct and adjudication of corporate actors.

Treaty negotiations are ongoing and the current draft of the treaty is most likely to be further revised. It is still uncertain whether and when any final treaty text will be adopted, let alone whether, if adopted, it will be ratified by home states of the largest and most powerful TNCs. Notwithstanding this, the role that the UNGPs continue to play in this effort towards new international law in the area of business and human rights is undeniable. The fact that the UNGPs have served as transitional stage for the ongoing international legalization in the area of business and human rights is reflected in either process leading to the beginning of treaty negotiations and, more significantly, in the substantive aspects of the 2023 revised draft of the treaty.



**PART II: BACK TO THE NATIONAL LEVEL**

## CHAPTER 6

### From International 'Soft' Law to National Law: The UNGPs in National Mandatory Human Rights Due Diligence Legislation

#### 1. Introduction

Parallel to the current treaty process, 'hardening' processes of elements of the UNGPs have been going on at the national level. These processes have translated into domestic law elements of the UNGPs' corporate responsibility to respect human rights by imposing binding obligations on corporate actors. More specifically, the core component of the corporate responsibility to respect human rights, namely human rights due diligence, has been embodied in legislation in several jurisdictions. These developments are commonly referred to as 'mandatory human rights due diligence' legislation.

The present chapter explores these national laws, which impose on companies a domestic legal obligation to exercise human rights due diligence. Put differently, the chapter is concerned with the move in the area of business and human rights from international 'soft' law to national law. It shows how norms enshrined in legally non-binding international instruments 'may provide a model for domestic legislation and thus become legally binding internally, while remaining non-binding internationally'<sup>474</sup>.

Section 2 briefly discusses the emerging trend towards a binding corporate obligation to exercise human rights due diligence at the national level, highlighting some of the reasons behind the call for mandatory corporate human rights due diligence. Section 3 introduces the categories of existing national legislation that deal with business and human rights issues. It then introduces three selected case studies of national legislation on mandatory human rights due diligence. Section 4 highlights substantive aspects of the selected legislation. Section 5 investigates how the selected legislative instruments respectively incorporate into domestic law and reflect specific elements of principles enshrined in the UNGPs.

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<sup>474</sup> Shelton D, 'Soft Law' in Armstrong D (ed), *Handbook of International Law* (Routledge 2008) at 2. See also Chinkin C, 'The Challenge of Soft-Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, at 858.

## 2. The Trend Towards Mandatory Corporate Human Rights Due Diligence Under National Law

To recall, the UNGPs do not place binding obligations on companies to exercise human rights due diligence as part of their ‘responsibility’ to respect human rights under Pillar II<sup>475</sup>. However, a trend towards binding corporate obligations to exercise human rights due diligence at the national level has emerged in response both to poor implementation by companies of their ‘soft’ – that is, non-binding – ‘responsibility to respect’ and to the perceived failure of non-binding international instruments on business and human rights, and specifically the UNGPs, to improve standards of business conduct.

As to the corporate implementation of the ‘responsibility’ to respect human rights, the EU Commission reports that, ‘despite the influence of the UNGPs, the actual implementation of due diligence for human rights [...] impacts has been very poor in practice’<sup>476</sup>. Recent studies have shown that many companies do not implement at all human rights due diligence as envisaged by the UNGPs, or although purporting to implement it, ‘do not demonstrate practices that meet the [expectations] set by the Guiding Principles’<sup>477</sup>, in not identifying, preventing, or mitigating, human rights risks effectively<sup>478</sup>. The 2020 Corporate Benchmark Assessment shows that almost half of the 229 companies assessed across all sectors fail to score any points with respect to the exercise of human rights due diligence<sup>479</sup>. Two years later, in 2022, the same Assessment shows that almost half of the 129 companies examined across three sectors, namely food and agriculture, ICT manufacturing and automotive manufacturing, fail to meet the expectations for the initial steps of the human rights due diligence process envisaged by the UNGPs<sup>480</sup>.

As for those companies that at least purport to implement the responsibility to respect human rights, among weaknesses in corporate human rights due diligence practices the UN Working

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<sup>475</sup> Recall Chapter 4.

<sup>476</sup> See in this regard European Commission, ‘Study on Due Diligence Requirements through the Supply Chain – Final Report’ (January 2020) at 243. Available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.

<sup>477</sup> See Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, 16 July 2018, UN Doc. A/73/163, para. 25.

<sup>478</sup> See, in this regard, OHCHR, ‘UN Human Rights “Issues Paper” on legislative proposals for mandatory human rights due diligence by companies’ (June 2020), at 8. Available at: [https://www.ohchr.org/Documents/Issues/Business/MandatoryHR\\_Due\\_Diligence\\_Issues\\_Paper.pdf](https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf).

<sup>479</sup> World Benchmarking Alliance, *Corporate Human Rights Benchmark 2020: Key Findings*, 3, available at: <https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf>.

<sup>480</sup> World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022: Insights Report*, 3, available at: [https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report\\_FINAL\\_23.11.22.pdf](https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf).

Group on the issue of human rights and transnational corporations and other business enterprises<sup>481</sup> has highlighted the lack of understanding by companies that human rights due diligence should focus on the actual and potential risks to rights-holders, rather than to the business<sup>482</sup>; the tendency to undertake human rights due diligence processes as a box-ticking exercise, without meaningful engagement of stakeholders, especially vulnerable or at-risk groups<sup>483</sup>; and the failure by companies to address risks beyond first-tier companies in their global supply chains<sup>484</sup>. In response to these weaknesses, the Working Group has recommended that states adopt domestic measures to legally require companies to exercise human rights due diligence<sup>485</sup>, so as to ‘advance corporate human rights due diligence as part of standard business practice’<sup>486</sup>.

The poor implementation of the corporate ‘responsibility’ to respect human rights has been generally attributed to the legally non-binding character of the UNGPs specifically<sup>487</sup>. According to stakeholders, the UNGPs’ corporate responsibility to respect human rights has fallen short of improving the way in which companies identify and address their adverse human rights impacts<sup>488</sup> because it does not give rise to any legally binding obligations for companies to exercise human rights due diligence<sup>489</sup>. The lack of legally binding obligations in relation to human rights due diligence is alleged to have ‘allowed corporations to continue to disregard appalling human rights abuses [...] taking place throughout their global value chains’<sup>490</sup>. In light of this, it has been argued that introduction of legal obligations is necessary in the area of human rights due diligence, ‘where progress resulting from voluntary measures has been slow’<sup>491</sup>. The UN Working Group, for its part,

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<sup>481</sup> The body of experts established following the adoption of the UNGPs to promote worldwide dissemination and implementation of the instrument.

<sup>482</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, 16 July 2018, UN Doc. A/73/163, para. 25(a).

<sup>483</sup> *Ibid.*, para. 25(c).

<sup>484</sup> *Ibid.*, para. 29.

<sup>485</sup> *Ibid.*, para. 93.

<sup>486</sup> *Ibid.*

<sup>487</sup> See in this regard European Commission, ‘Study on Due Diligence Requirements through the Supply Chain – Final Report’ (January 2020) at 141.

<sup>488</sup> European Coalition for Corporate Justice (ECCJ) and CORE, ‘Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check’, November 2020, at 6. Available at: <http://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf>.

<sup>489</sup> European Commission, ‘Study on Due Diligence Requirements through the Supply Chain – Final Report’ (January 2020) at 243. See also Deva S, ‘Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?’ (2023) *Leiden Journal of International Law* 389, at 398: ‘as business responsibility to respect human rights under Pillar II is voluntary, conducting HRDD is also non-obligatory for businesses. This is a major limitation because market pressures or courts of public opinion do not always work against all enterprises’.

<sup>490</sup> European Coalition for Corporate Justice (ECCJ) and CORE, ‘Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check’, November 2020, at 4.

<sup>491</sup> World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022: Insights Report*, at 5. See also European Coalition for Corporate Justice (ECCJ) and CORE, ‘Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check’, November 2020, at 6.

has observed that voluntary instruments are inadequate to address existing weaknesses in business human rights due diligence practices, and has highlighted the need for ‘enhanced [...] regulatory action to address business-related human rights impacts across sectors and global value chains’, for instance through mandatory human rights due diligence requirements<sup>492</sup>.

### **3. National Laws in the Area of Business and Human Rights**

The perceived necessity to impose human rights obligations binding on companies under domestic law has borne fruit in a number of EU and non-EU jurisdictions since the adoption of the UNGPs in 2011. Domestic legislation in the area of business and human rights differs in terms of the types of obligations it places on companies. Some laws impose reporting obligations. Some create specific obligations to exercise human rights due diligence with respect to certain risks associated with business activities. Other impose overarching obligations to exercise human rights due diligence and to disclose the human rights due diligence process, in some cases with potential civil liability attached for failure to comply with these obligations<sup>493</sup>.

#### **3.1. The Categories of Existing Domestic Legislation in Business and Human Rights**

Different categories of existing legislation in the area of business and human rights can be distinguished.

The first category comprises domestic legislation that requires reporting by companies but does not specifically mandate the exercise of human rights due diligence. More specifically, legislation in this category places on high-earning domestic companies and foreign companies carrying out business or part of a business on the territory of the regulating state a requirement to report on their business activities and on the steps taken to address certain risks in their own business

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<sup>492</sup> OHCHR, ‘UN experts welcome new study on corporate human rights due diligence’, March 2020, available at <https://www.ohchr.org/en/press-releases/2020/03/un-experts-welcome-new-study-corporate-human-rights-due-diligence?LangID=E&NewsID=25758>.

<sup>493</sup> Martin-Ortega O, ‘Transparency and Human Rights in Global Supply Chains: From Corporate-led Disclosure to a Right to Know’ in Marx A, Calster GV and Wouters J (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar 2022) 100, at 106.

activities and in the context of their supply chains. Examples of such instruments are the 2015 UK Modern Slavery Act<sup>494</sup> and the 2018 Australian Modern Slavery Act<sup>495</sup>.

The second category of existing domestic legislation in the area of business and human rights comprises instruments that place on certain categories of national and foreign companies a requirement to carry out human rights due diligence in order to prevent certain human rights risks associated with business activities and to report on the due diligence measures adopted to prevent those risks. An example of these legislative instruments is the 2019 Dutch Child Labor Due Diligence Act<sup>496</sup>.

The third category of domestic legislation in the area of business and human rights comprises instruments that place on certain categories of companies an all-encompassing human rights due diligence obligation, rather than an obligation to carry out human rights due diligence with respect to specific types of corporate-related human rights risks. Legislation of this kind, already adopted

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<sup>494</sup> UK Modern Slavery Act 2015 (UK MSA), s54(12). The legislation requires high-earning commercial organizations, wherever incorporated, undertaking activities or part of their activities in the UK to prepare ‘a slavery and human trafficking statement for each financial year of the organization’. The statement must include ‘the steps that the organization has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business’ or it must declare that the organization has taken no such steps. If the organization has a website, it must publish the slavery and human trafficking statement there. See Part 6 in the legal text for the specific reporting requirements regarding transparency in supply chains, available at: <https://www.legislation.gov.uk/ukpga/2015/30/enacted#:~:text=An%20Act%20to%20make%20provision,Commissioner%3B%20and%20for%20connected%20purposes>. For a more thorough analysis of the legal instrument see, *inter alia*, Chiussi Curzi L and Malafosse C, 'A Public International Law Outlook on Business and Human Rights' (2022) 24 *International Community Law Review* 11, at 22; Macchi C and Bright C, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Buscemi M, Lazzarini N and Magi L (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill 2020) 218, at 222; Martin-Ortega O, 'Transparency and Human Rights in Global Supply Chains: From Corporate-led Disclosure to a Right to Know' in Marx A, Calster GV and Wouters J (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar 2022) 100, at 108.

<sup>495</sup> Australian Modern Slavery Act 2018, No. 153. The legislation requires entities based or operating in Australia, with an annual consolidated revenue of more than \$100 dollars to produce annual statements on modern slavery, ‘describing the risks of modern slavery in the operations and supply chains of reporting entities and entities owned or controlled by those entities’. The statement must also ‘describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks’. See Part 2 in the legal text, available at: <https://www.legislation.gov.au/Details/C2018A00153>.

<sup>496</sup> Netherlands Kamerstukken I, 2016/17, 34 506, A. The legislation requires companies registered in the Netherlands, as well as foreign companies which provide goods and services to Dutch customers, to exercise due diligence in order to identify and prevent the risk of child labor in their supply chains. More specifically, companies are required to investigate whether there is a reasonable suspicion that the goods and services supplied to Dutch consumers are produced with child labour. In the event of a reasonable suspicion, the company must draw up and implement an action plan. The Act also requires companies to produce a statement declaring that they are exercising appropriate due diligence in order to prevent child labour. For a more detailed analysis of the law see McCorquodale R, 'Human Rights Due Diligence Instruments: Evaluating the Current Legislative Landscape' in Marx A and others (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar Publishing 2022) 121, at 135-136. See also Macchi C and Bright C, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Buscemi M, Lazzarini N and Magi L (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill 2020) 218, at 229.

in a number of states in Europe, includes the 2017 French Duty of Vigilance Law, the 2021 German Corporate Due Diligence Obligations in Supply Chains Act, and the 2021 Norwegian Transparency Act. These three legislative instruments on mandatory human rights due diligence ('HRDD') are examined in the chapter.

### 3.2. The Three Selected Laws on Mandatory HRDD

The national legislation on mandatory human rights due diligence adopted in France, Germany, and Norway constitutes the focus of the present analysis. This is for several reasons.

First, the laws selected all incorporate into domestic law the corporate responsibility to respect human rights enshrined in Pillar II of the UNGPs by way of an all-encompassing legal requirement for certain categories of company to exercise human rights due diligence. The other existing legislation in the area of business and human rights either only requires reporting by businesses without specifically mandating the exercise of human rights due diligence or requires the exercise of human rights due diligence only with respect to specific business-related human rights risks. The legislation enacted in France, Germany, and Norway supplements reporting obligations with an obligation to exercise human rights due diligence, in line with the UNGPs<sup>497</sup>. It also imposes on companies an obligation to exercise human rights due diligence in relation to actual and potential adverse impacts on all internationally recognized human rights, again in line with the UNGPs<sup>498</sup>.

A second reason for focusing on the three selected laws is that all three have been explicitly characterized by the states in question as tools to implement and give effect at the domestic level to the UNGPs and, in particular, to the corporate responsibility to respect human rights. The French and German laws on mandatory human rights due diligence are both referred to in the respective National Action Plans (NAP) on Business and Human Rights of France<sup>499</sup> and Germany<sup>500</sup> as important measures to implement the UNGPs nationally. For its part, while

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<sup>497</sup> This is examined in Section 5.

<sup>498</sup> Recall, generally, Chapter 4 of the thesis. The UNGPs provide that the corporate responsibility to respect human rights, through the exercise of human rights due diligence, covers all internationally recognized human rights, given that corporate actors can virtually have an impact on the entire spectrum of internationally recognized human rights. See Commentary to Principle 12.

<sup>499</sup> Section 10 'Reinforcement of Legislation', at 24. French NAP available at: <https://globalnaps.org/wp-content/uploads/2017/11/france-nap-english.pdf>.

<sup>500</sup> German National Action Plan on Business and Human Rights (2016-2020), at 10: 'If fewer than 50% of the enterprise [...] have incorporated the elements of human rights due diligence [...] into their corporate processes by 2020, the Federal Government will consider further action, which may culminate in legislative measures'. NAP available at: <https://globalnaps.org/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf>. Additionally, the National Baseline Assessment (NBA) Report commissioned by the Federal

Norway's National Action Plan does not specifically refer to the Transparency Act among the measures to implement the UNGPs domestically, the report accompanying the introduction of the Act into the Norwegian Parliament states that one of main purposes of the legislation is to 'promote enterprises' respect for fundamental rights'<sup>501</sup>, as envisaged in international standards, including the UNGPs. Furthermore, the Act's drafting committee observed that the Transparency Act would cement in domestic law the expectations and requirements on corporate human rights responsibilities found in international standards and guidelines, among them the UNGPs<sup>502</sup>.

The third reason for selecting the laws of France, Germany and Norway is the overall alignment between substantive aspects of these laws and a number of principles in the three Pillars of the UNGPs. Among other examples, the three instruments place on certain categories of company an obligation to undertake human rights due diligence processes whose substantive elements are largely modelled on the principles in Pillar II of the UNGPs<sup>503</sup>.

#### **4. Substantive Aspects of Corporate Human Rights Due Diligence Legislation in France, Germany and Norway**

The present section of the chapter provides an outline of each of the selected domestic laws on mandatory human rights due diligence. The following subsections look respectively at the instruments adopted in France, Germany and Norway, with a focus on the scope of application of each instrument, the types of obligations set forth, the scope of these obligations, and the enforcement and liability mechanisms established.

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Foreign Office for the purpose of updating the current German NAP, provides that, with regards to the domestic operationalization of Pillar II of the UNGPs, the updated version of the NAP on business and human rights should focus specifically on the German Act on Corporate Due Diligence in Supply Chains. See German Institute for Human Rights, 'National Baseline Assessment: Contribution to the Update of the National Action Plan on Business and Human Rights', available at: [https://www.institutfuermenschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse\\_Studie/Analysis\\_National\\_Baseline\\_Assessment.pdf](https://www.institutfuermenschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analysis_National_Baseline_Assessment.pdf), at 15.

<sup>501</sup> Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), Recommendation from the Ministry of Children and Families, Prop. 150 L, April 2021, at 6. Available at: <https://www.forbrukertilsynet.no/wp-content/uploads/2022/07/prop-150-transparency-act-1.pdf>.

<sup>502</sup> Norwegian Ethics Information Committee, 'Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence', November 2019, 33-35. Available at: <https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf>.

<sup>503</sup> Albeit with some distinctions, which are discussed in more detail in Section 4.

#### 4.1. The French Law on the Duty of Vigilance<sup>504</sup>

The French Law on the Duty of Vigilance was the first legislation worldwide on mandatory corporate human rights due diligence<sup>505</sup>. It was adopted in 2017 at the end of a four-year long legislative process. It has been called the ‘best known and far reaching’<sup>506</sup> domestic regime on mandatory human rights due diligence and ‘a historic step forward for the corporate accountability movement’<sup>507</sup>. The Law is referred to in the French National Action Plan (NAP) on Business and Human Rights as one of the core measures adopted by France to implement the UNGPs at the domestic level<sup>508</sup>, specifically through the establishment of a ‘duty of vigilance’ on certain categories of parent companies to identify and prevent adverse impacts on the enjoyment of human rights in the context of their own activities and in their business relationships<sup>509</sup>, in line with the UNGPs<sup>510</sup>.

The Law places on large companies with registered office in French territory and other large companies with registered office in French territory or abroad<sup>511</sup> a tripartite obligation of vigilance or due diligence<sup>512</sup>. Companies falling within the scope of the law are required to develop, implement and disclose a vigilance plan with certain extraterritorial implications<sup>513</sup>. The vigilance

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<sup>504</sup> Unofficial translation into English available at <https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>.

<sup>505</sup> Bright C and others, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22 *Business and Politics* 667, at 685.

<sup>506</sup> OHCHR, ‘UN Human Rights “Issues Paper” on legislative proposals for mandatory human rights due diligence by companies’ (June 2020), at 3.

<sup>507</sup> Cossart S, Chaplier J and Lomenie TBD, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317, at 317.

<sup>508</sup> French Ministry for Foreign Affairs and International Development, *French National Action Plan on Business and Human Rights*, at 24. Available at: <https://globalnaps.org/wp-content/uploads/2017/11/france-nap-english.pdf>.

<sup>509</sup> Macchi C and Bright C, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Buscemi M, Lazzerini N and Magi L (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill 2020) 218, at 232.

<sup>510</sup> French National Assembly, ‘Compte rendu intégral, Première séance du lundi 30 mars 2015’, available at: <https://www.assemblee-nationale.fr/14/cr/2014-2015/20150193.asp>.

<sup>511</sup> ‘Any company that at the end of two consecutive financial years employs at least 5,000 employees within the company and its direct or indirect subsidiaries, whose head office is located on French territory, or that has at least 10,000 employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad’. See Article 1 of the Duty of Vigilance Law.

<sup>512</sup> It should be noted that the terminology used in the legal text to refer to human rights due diligence is ‘reasonable vigilance’ (*vigilance raisonnable*). It has been noted that the concept of vigilance might allow to translate more appropriately the concept of human rights due diligence envisaged by the UNGPs into French Law. Even if different terminologically, the substantive aspects of the vigilance obligations reflect the components of human rights due diligence in Pillar II of the UNGPs. See, in this regard, Macchi C and Bright C, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Buscemi M, Lazzerini N and Magi L (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill 2020) 218, at 233.

<sup>513</sup> As discussed further below, this refers mainly to the fact that the vigilance plan that enterprises falling within the scope of the Duty of Vigilance Law must draft and implement not only applies to the activities of the enterprise but also to any activity of entities the enterprise controls or with whom the enterprise has an established commercial relationship, including therefore the activities of entities potentially domiciled and operating outside the territory of France, which is to say extraterritorially.

plan has to cover the company's own activities, the activities of subsidiaries it directly or indirectly controls, and the activities of subcontractors and suppliers further down the supply chain with whom the company maintains an established commercial relationship. The concept of 'control over a company' in the Law is referable to Article L.233-16 of the French Commercial Code, which specifies that exclusive control by a company over another entity results from a number of factors, among them the right to exercise a dominant influence over a company by virtue of contract or statutory clauses<sup>514</sup>. By 'established commercial relationships', the Law means 'a stable, regular commercial relationship, taking place with or without contract, with a certain volume of business, and under a reasonable expectation that the relationship will last'<sup>515</sup>.

The purpose of the vigilance plan is to enable companies falling within the scope *ratione personae* of the legislation to identify and prevent risks to human rights and fundamental freedoms, health, and safety<sup>516</sup> resulting from their own activities and the activities of companies under their control or with whom they maintain commercial relationships. To this end, the vigilance plan must include a number of substantive elements<sup>517</sup>, among them measures to identify actual and potential risks linked to the company, the companies it controls, and business partners; measures to prevent the risks identified; a mechanism to assess regularly the situation of subsidiaries, as well as of subcontractors and suppliers with whom the company has commercial relationships; and a monitoring scheme to follow up on the measures adopted and to assess their efficacy. In addition to the obligation to draft and implement the vigilance plan, companies are required to disclose publicly their due diligence plan<sup>518</sup>.

In the event of failure to comply with their obligations of vigilance, injunctions can be sought to compel companies to develop, implement and disclose their vigilance plan<sup>519</sup>.

The Law establishes a civil liability regime that allows adversely affected parties to initiate proceedings in negligence whenever a company's failure to comply with its obligations of vigilance

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<sup>514</sup> Article L.233-16 – Commercial Code, available at: [https://www.legifrance.gouv.fr/codes/article\\_lc/LEGIARTI000030927205/](https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000030927205/).

<sup>515</sup> Cossart S, Chaplier J and Lomenie TBD, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317, at 320.

<sup>516</sup> Albeit outside the scope of the chapter, the Law also requires relevant enterprises to exercise due diligence to identify and prevent environmental harm.

<sup>517</sup> Article 1 of the Duty of Vigilance Law.

<sup>518</sup> *Ibid.*

<sup>519</sup> Macchi C and Bright C, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Buscemi M, Lazzarini N and Magi L (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill 2020) 218, at 234.

results in harm. A company that fails to comply with its obligations ‘shall be held liable and obliged to compensate for any harm that due diligence would have permitted to avoid’<sup>520</sup>. The burden of proof remains with the claimant, who needs to prove harm, a breach of the company’s due diligence obligations, and a causal link between the harm and the breach<sup>521</sup>. The civil liability regime entered into force only in 2019<sup>522</sup>. Since then, however, a number of civil claims have been brought against companies domiciled in France for alleged human rights (and environmental impacts) resulting from their failure to comply with their due diligence obligations<sup>523</sup>.

#### 4.2. The German Act on Corporate Due Diligence Obligations in Supply Chains<sup>524</sup>

The German law on mandatory corporate human rights due diligence was published in the Federal Law Gazette<sup>525</sup> on 22 July 2021, at the end of a legislative process that started back in 2019<sup>526</sup>. Debates on the potential introduction of binding human rights due diligence obligations for

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<sup>520</sup> Article 2 of the Duty of Vigilance Law.

<sup>521</sup> Cossart S, Chaplier J and Lomenie TBD, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317, at 321.

<sup>522</sup> Macchi C and Bright C, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Buscemi M, Lazzerini N and Magi L (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill 2020) 218, at 235.

<sup>523</sup> The following cases are pending and no decisions on actual violations of due diligence obligations under the Law have been made: (1) In *Friends of the Earth et al. v. Total*, brought in 2019 and the first case tested under the legislation, six NGOs sued oil company Total over a project in Uganda and Tanzania, for the alleged failure to take into account the project’s potential human rights and environmental impacts. Total was requested to provide a vigilance plan for the oil project, in accordance with its obligations under the Duty of Vigilance Law, which includes the measures to prevent serious violations of human rights as well as environmental damage. After four years since the beginning of legal proceedings, in February 2023, a French civil court has ruled the case ‘inadmissible’ on procedural grounds, stating that the NGO plaintiffs did not correctly follow court procedures against Total. See, in this regard, <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/>; (2) In *Envol Vert et al. v. Casino*, brought in 2021, French supermarket chain Casino was sued by eleven NGOs for alleged human rights and environmental impacts linked to the company’s involvement in the cattle industry in Brazil and Colombia. The claimants require that the company complies with its obligation to produce and implement a duty of vigilance plan, as well as to compensate for damages stemming from the company’s failure to comply with its due diligence obligations. See, in this regard, [http://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/#:~:text=Summary%3A,environmental%20and%20human%20rights%20harms](http://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/#:~:text=Summary%3A,environmental%20and%20human%20rights%20harms;); (3) In February 2023, BNP Paribas has been sued under the French Duty of Vigilance Law by three French NGOs alleging that the commercial bank is in breach of its duty of vigilance obligations due to its alleged failure to provide a robust vigilance plan to identify and prevent environmental and human rights risks arising from its activities in the fossil fuel sector. In the same month a second lawsuit has been initiated against the bank under the Duty of Vigilance Law, in this case for the alleged provision of financial services without adequate due diligence to corporations engaged in deforestation, forced labor and violations of indigenous rights. See, in this regard, <https://www.rfi.fr/en/business/20221027-ngos-launch-legal-battle-against-french-bank-bnp-over-fossil-fuel-investment>.

<sup>524</sup> German Act on Corporate Due Diligence Obligations in Supply Chains, Federal Law Gazette No. 46, 2021. The unofficial English translation is available at <https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html>.

<sup>525</sup> See [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl121s2959.pdf#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl121s2959.pdf%27%5D\\_1646731666842](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl121s2959.pdf#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D_1646731666842).

<sup>526</sup> For a more detailed account on the several phases of development of the legislation, see <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/>.

companies, however, can be traced back to 2016, when Germany adopted its first NAP on Business and Human Rights.

While the NAP included only voluntary measures to implement the UNGPs at the domestic level, it also made it clear, with regards to human rights due diligence, that the introduction of mandatory measures would be considered ‘if less than 50% of German companies with more than 500 employees incorporated the elements of human rights due diligence [in accordance with the UNGPs] into their corporate processes by 2020<sup>527</sup>. A subsequent review of corporate human rights due diligence practices revealed that ‘only 13 to 17 per cent of all companies with more than 500 employees actively applied human rights due diligence<sup>528</sup>, signaling that companies’ compliance with voluntary standards in the area of business and human rights remained insufficient. In light of this, negotiations for a mandatory corporate human rights due diligence legislation officially began, culminating in the enactment in 2021 of the Act on Corporate Due Diligence Obligations in Supply Chains. The legislation officially entered into force at the beginning of 2023.

The Act applies to enterprises with ‘central administration, principal place of business, administrative headquarters, or statutory seat’ in Germany and with at least 3,000 employees<sup>529</sup>. Additionally, it applies to other enterprises with a domestic branch on German territory and with at least 3,000 employees<sup>530</sup>. From the beginning of 2024, however, the employee threshold will be considerably lower with respect to both domestically-domiciled and other companies, which will fall within the scope of the Act when they employ at least 1,000 individuals instead of 3,000 individuals<sup>531</sup>.

The Act places on the relevant companies an obligation to exercise due diligence in order to identify, prevent and minimize, *inter alia*, any human rights risk in the company’s supply chain<sup>532</sup>. An enterprise’s ‘supply chain’ encompasses both the activities of an enterprise in its own business area and the activities of direct and indirect suppliers<sup>533</sup>. Human rights-related risks are defined as

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<sup>527</sup> German Federal Foreign Office, ‘German National Action Plan on Business and Human Rights’, at 10.

<sup>528</sup> Krajewski M, Tonstad K and Wohltmann F, ‘Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?’ (2021) 6 *Business and Human Rights Journal* 550, at 552.

<sup>529</sup> Act on Corporate Due Diligence Obligations in Supply Chains, General Provisions, Section 1, Scope of Application.

<sup>530</sup> *Ibid.*

<sup>531</sup> *Ibid.* In this regard, it is expected that the Law covers approximately 900 companies at the beginning of 2023, and 4,800 companies at the beginning of 2024. See Krajewski M, Tonstad K and Wohltmann F, ‘Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?’ (2021) 6 *Business and Human Rights Journal* 550, at 553.

<sup>532</sup> *Ibid.*, Due Diligence Obligations, Section 3.

<sup>533</sup> Definitions, Section 2(5).

conditions ‘in which there is sufficient probability that a violation of [...] a prohibition is imminent’<sup>534</sup>. Section 2 of the Act provides an indicative list of human rights-related prohibitions, which includes prohibitions in the area of child labour, forced labour, employment, and discrimination<sup>535</sup>.

The due diligence obligation includes five relevant requirements<sup>536</sup>. The first requirement is the establishment of an appropriate and effective risk management system to allow the enterprise to comply with its due diligence obligations. An ‘effective’ risk management system is one that enables the enterprise to ‘identify and minimize human rights risks [...] and to prevent, end or minimize human rights-related [...] violations if the enterprise has caused or contributed to these risks or violations within the supply chain’<sup>537</sup>.

As part of risk management, the second requirement is the performance of appropriate risk analyses to identify human rights risks resulting from the enterprise’s own area of business and that of its direct suppliers<sup>538</sup>.

If the enterprise identifies a risk in the course of a risk analysis, the third due diligence requirement is the adoption of preventive measures by the enterprise in its own area of business and that of its direct suppliers<sup>539</sup>. In the specific case of preventing human rights risks in the activities of direct suppliers, the enterprise must consider, *inter alia*, ‘human rights-related expectations when selecting a direct supplier’ and the adoption of ‘contractual assurances from the entity that it will comply with the human rights-related expectations required by the enterprise’s senior management and address them along the supply chain’<sup>540</sup>.

If, in spite of preventive measures, a violation of human rights-related obligation has nonetheless occurred or is imminent in the enterprise’s own business area or that of a direct supplier, the fourth

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<sup>534</sup> Definitions, Section 2(2) and Section 2(3).

<sup>535</sup> Act on Corporate Due Diligence Obligations in Supply Chains, Definitions, Section 2. Each of the prohibitions included in Section 2 refers to specific provisions included in international and domestic human rights standards. Although outside the scope of the chapter, it should be specified that the Act also requires enterprises to exercise due diligence in relation to environmental risks. The Act provides examples of environment-related prohibitions, including the prohibitions to manufacture mercury-added products, to produce and use chemicals, to collect and dispose of waste in a manner that is not environmentally sound, and to export hazardous waste.

<sup>536</sup> *Ibid.*, Due Diligence Obligations, from Section 3 to Section 9.

<sup>537</sup> *Ibid.*, Section 4.

<sup>538</sup> *Ibid.*, Section 5. Section 2 of the Act defines a ‘direct supplier’ as ‘a partner to a contract for the supply of goods or the provision of services whose supplies are necessary for the production of the enterprise’s product or for the provision and use of the relevant service’.

<sup>539</sup> *Ibid.*, Section 6.

<sup>540</sup> *Ibid.*

due diligence requirement is to adopt immediately remedial measures to end or minimize the violation<sup>541</sup>. When a violation results in the business area of the enterprise, the Act requires enterprises to bring the violation to an end. When a violation results in the context of direct suppliers' activities, and the enterprise cannot bring the violation to an end, it is required to minimize the violation without undue delay. The termination of the business relationship with the direct supplier is considered a last resort, required only if the violation is very serious, the measures adopted do not remedy the situation, and less severe measures are not available<sup>542</sup>.

The fifth and final due diligence requirement is the establishment of a complaints procedure to enable persons to report potential human rights risks, as well as violations of human rights-related or environment-related obligations enshrined in the Act resulting from the company's activities in its own business area or those of its direct suppliers<sup>543</sup>.

The requirements of the due diligence obligation in the Act apply primarily to the activities of an enterprise in its own business area and those of its direct suppliers. With regards to the activities of indirect suppliers, which fall within the meaning of 'supply chain'<sup>544</sup> in the Act and, therefore, within the scope of the due diligence obligations<sup>545</sup>, the legislation sets forth an obligation for enterprises to set up a complaints mechanism to allow persons to report potential risks and violations of obligations resulting from the activities of these entities. Only if the enterprise has obtained 'substantiated knowledge' that a violation of human rights-related obligations by an indirect supplier 'may be possible'<sup>546</sup> is it required to follow the five due diligence requirements<sup>547</sup>. Where, in contrast, the enterprise does not have 'actual indications that suggest that a violation of

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<sup>541</sup> *Ibid.*, Section 7.

<sup>542</sup> *Ibid.*

<sup>543</sup> *Ibid.*, Section 8. A number of complaints have already been filed against companies under the legislation. In April 2023, a first complaint was filed against Tom Tailor, Amazon and IKEA for the alleged inadequate monitoring of health and safety in their Bangladeshi factories. See <https://duediligence.design/first-case-filed-under-the-german-supply-chain-due-diligence-act-against-tom-tailor-amazon-and-ikea-by-bangladeshi-workers/>. A second complaint was filed in June 2023 against car manufacturers Volkswagen, BMW and Mercedes-Benz for their alleged failure to identify, prevent and mitigate (that is to say, to exercise human rights due diligence) adverse human rights impacts in their supply chains in China. See, in this regard, <https://duediligence.design/second-case-filed-under-the-german-supply-chain-due-diligence-act/>. The most recent complaint was filed in November 2023 against German supermarket chains Rewe and Edeka for alleged adverse human rights impacts on Latin American banana and pineapple plantations. See, in this regard, <https://bnn.network/social-issues/oxfam-accuses-german-supermarkets-of-human-rights-violations-a-test-for-the-supply-chain-act/>.

<sup>544</sup> Act on Corporate Due Diligence Obligations in Supply Chains, Section 2(5).

<sup>545</sup> *Ibid.*, Section 3(1).

<sup>546</sup> *Ibid.*, Section 9.

<sup>547</sup> *Ibid.*

a human rights-related obligation by indirect suppliers may be possible<sup>548</sup>, it is not obliged to conduct due diligence in relation to these entities<sup>549</sup>.

The fulfillment of the due diligence obligations must be documented by the enterprise on a regular basis. Under Section 10, the Act places a separate reporting requirement on enterprises to draft an annual report on the fulfillment of their due diligence obligations in the previous financial year and make it available on the enterprise's website. The report must state whether the company has identified any human rights risk, or any violation of the human rights-related obligations stipulated in the Act. It must also include the measures adopted to fulfill the due diligence obligations and an assessment of the impact and effectiveness of such measures<sup>550</sup>.

In contrast to the French Duty of Vigilance Law, the German Act does not establish a civil liability regime for harm resulting from enterprises' failure to comply with their due diligence obligations. As a result of political compromises during the legislative process<sup>551</sup>, the final draft of the Act specifically contains a provision<sup>552</sup> which excludes the possibility that violations of due diligence obligations enshrined in the Act give rise to any liability under civil law<sup>553</sup>. Any liability arising independently of the Act remains unaffected, meaning that enterprises might still face legal claims on the basis of general tort law<sup>554</sup>.

Monitoring and enforcement of the Act falls to the Federal Office for Economic Affairs and Export Control (BAFA)<sup>555</sup>. This administrative agency is responsible for receiving and assessing the reports prepared by enterprises where, pursuant to their due diligence obligations under the Act, potential human rights and environmental risks are identified and preventive measures are laid out. In terms of sanctions, for companies that fail to comply with their due diligence obligations intentionally or by negligence the Act envisages the imposition of administrative fines<sup>556</sup> and the

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<sup>548</sup> *Ibid.*

<sup>549</sup> Krajewski M, Tonstad K and Wohltmann F, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6 *Business and Human Rights Journal* 550, at 556.

<sup>550</sup> Act on Corporate Due Diligence Obligations in Supply Chains, Section 10.

<sup>551</sup> Krajewski M, Tonstad K and Wohltmann F, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6 *Business and Human Rights Journal* 550, at 558.

<sup>552</sup> Act on Corporate Due Diligence Obligations in Supply Chains, Section 3(3).

<sup>553</sup> *Ibid.*

<sup>554</sup> Krajewski M, Tonstad K and Wohltmann F, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6 *Business and Human Rights Journal* 550, at 558.

<sup>555</sup> Act on Corporate Due Diligence Obligations in Supply Chains, Division 6, Section 19(1).

<sup>556</sup> *Ibid.*, Division 6, Section 24.

possibility of being excluded ‘from participation in a procedure for the award of a supply, works or service contract [...] until they have proved that they have cleared themselves’<sup>557</sup>.

#### 4.3. The Norwegian Transparency Act<sup>558</sup>

On the same day that Germany adopted its legislation on mandatory human rights due diligence, the Norwegian Parliament passed a law relating to enterprises’ transparency and work on fundamental human rights and decent working conditions, commonly referred to as the ‘Transparency Act’<sup>559</sup>. In response to call by various civil society organizations and NGOs ‘for a law that would give a right to information about working conditions at production sites’<sup>560</sup>, the Norwegian Government appointed in 2018 the Ethics Information Committee, with the mandate, *inter alia*, ‘to examine whether it is possible and predictable to impose a duty on enterprises to provide information to consumers and organizations about their production sites, and how they exercise responsible business conduct and manage their supply chains’<sup>561</sup>. In the final Report presented to the Government, the Committee stressed the importance of national legislation on corporate transparency and due diligence in supply chain, observing:

‘Transparency can serve as a competitive advantage. Benefits may include enhanced reputation, motivated employees, greater efficiency, legal compliance, and improved access to capital [...] Today enterprises increasingly recognize the need for transparency about the production of goods and services, and their responsibilities also when it comes to the supply chain [...] An Act regulating transparency about supply chain and due diligence with respect to human rights and decent work is an appropriate answer to some of the most crucial challenges of our time’<sup>562</sup>.

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<sup>557</sup> *Ibid.*, Division 5, Section 22(1).

<sup>558</sup> Norwegian Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Working Conditions (Transparency Act), Norwegian Legislative Gazette No. 2021-1042, 2021. Full text is available at <https://www.regjeringen.no/contentassets/c33c3faf340441faa7388331a735f9d9/transparency-act-english-translation.pdf>.

<sup>559</sup> Krajewski M, Tonstad K and Wohltmann F, ‘Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?’ (2021) 6 *Business and Human Rights Journal* 550, at 550.

<sup>560</sup> *Ibid.*, at 551.

<sup>561</sup> Norwegian Ethics Information Committee, ‘Supply Chain Transparency: Proposal for an Act regulating Enterprises’ transparency about supply chains, duty to know and due diligence’, November 2019, 9.

<sup>562</sup> *Ibid.*, at 7-8.

Along with its final report, the Committee presented in 2019 the draft Transparency Act, which was later submitted to the Norwegian parliament and enacted in 2021<sup>563</sup>. The Transparency Act officially entered into force on 1 July 2022.

The Transparency Act applies to larger Norwegian enterprises which offer goods and services in or outside Norway and to larger foreign enterprises that offer goods and services in Norway<sup>564</sup>. The term 'larger enterprises' refers to enterprises as defined in the Accounting Act or that satisfy two of three criteria, namely sales revenues in excess of NOK 70 million, a balance sheet total in excess of NOK 35 million, and an average number of employees in the financial year in excess of 50 full-time equivalent<sup>565</sup>. The Act provides that parent companies shall be considered 'larger enterprises', within the scope of the Act, if the criteria above are satisfied for 'the parent company and subsidiaries as a whole'<sup>566</sup>.

The Act places on these enterprises two main substantive obligations, referred to as the 'duty to carry out due diligence' and the 'duty to account for due diligence' respectively.

In accordance with the first, the relevant enterprises are obliged to carry out human rights due diligence in accordance with the OECD Guidelines for Multinational Enterprises<sup>567</sup>. Due diligence is defined by implicit reference to the six due diligence steps envisaged in the OECD Due Diligence Guidance for Responsible Business Conduct<sup>568</sup>. First, enterprises are required to embed responsible business conduct in their policies<sup>569</sup>. Second, they are required to identify and assess actual and potential adverse impacts on fundamental human rights<sup>570</sup> and decent working conditions<sup>571</sup> that the enterprise may cause or contribute to or that are directly linked to the enterprise's operations, products or services via the supply chain or business partners<sup>572</sup>. The Act defines 'supply chain' as encompassing 'any party in the chain of suppliers and sub-contractors that supplies or produces

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<sup>563</sup> Krajewski M, Tonstad K and Wohltmann F, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6 *Business and Human Rights Journal* 550, at 551-552.

<sup>564</sup> Norwegian Transparency Act, Section 2.

<sup>565</sup> *Ibid.*, Section 3(a).

<sup>566</sup> *Ibid.*

<sup>567</sup> *Ibid.*, Section 4.

<sup>568</sup> *Ibid.*, Section 4(a) to (f). See OECD Due Diligence Guidance for Responsible Business Conduct, 2018, available at: <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

<sup>569</sup> *Ibid.*, Section 4(a).

<sup>570</sup> 'Fundamental human rights' encompass internationally recognized human rights enshrined, *inter alia*, in the ICCPR and ICESCR, and in the ILO's core conventions on fundamental principles and rights at work. See Section 3(b).

<sup>571</sup> 'Decent working conditions' refers to work that safeguards fundamental human rights and health, safety and environment in the workplace, and that provides a living wage. See Norwegian Transparency Act, Section 3(c).

<sup>572</sup> *Ibid.*, Section 4(b).

goods, services or other input factors<sup>573</sup>. The term ‘business partner’ is defined as ‘any party that supplies goods or services directly to the enterprises, but that is not part of the supply chain’<sup>574</sup>. When adverse impacts are identified, the third requirement in the due diligence obligation is to implement suitable measures to cease, prevent or mitigate the adverse impacts<sup>575</sup>. The fourth and fifth requirements are to track the implementation and results of measures adopted to prevent and mitigate adverse impacts<sup>576</sup> and to communicate to affected stakeholders how the enterprise is addressing the adverse impacts<sup>577</sup>. The final due diligence requirement is to provide for or cooperate in remediation and compensation, where this is required, if the enterprise has caused or contributed to adverse impacts<sup>578</sup>.

Pursuant to the obligation to account for due diligence, the relevant enterprises must publish an account of how the enterprise carries out due diligence<sup>579</sup>. More specifically, enterprises are required to publish on their website an account of due diligence which includes information regarding, first, actual adverse impacts and significant risks of adverse impacts identified through due diligence and, secondly, measures implemented or planned to cease the former or to mitigate the latter, as well as the results or expected results of such measures<sup>580</sup>. The obligation to account for due diligence is linked to another provision of the Act, which deals with individuals’ right to information<sup>581</sup>. Section 6 provides that, upon request, ‘any person has the right to information from an enterprise regarding how the enterprise addresses actual and potential adverse impacts’<sup>582</sup> pursuant to their due diligence obligations. The right to information includes ‘both general information and information relating to a specific product or service offered by the enterprise’<sup>583</sup>. Only under certain circumstances<sup>584</sup> may the enterprise deny a request for information.

Like the German Act on Corporate Due Diligence Obligations in Supply Chains, the Norwegian Transparency Act does not provide for a civil liability regime for harm resulting from enterprises’

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<sup>573</sup> Norwegian Transparency Act, Section 3(d).

<sup>574</sup> *Ibid.*, Section 3(e).

<sup>575</sup> *Ibid.*, Section 4(c).

<sup>576</sup> *Ibid.*, Section 4(d).

<sup>577</sup> *Ibid.*, Section 4(e).

<sup>578</sup> *Ibid.*, Section 4(f).

<sup>579</sup> *Ibid.*, Section 5.

<sup>580</sup> *Ibid.*, Section 5(b) and 5(c).

<sup>581</sup> *Ibid.*, Section 6.

<sup>582</sup> *Ibid.*

<sup>583</sup> *Ibid.*

<sup>584</sup> These circumstances include when (1) the request does not provide a sufficient basis for identifying what the request concerns; (2) the request is clearly unreasonable; (3) the requested information concerns data relating to an individual’s personal affairs; and (4) the requested information concerns data that is important to keep secret in the interest of the person whom the information concerns. See Section 6(a)-(d).

non-compliance with due diligence obligations. The Norwegian Consumer Authority is tasked with monitoring compliance by enterprises with the provisions of the Act<sup>585</sup> and with seeking to influence enterprises to comply with their obligations<sup>586</sup> and to cease illegal conduct in the event of breach of the Act<sup>587</sup>. For enterprises that fail to comply with their obligations to carry out and to account for due diligence, the Consumer Authority may issue prohibitions and orders and may establish enforcement penalties<sup>588</sup>. For repeated failure to comply with the obligation to account for due diligence, the obligation to disclose upon individuals' request or the obligation to provide access to the relevant information in a timely manner, infringements penalties may be imposed on the enterprise, as well as on natural persons acting on behalf of the enterprise<sup>589</sup>.

## 5. The UNGPs in Due Diligence Legislation in France, Germany and Norway

The aim of the present section of the chapter is to highlight how the UNGPs, as a legally non-binding international instrument, have provided a model for the selected domestic human rights due diligence laws and have informed substantive aspects of these laws. To this end, the following subsections highlight the extent to which the laws enacted in France, Germany and Norway reflect elements of the UNGPs by examining selected principles enshrined in the three Pillars of the instrument. With regards to Pillar II specifically, they examine how the three laws transform the non-binding corporate responsibility to respect into a binding obligation to exercise human right due diligence at the domestic level.

### 5.1. Pillar I: The State Duty to Protect

The three legislative instruments examined in the chapter are informed by core principles belonging to the state duty to protect human rights in Pillar I of the UNGPs. What follows focuses on selected principles.

#### *Principles 1 and 2*

To recall<sup>590</sup>, Pillar I of the UNGPs reaffirms the existing international human rights obligations binding on states with respect to the conduct of business entities within their territory or,

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<sup>585</sup> Norwegian Transparency Act, Section 9.

<sup>586</sup> *Ibid.*

<sup>587</sup> *Ibid.*

<sup>588</sup> *Ibid.*, Sections 12 and 13.

<sup>589</sup> *Ibid.*, Section 14.

<sup>590</sup> Recall, generally, Chapter 4.

depending on the language of the relevant treaty provision, jurisdiction. States are required to secure to everyone within their territory or territory under their jurisdiction the enjoyment of internationally-protected human rights against any adverse impacts resulting from the activities there of business entities. Principle 1 in the UNGPs provides that, in order for states to discharge this obligation, they are required to take appropriate steps to ‘prevent, investigate, punish and redress’ corporate adverse human rights impacts within their territory or jurisdiction. The commentary to Principle 1 elaborates on this, saying that, while states generally have discretion in deciding upon these appropriate steps, they should consider preventative and remedial measures such as ‘effective policies, legislation, regulations and adjudication’. The specific requirement to prevent corporate adverse human rights impacts within their territory or jurisdiction entails a positive duty to adopt preventative measures at the domestic level, including the enactment of effective legislation aimed at strengthening business respect for human rights, that is, ensuring that business enterprises do not interfere with individuals’ enjoyment within their territory or jurisdiction of their human rights.

As part of their duty to protect, Principle 2 provides that states should ‘set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations’<sup>591</sup>. With respect to home states specifically, as noted, the commentary to Principle 2 provides that, while ‘not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction’, ‘there are strong policy reasons for home States to set out clearly the expectation that businesses [domiciled in their territory and/or jurisdiction] respect human rights abroad’<sup>592</sup>.

The laws enacted in France, Germany and Norway are examples of tools whereby states set out clearly, as urged by Principle 2 of the UNGPs, the expectation that businesses respect human rights throughout their operations. But more than setting out mere ‘expectations’ to respect, they mandate business respect for human rights at the domestic level through the creation of a legal requirement to exercise human rights due diligence to identify, prevent and mitigate adverse human rights impacts in the context of business enterprises’ activities and business relationships. The French Duty of Vigilance Law is specifically referred to in the country’s NAP as one of the regulatory legislative measures adopted by France to give effect to the corporate responsibility to

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<sup>591</sup> UNGPs, Principle 2. Recall, generally, Chapter 4 of the thesis.

<sup>592</sup> Commentary to Principle 2.

respect human rights under domestic law<sup>593</sup>. The German Act on Corporate Due Diligence Obligations in Supply Chains is referred to in the NBA Report<sup>594</sup> as the key legislative instrument to implement under national law the corporate responsibility to respect human rights. Lastly, while not specifically referred to in the country's NAP, the preparatory works of Norway's Transparency Act have clarified that one of the purposes of the legislation is to foster business respect for fundamental human rights under national law, in accordance with international standards, among others the UNGPs<sup>595</sup>.

The commentary to Principle 2 observes that one approach adopted by states to 'set out clearly the expectation that businesses respect human rights throughout their operations' is the enactment of 'domestic measures with extraterritorial implications'<sup>596</sup>. Examples include domestic legislative measures that place on parent companies 'obligations to report in the regulating state on the global activities of the entire enterprise'<sup>597</sup>, therefore including the activities of entities potentially located and operating on the territory of states other than the regulating state.

The laws adopted in France, Germany and Norway are examples of domestic measures with extraterritorial implications mentioned in the commentary to Principle 2. The three laws place on enterprises falling within their scope an obligation to undertake human rights due diligence not only in relation to their own business activities, but also in relation to the activities of subsidiaries and entities in their supply chains, irrespective of where these entities are located and operate. In other words, enterprises falling within the scope of the laws are required to exercise human rights due diligence to identify, prevent and mitigate adverse impacts resulting from the activities of entities potentially domiciled and operating outside the respective regulating states, which is to say extraterritorially. These entities are not subject directly to obligations with respect to human rights

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<sup>593</sup> Section 10 'Reinforcement of Legislation', at 24. French NAP available at: <https://globalnaps.org/wp-content/uploads/2017/11/france-nap-english.pdf>. See also French National Assembly, 'Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', Report No. 2578, 2015. The report clarifies that the overall purpose of the proposed legislation is to make enterprises responsible in order to prevent the occurrence of tragedies in France and abroad.

<sup>594</sup> The National Baseline Assessment (NBA) Report commissioned by the Federal Foreign Office for the purpose of updating the 2016 German NAP, provides that, with regards to the domestic operationalization of the corporate responsibility to respect human rights, enshrined in Pillar II of the UNGPs, the updated version of the NAP on business and human rights should focus specifically on advancing the implementation of the German Act on Corporate Due Diligence in Supply Chains. See [https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse\\_Studie/Analysis\\_National\\_Baseline\\_Assessment.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analysis_National_Baseline_Assessment.pdf), at 15.

<sup>595</sup> See Norwegian Ethics Information Committee, 'Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence', November 2019, at 4.

<sup>596</sup> Commentary to Principle 2.

<sup>597</sup> *Ibid.*

but their human rights performance is indirectly regulated through the due diligence obligation placed on enterprises subject to the legislative instruments in France, Germany and Norway<sup>598</sup>.

By placing on the relevant enterprises a territorial obligation to exercise human rights due diligence with respect to the activities of subsidiaries and other entities potentially located outside the regulating states, the laws examined in the chapter reflect at the national level the expectation placed on home states under Principle 2 of the UNGPs, as part of the broader duty of states to protect human rights in the context of business activities enshrined in Principle 1.

### *Principle 3*

Principle 3 of the UNGPs provides guidance on the operationalization of foundational Principles 1 and 2. It elaborates on the exercise by states of their regulatory and policy functions in meeting their obligation to protect human rights via prevention of adverse human rights impacts in the context of business activities. According to Principle 3, states should, among other things, ‘address any gaps’ in laws that ‘are aimed at, or have the effect of, requiring business enterprises to respect human rights’, as well as ‘provide effective guidance to business enterprises on how to respect human rights throughout their operations’. In general, the commentary suggests that, in meeting their obligation to protect human rights against corporate adverse impacts, states should consider ‘a smart mix of measures’, including national mandatory measures, aimed at fostering business respect for human rights<sup>599</sup>. Respect by business enterprises for human rights is understood to involve their refraining from causing or contributing to adverse human rights impacts in the context of their business activities and business relationships through the exercise of human rights due diligence, in line with the expectations of Pillar II of the UNGPs<sup>600</sup>.

It can be argued that, as part of the ‘smart mix of measures’ that states should consider adopting to foster business respect for human rights, states might consider adopting mandatory national measures mandating business respect for human rights through a specific legal requirement for businesses to exercise human rights due diligence in order to identify, prevent and mitigate adverse human rights impacts throughout their operations<sup>601</sup>. Put differently, states might consider

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<sup>598</sup> OHCHR, ‘UN Human Rights “Issues Paper” on legislative proposals for mandatory human rights due diligence by companies’ (June 2020), at 10.

<sup>599</sup> UNGPs, Commentary to Principle 3.

<sup>600</sup> See UNGPs, Principle 11, Principle 13 and Principle 17.

<sup>601</sup> By way of example, the UN Committee on Economic, Social and Cultural Rights has noted that ‘the obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those

‘hardening’ the corporate responsibility to respect human rights and its core component, namely human rights due diligence, at the domestic level. In doing so, states would meet the requirement to take appropriate steps to prevent corporate adverse impacts as part of their international obligation to protect human rights in the context of business activities within their territory or jurisdiction.

The three laws examined in the chapter can be included among relevant preventative measures in the ‘smart mix of measures’, advised by commentary to Principle 3, to foster business respect for human rights at the domestic level.

Principle 3 of the UNGPs suggests that, among measures adopted to operationalize the state duty to protect, states should consider ‘encourag[ing], and where appropriate require[ing], business enterprises to communicate how they address their human rights impacts’<sup>602</sup>. According to the commentary to Principle 3, state encouragement or binding obligations placed on companies to communicate how they address their adverse impacts, including by way of formal public reporting, are key to foster respect for human rights by business enterprises<sup>603</sup>. It could be argued that, as human rights due diligence is generally understood as the process whereby companies can address their adverse human rights impacts, states might consider encouraging, and where appropriate requiring, companies to communicate how they carry out human rights due diligence.

The three national laws examined in the chapter reflect this aspect envisaged by Principle 3 of the UNGPs. As illustrated in Section 4, the laws adopted in France, Germany and Norway not only impose on relevant categories of companies an obligation to exercise human rights due diligence but also require these companies to disclose how they fulfill their human rights due diligence obligation by providing information on the adverse impacts identified and on the measures adopted to prevent and mitigate the identified adverse impacts in their own activities and supply chains<sup>604</sup>.

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of entities they control on the enjoyment of Covenant rights. States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity’s supply chain and by subcontractors, suppliers, franchisees, or other business partners’. See UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 24 on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the Context of Business Activities’, UN Doc. E/C.12/GC/24, para. 16.

<sup>602</sup> UNGPs, Principle 3.

<sup>603</sup> Commentary to Principle 3.

<sup>604</sup> This is further discussed in Section ‘Principle 21’ below.

## 5.2. Pillar II: The Corporate Responsibility to Respect

The laws examined in the chapter not only reflect aspects of principles belonging to the state duty to protect human rights in Pillar I but also incorporate into domestic law core principles belonging to the corporate responsibility to respect human rights in Pillar II of the UNGPs. What follows focuses on selected principles.

### *Principle 17*

To recall, Principle 17 of the UNGPs provides that, '[i]n order to identify, prevent, mitigate and account for how they address their adverse human rights impacts', business enterprises should carry out human rights due diligence<sup>605</sup>. The UNGPs provide that companies might be involved with adverse human rights impacts 'either through their own activities or as a result of their business relationships with other parties'<sup>606</sup>. In light of these different degrees of involvement in adverse human rights impacts, Principle 17(a) provides that human rights due diligence processes 'should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'. 'Business relationships' are understood to encompass 'relationships with business partners, entities in [the company's] value chain, and any other non-State or State entity directly linked to its business operations, products or services'<sup>607</sup>, with no restriction as to where these entities are located.

The laws examined in the chapter 'harden' at the domestic level Principle 17 of the UNGPs by placing a legal obligation binding on certain categories of companies to exercise human rights due diligence. The parameters of human rights due diligence provided, *inter alia*, by Principle 17(a) are also generally reflected in the human rights due diligence obligations set forth in the laws examined. Albeit with some distinctions, the three laws require enterprises falling within their scope to exercise human rights due diligence in relation to adverse human rights impacts stemming in the context of their own activities and adverse human rights impacts stemming from their business relationships with other entities, including subsidiaries, suppliers and business partners, regardless of where these entities are located.

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<sup>605</sup> UNGPs, Principle 17.

<sup>606</sup> Commentary to Principle 13. Recall, generally, Chapter 4 of the thesis.

<sup>607</sup> *Ibid.*

In the French Duty of Vigilance Law, the vigilance obligation covers the human rights risks resulting directly or indirectly from the activities of the enterprise, the activities of companies it controls directly and indirectly and the activities of subcontractors or suppliers further down the supply chain with whom the enterprise maintains an ‘established business relationship’. With respect to risks stemming from business relationships, however, it should be observed that the scope of the vigilance obligation is narrower than the parameters of the human rights due diligence process in the UNGPs<sup>608</sup>. Indeed, while human rights due diligence in the UNGPs should cover adverse human rights impacts that may be directly linked to the enterprise’s business relationships, the vigilance obligation in the French Duty of Vigilance Law covers the adverse human rights impacts linked to the enterprise’s ‘established’ business relationships. An established business relationship is understood as ‘a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last’<sup>609</sup>.

In the German Act on Corporate Due Diligence Obligations in Supply Chains, the due diligence obligation covers ‘all world-wide supply chains’ that are initiated or controlled by German and foreign enterprises with a domestic branch in Germany falling within the scope of the Act<sup>610</sup>. As provided by the Act, an enterprise’s supply chain includes ‘all steps in Germany and abroad that are necessary to produce the products and provide the services’ of an enterprise and encompasses the activities of the enterprise, the activities of its direct suppliers and the activities of its indirect suppliers<sup>611</sup>. In light of this, the human rights due diligence requirement covers the human rights-related risks stemming from the activities of the enterprise, from the activities of its direct suppliers and from the activities of its indirect suppliers in some cases. In this respect, it should be pointed out that the German legislation partly departs from the UNGPs as enterprises are under the obligation to exercise human rights due diligence with respect to indirect suppliers only when the enterprise has actual indications or ‘substantiated knowledge’ that a violation of a human rights-related obligation ‘may be possible’<sup>612</sup>.

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<sup>608</sup> Macchi C and Bright C, ‘Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation’ in Buscemi M, Lazzerini N and Magi L (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill 2020) 218, at 234.

<sup>609</sup> Cossart S, Chaplier J and Lomenie TBD, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’ (2017) 2 *Business and Human Rights Journal* 317, at 320.

<sup>610</sup> See FAQs on the German mHRDD legislation, available at: <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html>.

<sup>611</sup> Section 2(5) in the Act.

<sup>612</sup> See Section 9(3) in the Act.

In the Norwegian Transparency Act, enterprises are required to carry out due diligence to identify and prevent actual and potential adverse impacts resulting from their own activities, and the activities of entities in their supply chain as well as the activities of their business partners. With respect to the activities of an enterprise, the legal commentary of the Act provides that these encompass the activities of the parent company together with the activities of its subsidiaries<sup>613</sup>. In light of this, it has been clarified that ‘the parent company’s due diligence shall therefore include risks associated with both the parent company’s and subsidiaries’ activities, regardless of where the subsidiaries are domiciled’<sup>614</sup>. With respect to the activities of entities in the enterprise’s supply chain, the due diligence obligation covers the global supply chain of the enterprise and ‘is not limited to specific tiers’<sup>615</sup>, in line with the UNGPs which ‘do not [...] restrict due diligence requirements to apply to a specific number of tiers in the supply chain’<sup>616</sup>. The drafting committee of the legislation has noted that ‘it is the risk of harmful impact that determines the scope of due diligence’<sup>617</sup>.

#### *Principles 18, 19 and 20*

The essential components of the human rights due diligence process envisaged by the UNGPs are respectively dealt with in separate principles under Pillar II. In accordance with Principle 18, businesses should identify and assess any actual or potential adverse human rights impacts stemming from their own business activities or their business relationships. Principle 19 states that, in order to prevent and mitigate any adverse human rights impacts identified, businesses should integrate the findings of their human rights impact assessments across relevant internal functions and processes and take appropriate action. Such action will vary according to whether the company has caused or contributed to the adverse impact or is involved ‘solely because the impact is directly linked to its operations, products or service by a business relationship’<sup>618</sup>. Pursuant to Principle 20, in order to verify whether they are addressing any adverse impacts identified, businesses should track the effectiveness of their response.

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<sup>613</sup> Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), Recommendation from the Ministry of Children and Families, Prop. 150 L, April 2021, at 69.

<sup>614</sup> *Ibid.*, 70.

<sup>615</sup> Norwegian Ethics Information Committee, ‘Supply Chain Transparency: Proposal for an Act regulating Enterprises’ transparency about supply chains, duty to know and due diligence’, November 2019, at 47.

<sup>616</sup> *Ibid.*

<sup>617</sup> *Ibid.*

<sup>618</sup> UNGPs, Principle 19(b).

The substantive components of the human rights due diligence obligation in the domestic legislation enacted in France, Germany and Norway generally reflect the core elements of the human rights due diligence process envisaged by the UNGPs.

In the context of the French Duty of Vigilance Law, the preparatory works to the legislation clarify that the concept of due diligence adopted resonates with the concept of due diligence advanced in Principle 17 of the UNGPs<sup>619</sup> and that the purpose of placing a due diligence or ‘vigilance’ obligation on certain categories of companies is to prevent and tackle adverse impacts by businesses in their activities and supply chains<sup>620</sup>. As discussed, in order to meet their vigilance obligations, companies falling within the scope of the legislation are required to produce and implement a vigilance plan which shall include a number of measures<sup>621</sup>. In line with Principle 18 of the UNGPs, the vigilance plan must include, *inter alia*, measures allowing an enterprise to identify and assess risks stemming from the operations of the company, as well as from its business relationships<sup>622</sup>. In line with Principle 19, the vigilance plan must include measures to allow the enterprise to prevent and mitigate identified human rights risks. Finally, along the general lines of Principle 20, the vigilance plan must include a monitoring scheme to allow enterprises to follow-up on the measures adopted to address their human rights impacts and assess their efficacy.

The German Act on Due Diligence Obligations in Supply Chains, too, transforms the human rights due diligence expectations under Pillar II into human rights due diligence obligations under domestic law. Pursuant to Sections 4 and 5 of the Act, enterprises must have in place a risk management system, as part of which they must conduct risk analyses to identify actual and potential adverse human rights risks in line with Principle 18 of the UNGPs. Pursuant to Sections 6 and 7 of the Act, enterprises must adopt measures to prevent, end or minimize adverse human rights impacts, in line with Principle 19 of the UNGPs. Specifically, the measures required by Section 7 reflect on the whole the recommendations in Principle 19. Enterprises are required to cease violations of human rights-related obligations when these stem from their own business

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<sup>619</sup> French National Assembly, ‘Rapport Fait au nom de la Commission des Lois Constitutionnelles, de la Législation et de l’Administration Générale de la République sur la Proposition de Loi (n° 2578), relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre’, Report No. 2628, 2015. Available at: <https://www.assemblee-nationale.fr/14/rapports/r2628.asp>.

<sup>620</sup> French National Assembly, ‘Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre’, Report No. 2578, 2015, available at: <https://www.assemblee-nationale.fr/14/propositions/pion2578.asp>.

<sup>621</sup> The fourth relevant measures in the vigilance plan is discussed in Section ‘Principle 21’ below.

<sup>622</sup> In this regard, as part of risk mapping, enterprises are required to adopt ‘procedures to regularly assess [...] the situation of subsidiaries, subcontractors or suppliers with whom [they] maintain an established business relationship’. Article 1.

activities<sup>623</sup>. With respect to violations of human rights-related obligations to which the enterprise is linked through its contractual relationships with direct suppliers, it is required to consider additional measures to end or minimize the violation without undue delay. Such measures include increasing the influence or leverage exercised on the entity that causes or may cause harm and temporarily suspending the business relationship, with termination of the latter as last resort<sup>624</sup>. Finally, generally in line with the recommendations in Principle 20 of the UNGPs, Sections 6 and 7 of the Act require enterprises to review the effectiveness of, and update if necessary, the measures adopted to prevent, end or minimize adverse human rights impacts.

For its part, the Norwegian Transparency Act provides that enterprises must carry out human rights due diligence specifically in accordance with the OECD Guidelines for Multinational Enterprises, rather than the UNGPs. However, the final report by the drafting committee explains that the due diligence standard adopted in the legislation generally ‘reflects the agreed standards as set out in the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises’<sup>625</sup>. The drafters also clarify that the substance of the due diligence duty is intended to align with the UNGPs, whereas ‘the duty is materially restricted in comparison with the OECD Guidelines for Multinational Companies, which also require due diligence on disclosure, environmental protection, bribery and corruption and consumer interests’<sup>626</sup>. In practice, the substantive due diligence requirements set forth in the Act do indeed align by and large with the due diligence steps envisaged in Pillar II of the UNGPs. Enterprises exercising due diligence pursuant to their obligations under the Transparency Act would at the same time ‘be able to fulfill the recommendations in the UNGPs [...] regarding due diligence’<sup>627</sup>. Pursuant to Section 4(b) of the Act, which is in line with Principle 18 of the UNGPs, enterprises are required, among other things, to identify and assess actual and potential adverse impacts that the enterprise has caused or to which it has contributed or that are directly linked to the enterprise’s business

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<sup>623</sup> The commentary to Principle 19 of the UNGPs states that, when a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.

<sup>624</sup> With respect to adverse human rights impacts to which the company is linked through its business relationships, the commentary to Principle 19 states that the business enterprise should exercise or increase leverage if it has leverage to prevent or mitigate the adverse impact. In the event that the business enterprise lacks leverage over the other relevant entity and is unable to increase it, it should then consider ending the business relationship.

<sup>625</sup> Norwegian Ethics Information Committee, ‘Supply Chain Transparency: Proposal for an Act regulating Enterprises’ transparency about supply chains, duty to know and due diligence’, November 2019, at 5. It is also important to recall, in this respect, that in the 2011 updated version of the OECD Guidelines, the newly introduced chapter on human rights (Chapter IV) draws upon and aligns with the Guiding Principles, including with respect to human rights due diligence. See <https://www.oecd.org/daf/inv/mne/48004323.pdf>, at 31-34.

<sup>626</sup> *Ibid.*

<sup>627</sup> See Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), Recommendation from the Ministry of Children and Families, Prop. 150 L, April 2021, at 88.

relationships. Once adverse impacts are identified, Section 4(c) of the Act, which aligns with the expectations in Principle 19 of the UNGPs, requires enterprises to adopt measures to cease, prevent or mitigate these impacts. Finally, in accordance with Section 4(d) of the Act, which is in line with Principle 20 of the UNGPs, enterprises are required to track the implementation and results of measures adopted to cease, prevent, or mitigate adverse human rights impacts.

### *Principle 21*

As part of the human rights due diligence process envisaged by the UNGPs, Principle 21 of the UNGPs provides that ‘in order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders’<sup>628</sup>. The commentary provides that ‘the responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice’<sup>629</sup>. By way of communicating how they address their adverse human rights impacts, companies can provide ‘a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders’<sup>630</sup>. Communication can take the form, *inter alia*, of formal public reporting, which is especially expected ‘where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts’<sup>631</sup>.

In line with the expectations of Principle 21 of the UNGPs, the three laws examined in the chapter supplement the obligation to exercise human rights due diligence with an obligation publicly to disclose or report how the company addresses human rights risks in its operations and supply chains, that is, how the company undertakes human rights due diligence in practice.

Transparency and disclosure play an important role in the French Duty of Vigilance Law<sup>632</sup>. As part of their vigilance obligations, in addition to the obligation to establish and implement an effective vigilance plan with measures to address human rights risks, companies are required by Article 1 of the Law publicly to disclose the vigilance plan along with the report on its effective implementation. By supplementing the obligation to draft and implement the vigilance plan with

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<sup>628</sup> UNGPs, Principle 21.

<sup>629</sup> Commentary to Principle 21.

<sup>630</sup> *Ibid.*

<sup>631</sup> *Ibid.*

<sup>632</sup> Elsa Savourey, ‘France Country Report in European Commission (EC) Study on Due Diligence’, 70. Available at: <https://repub.eur.nl/pub/116741/EC-study-DD-in-supply-chains-part-3-country-reports.pdf>

an obligation to make the vigilance plan publicly available to stakeholders, ‘the French law brings together the human rights due diligence and transparency elements of the UNGPs’ second pillar<sup>633</sup>.

The human rights due diligence obligations in the German Act on Corporate Due Diligence Obligations in Supply Chains includes a reporting obligation under Section 10. Specifically, the Act requires enterprises to document ‘continuously’ how they fulfill their due diligence obligations<sup>634</sup>, by way of preparing an annual report and making it publicly available, and free of charge, on the enterprise’s website for a period of seven years<sup>635</sup>. The report must state whether the company has identified any human rights risk or any violation of the human rights-related obligations laid out in the Act. It must also include the measures adopted to fulfill the various components of the due diligence obligation, as well as information on how the company assesses the impact and effectiveness of the measures adopted<sup>636</sup>.

The Norwegian Transparency Act, as the name suggests, places great emphasis on the importance of transparency in the context of enterprises’ activities and their supply chains. As highlighted by the drafting committee, ‘the Act builds on the understanding that transparency is a key asset in our society<sup>637</sup>. Disclosure by enterprises and individuals’ access to information with regards to business activities are regarded essential ‘to display the due diligence expected under the UN Guiding Principles on Business and Human Rights (UNGPs) and thereby prevent adverse human rights impacts<sup>638</sup>. In light of this, the Transparency Act includes two interrelated provisions dealing with transparency, whose overall aim is to ‘enable [stakeholders] informed decisions about purchases and investments, and other decisions that take into account the social impacts of businesses<sup>639</sup>. The first obligation is the obligation under Section 5 to account for due diligence, that is, an obligation for enterprises to make accessible on their website an account which includes information on the enterprise’s structure, area of operations, guidelines and procedures for handling actual and potential adverse impacts; information on actual and potential impacts identified through human rights due diligence; and information on the measures to cease or mitigate these adverse impacts. The second obligation generally dealing with transparency is the

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<sup>633</sup> Chambers R and Vastardis AY, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability' (2021) 21 *Chicago Journal of International Law* 323, at 335.

<sup>634</sup> Section 10(1) in the Act.

<sup>635</sup> *Ibid.*, Section 10(2).

<sup>636</sup> *Ibid.*

<sup>637</sup> Norwegian Ethics Information Committee, ‘Supply Chain Transparency: Proposal for an Act regulating Enterprises’ transparency about supply chains, duty to know and due diligence’, November 2019, at 7.

<sup>638</sup> *Ibid.*, 8.

<sup>639</sup> *Ibid.*, 6.

obligation under Section 6 to provide information upon written request, or ‘an obligation to disclose on demand’,<sup>640</sup> how the enterprise addresses actual and potential adverse impacts pursuant to the due diligence obligations set forth in the legislation. Overall, the two obligations together are designed to enhance transparency by enterprises which, in turn, is considered key to achieving the purpose of the UNGPs at the national level, that is, ensuring corporate respect for human rights<sup>641</sup>.

### 5.3. Pillar III: Access to Remedies

Pillar III elaborates on the roles of states and corporations in ensuring that victims of corporate-related adverse human rights impacts have access to an effective remedy when adverse impacts occur. Core foundational and operational principles enshrined in Pillar III inform, albeit with some distinctions, the laws examined in the chapter. What follows focuses on selected principles.

#### *Principles 25 and 26*

Guiding Principle 25 provides that, as part of their obligation to protect human rights against the adverse impacts of business enterprises, states are required to ‘take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy’<sup>642</sup>. The commentary to Principle 25 states that, unless states take steps ‘to investigate, punish and redress’ the adverse human rights impacts of businesses, the international obligation of states to protect human rights can become ‘weak or even meaningless’. The commentary continues by stating that remedies can be provided by State-based or non-State-based, judicial or non-judicial, mechanisms<sup>643</sup> and can include, *inter alia*, restitution, compensation and punitive sanctions such as criminal or administrative fines, as well as the prevention of harm through injunctions or guarantees of non-repetition. Principle 26 provides that ‘states should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights

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<sup>640</sup> Martin-Ortega O, 'Transparency and Human Rights in Global Supply Chains: From Corporate-led Disclosure to a Right to Know' in Marx A, Calster GV and Wouters J (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar 2022) 100, at 119.

<sup>641</sup> See Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), Recommendation from the Ministry of Children and Families, Prop. 150 L, April 2021, at 121.

<sup>642</sup> UNGPs, Principle 25.

<sup>643</sup> For the purposes of the UNGPs, a grievance is understood as ‘a perceived injustice invoking an individual’s or a group’s sense of entitlement’. A grievance mechanism is therefore understood as a process through which grievances concerning corporate adverse human rights impacts can be raised and remedy can be sought. See Commentary to Principle 25.

abuses'. The commentary to Principle 26 places state-based judicial mechanisms 'at the core of ensuring [victims'] access to a remedy'<sup>644</sup>.

Out of the three laws examined in the chapter, regrettably only the French Duty of Vigilance Law reflects at the domestic level the requirement for states, as part of their duty to protect human rights in the context of business activities, to take steps to ensure that those adversely affected by corporate activities have access to an effective remedy, specifically through judicial mechanisms.

Under the French Duty of Vigilance Law, in the event of failure by an enterprise to comply with its obligations of vigilance within a three-month period of receiving formal notice to comply, 'the relevant jurisdiction can, following the request of any person with a legitimate interest in this regard, urge said company, under financial compulsion if appropriate, to comply with its duties'<sup>645</sup>. The Law goes on to provide for civil liability for harm resulting from companies' failure to comply with their duties of vigilance. The legislation stipulates that companies failing to comply with their duty of vigilance 'shall be held liable and obliged to compensate for the harm that due diligence would have permitted to avoid'<sup>646</sup>. Proceedings brought under the law are governed by the principles of tort law. Civil liability is established when a duty of vigilance obligation is breached by the company in question, harm occurs, and a causal link exists between the breach of the obligation and the harm<sup>647</sup>. The burden of proof is on the claimant<sup>648</sup>.

Mandatory HRDD legislation adopted in Germany and Norway do not provide for a civil liability mechanism and do not, at present, align with the expectations of the UNGPs with regard to ensuring that victims of corporate-related adverse human rights impacts have access to effective remedy through judicial mechanisms<sup>649</sup>.

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<sup>644</sup> Commentary to Principle 26.

<sup>645</sup> Duty of Vigilance Law, Article 1.

<sup>646</sup> Duty of Vigilance Law, Article 2.

<sup>647</sup> Elsa Savourey, 'France Country Report in European Commission (EC) Study on Due Diligence', at 73.

<sup>648</sup> Cossart S, Chaplier J and Lomenie TBD, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317, at 321. Although the establishment of a civil liability regime is arguably a relevant operationalization of Pillar III of the UNGPs under domestic law, some commentators have pointed out that, due to the failure to alleviate the burden of proof, 'the French law falls short of the requirements set out in Guiding Principle 26 of the UNGPs', which expects states to remove legal and practical barriers that might lead to victims' denial of justice. See, in this regard, Macchi C and Bright C, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Buscemi M, Lazzarini N and Magi L (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill 2020) 218, at 235.

<sup>649</sup> Both legislation envisage penalties for non-compliance by companies with their due diligence obligations. The German Act on Corporate Due Diligence Obligations in Supply Chains envisages administrative fines for regulatory offences by enterprises, which are understood as enterprises' failure, either intentionally or by negligence, to comply with the different components of their human rights due diligence obligation, with the requirement to submit the

### *Principles 28 and 29*

According to the UNGPs, ‘states should consider ways to facilitate access to effective non-state-based grievance mechanisms dealing with business-related human rights harms’<sup>650</sup>. As specified in the commentary to Principle 28, ‘one category of non-state-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group’<sup>651</sup>. These are referred to as operational-level grievance mechanisms.

With respect to these, Principle 29 provides that, ‘in order for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who might be adversely impacted’. Such mechanisms are administered at company level and ‘can engage the business enterprise directly in assessing the issues and seeking remediation of any harm’<sup>652</sup>. According to the commentary to Principle 29, operational-level grievance mechanisms might play an important role with respect to the corporate responsibility to respect human rights because they provide a channel for individuals and communities affected by the activities of the company ‘to raise concerns when they believe they are being or will be adversely impacted’. This contributes to support the identification by the company of adverse human rights impacts, as part of its on-going human rights due diligence<sup>653</sup>. Once grievances are identified, these mechanisms make it possible for the company to address them and to remediate early adverse impacts, ‘thereby preventing harms from compounding and grievances from escalating’<sup>654</sup>.

Aspects of Principles 28 and 29 of the UNGPs are reflected in the three laws examined in the chapter. As part of the due diligence obligations in the three instruments, enterprises are required to establish an operational-level grievance mechanism in the form of a complaint mechanism or procedure.

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report pursuant to Section 10 of the Act, or with the orders that may be issued by the competent authority to rectify the report within a reasonable period of time or to submit a corrective action plan in case of violations of the human rights due diligence obligations (Section 24). Under the Norwegian Transparency Act, to ensure that prohibitions and orders are observed, enforcement penalties may be established, to be paid in case of non-compliance (Section 13). For repeated failure to comply with the obligation to account for due diligence, the obligation to disclose upon individuals’ request or the obligation to provide access to the relevant information in a timely manner, infringements penalties may be imposed on the enterprise, as well as on natural persons acting on behalf of the enterprise (Section 14).

<sup>650</sup> UNGPs, Principle 28.

<sup>651</sup> Commentary to Principle 28.

<sup>652</sup> Commentary to Principle 29.

<sup>653</sup> *Ibid.*

<sup>654</sup> *Ibid.*

In the French Duty of Vigilance Law, among other measures that the vigilance plan must include, companies are required to establish an alert mechanism ‘that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned’<sup>655</sup>. It has been pointed out that the mechanism in question is intended to apply to both internal stakeholders, such as workers, and external stakeholders, such as local communities, who might be adversely affected by the activities of companies falling within the scope of the Law, providing them a tool to raise concerns about the ‘existence or realization of risks’<sup>656</sup>.

As part of their human rights due diligence obligations under the German Act on Corporate Due Diligence Obligations in Supply Chain, enterprises are required to set up a complaints procedure. According to Section 8 in the Act, ‘the complaints procedure enables persons to report human rights [...] risks as well as violations of human rights-related [...] obligations that have arisen as a result of the economic actions of an enterprise in its own business area or of a direct supplier’. The Act provides that, whenever risks and violations are reported, the persons entrusted by the enterprise with the implementation of the procedure, having discussed the facts with the person reporting the information, may offer a procedure for amicable settlement to those raising the complaint.

Finally, the Norwegian Transparency Act requires enterprises falling within the scope of the legislation, as part of their duty to carry out due diligence, to provide for or cooperate in remediation and compensation. The guidance document on due diligence published by the OECD clarifies that this requirement for companies entails, *inter alia*, establishing legitimate remediation mechanisms<sup>657</sup>, such as operational-level grievance mechanisms like in-house worker complaint mechanisms or third-party complaint systems, ‘through which impacted stakeholders and rightsholders can raise complaints and seek to have them addressed with the enterprise’<sup>658</sup>.

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<sup>655</sup> Duty of Vigilance Law, Article 1.

<sup>656</sup> Elsa Savourey, ‘France Country Report in European Commission (EC) Study on Due Diligence’, at 69.

<sup>657</sup> See OECD Due Diligence Guidance for Responsible Business Conduct, 2018, at 35.

<sup>658</sup> *Ibid.*

## 5. Conclusion

In parallel with the ongoing treaty efforts at the international level, ‘hardening’ processes of elements of the UNGPs have been going on at the national level, in response both to the poor implementation by companies of their ‘soft’ responsibility to respect human rights and the perceived failure of existing international non-binding instruments to improve standards of business conduct.

These processes have translated into domestic law elements of the UNGPs’ corporate responsibility to respect human rights by placing binding obligations on relevant categories of corporate actors. More specifically, the core component of the corporate responsibility to respect human rights as elaborated in the UNGPs, namely human rights due diligence, has been embodied in legislation in jurisdictions such as France, Germany and Norway.

The three national laws enacted in France, Germany and Norway are arguably recent additional examples of how the UNGPs have inspired efforts towards new law at the national level, and how they have served as a model for domestic legalization in the area of business and human rights. The principles enshrined in the three Pillars of the UNGPs are generally reflected in the processes leading to the adoption of the laws and in a number of aspects of the obligations they set forth.

The three legislative instruments examined in the chapter are examples of preventative measures suggested by the UNGPs whereby states can discharge their obligation, under international human rights law, to secure to everyone within their territory or territory under their jurisdiction the enjoyment of internationally-protected human rights against any adverse impacts resulting from the activities there of business entities. The laws are also examples of tools whereby states set out clearly the expectation that businesses respect human rights throughout their operations. But more than setting out mere ‘expectations’ to respect, they mandate business respect for human rights at the domestic level through the creation of a legal requirement to exercise human rights due diligence.

The laws arguably ‘harden’ at the domestic level core elements of the corporate responsibility to respect human rights in Pillar II of the UNGPs, by way of transforming the ‘soft’ responsibility to exercise human rights due diligence into legal obligation binding on certain categories of companies to do so. As examined, the core components of the human rights due diligence obligation set forth in the three laws generally align to the core components of the human rights due diligence process

envisaged in the UNGPs. Additionally, in line with the expectations of Pillar II, the three laws supplement the obligation to exercise human rights due diligence with an obligation publicly to disclose or report how the company undertakes human rights due diligence in practice

Finally, core foundational and operational principles enshrined in Pillar III inform, albeit with some departures, inform the laws examined. Only the French Duty of Vigilance Law ensures that those negatively affected by corporate activities have access to effective judicial remedies. Notwithstanding this, all three laws require companies falling within their scope to establish operational-level grievance mechanisms, such as complaint mechanisms and procedures, to allow stakeholders to raise concerns about the potential adverse impacts of corporate activities and to have them addressed with the company directly.



## CHAPTER 7

### From International ‘Soft’ Law to National Law: The UNGPs and the Harmonization of National Law in the EU via the Corporate Sustainability Due Diligence Directive (CSDDD)

#### 1. Introduction

In parallel with the entry into force of the German and Norwegian HRDD legislation, the EU has in recent years worked towards adopting regulatory measures that would require EU Member States to place due diligence obligations on certain categories of companies under their domestic law. The legislative efforts at the EU level started back in 2022, when the European Commission adopted its proposal for a Directive on Corporate Sustainability Due Diligence<sup>659</sup>. This was followed by the adoption by the Council of the EU and the European Parliament of their own positions and amendments to the Proposal in 2022<sup>660</sup> and 2023<sup>661</sup> respectively. Eventually, the culmination of these efforts was the approval by the European Parliament in April 2024 of the text of the European Union Corporate Sustainability Due Diligence Directive (hereinafter CSDDD)<sup>662</sup>. The intended effect of the CSDDD will be to harmonize national law in this regard across the 27 EU Member States, which will have until July 2026 to adopt laws transposing the Directive at the domestic level.

The CSDDD seeks to promote responsible behaviour by companies across global supply chains by introducing ‘sustainability due diligence obligations’ for certain categories of companies domiciled in EU Member States and for foreign companies active in the EU market. The Directive states that ‘the behaviour of companies across all sectors is key to success with regard to the Union’s sustainability objectives’<sup>663</sup>. The explanatory memorandum to the CSDDD declares that ‘Union legislation on corporate due diligence would advance respect for human rights..., create a level playing field for companies within the Union and avoid fragmentation resulting from Member

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<sup>659</sup> European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937’, 23 February 2022. Available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF).

<sup>660</sup> Position of the Council available at: <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

<sup>661</sup> Amendments by the EU Parliament available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html).

<sup>662</sup> The CSDDD has been published in the Official Journal of the EU in July 2024. See Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760, available at: [https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=OJ:L\\_202401760](https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=OJ:L_202401760).

<sup>663</sup> EU CSDDD, Recital 4.

States acting on their own<sup>664</sup>. It also observes that the instrument aligns with the EU Action Plan on Human Rights and Democracy 2020-2024, one of the objectives of which is to strengthen the engagement of the EU and its Member States in the promotion of international standards on responsible business conduct, among others, the UNGPs<sup>665</sup>. In general, the Directive requires EU Member States to enact national legislation mandating the exercise by relevant companies of, *inter alia*, human rights due diligence. The human rights due diligence envisaged in the Directive arguably generally aligns with the human rights due diligence expectations of the UNGPs.

The purpose of the present chapter is to explore the CSDDD, which is an attempt to harmonize EU Member States' national laws on mandatory human rights due diligence for companies, and to examine to what extent this instrument and the obligations it introduces for relevant categories of companies under domestic law have been influenced and informed by international business and human rights legally non-binding instruments, specifically the UNGPs. Section 2 briefly discusses the reasons for and the objectives of Union-level legislation on mandatory due diligence. Section 3 presents the substantive aspects and obligations set forth in the CSDDD. Section 4 examines the influence of the UNGPs on the CSDDD, investigating the extent to which aspects of the CSDDD reflect specific elements of principles enshrined in the three Pillars of the UNGPs. While the CSDDD also provides for rules on environmental due diligence and climate change mitigation, the focus of the present analysis is on the human rights due diligence obligations set out in the Directive.

## **2. Reasons for and Objectives of the CSDDD**

The apprehended necessity for action at the EU level on mandatory corporate human rights due diligence stems from the perceived failure of voluntary human rights due diligence standards and the potential risk of legal fragmentation stemming from individual Member States' national legislative initiatives on mandatory due diligence.

As to the former, the explanatory memorandum to the CSDDD notes that EU companies already engage in due diligence in line with existing international standards on business and human rights,

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<sup>664</sup> European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937', at 3.

<sup>665</sup> *Ibid.*, at 9. See also Joint Communication to the European Parliament and the Council on the EU Action Plan on Human Rights and Democracy 2020-2024 (JOIN/2020/5 final).

among others the UNGPs, in order to identify and prevent risks in their global value chains<sup>666</sup>. But it continues that ‘these processes are based on voluntary standards and do not result in legal certainty’ either for companies or victims in the event that harm occurs<sup>667</sup>. Overall, the explanatory memorandum concludes that ‘voluntary action does not appear to have resulted in large scale improvement across sectors and, as a consequence, negative externalities from EU production and consumption are being observed both inside and outside the Union’<sup>668</sup>. These negative externalities include adverse impacts on individuals’ enjoyment of human rights. One of the main objectives of the CSDDD is therefore to ‘better exploit the potential of the single market to contribute to [...] sustainable development through the prevention and mitigation of potential or actual human rights [...] adverse impacts in companies’ chains of activities’<sup>669</sup>.

As to the risk of legal fragmentation in the EU, the explanatory memorandum observes that, while some Member States have adopted legislative initiatives which require relevant categories of companies to exercise human rights due diligence, such initiatives ‘bring fragmentation and risk undermining legal certainty and a level playing field for companies in the single market’<sup>670</sup>. By setting out a horizontal legal framework on corporate human rights due diligence, the Directive expects to ‘...create a level playing field for companies within the Union and avoid fragmentation resulting from Member States acting on their own’<sup>671</sup>.

### 3. The CSDDD: Key Elements

The CSDDD lays down rules for EU Member States regarding domestic obligations for companies to exercise human rights [and environmental] due diligence ‘with respect to their own operations, the operations of their subsidiaries and the operations carried out by their business partners in the chains of activities of those companies’<sup>672</sup>. It also provides rules for civil liability for violations of these domestic obligations<sup>673</sup>.

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<sup>666</sup> European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937’, at 2.

<sup>667</sup> *Ibid.*

<sup>668</sup> *Ibid.*

<sup>669</sup> *Ibid.*, Recital 71.

<sup>670</sup> *Ibid.*, at 3.

<sup>671</sup> *Ibid.*, at 3.

<sup>672</sup> EU CSDDD, Article 1(1)(a).

<sup>673</sup> *Ibid.*, Article 1(1)(b).

It applies to EU-domiciled companies with more than 1000 employees and a net global turnover of more than EUR 450m<sup>674</sup>, as well as to foreign companies active in the EU market with a net global turnover of more than EUR 450m generated in the EU<sup>675</sup>.

The CSDDD requires Member States to oblige relevant companies to conduct risk-based human rights due diligence<sup>676</sup>. As provided for in the Directive, companies must be obliged to integrate human rights due diligence into their policies and risk management systems; to identify and assess actual or potential adverse impacts<sup>677</sup>; to prevent and mitigate potential adverse impacts; to bring to an end actual adverse impacts; to provide remediation for actual adverse impacts; to carry out meaningful engagement with relevant stakeholders; to establish and maintain a notification mechanism and complaints procedure; to monitor and track the effectiveness of their due diligence policies and measures; and publicly to communicate how they exercise due diligence<sup>678</sup>. The respective elements of the mandatory human rights due diligence process are dealt with in separate provisions of the Directive.

The first obligation envisaged for companies in the due diligence process is the integration of human rights due diligence into the company's policies and and risk management systems<sup>679</sup>. Companies must be obliged to have a human rights due diligence policy which contains, among other things, descriptions of the company's approach to due diligence<sup>680</sup> and of the processes put in place 'to integrate due diligence into the relevant policies and to implement due diligence'<sup>681</sup>.

The second of the due diligence obligations that Member States must enact is the identification and assessment, through appropriate measures, of actual and potential adverse impacts resulting from the company's own operations, the operations of its subsidiaries and those of its business partners in the chain of business activities<sup>682</sup>. As part of this obligation, companies must map their

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<sup>674</sup> EU CSDDD, Article 2(1)(a).

<sup>675</sup> *Ibid.*, Article 2(2)(a).

<sup>676</sup> *Ibid.*, Article 5.

<sup>677</sup> As specified in the CSDDD, 'adverse impacts' include 'adverse human rights impacts', which are defined as impacts on persons resulting from an abuse of a specific human right listed in Section 1 of the Annex to the Directive; and other human rights enshrined in human rights instruments listed in Section 2 of the Annex, provided that the human right can be abused by a company, the human right abuse directly impairs a legal interest protected in the human rights instruments listed in the Annex, and the company could have foreseen the risk that such human right may be affected. See EU CSDDD, Article 3(1)(c).

<sup>678</sup> *Ibid.*, Article 5(1)(a) to (h), summarizing the obligations stipulated in detail in Articles 7 to 16.

<sup>679</sup> *Ibid.*, Article 7(1).

<sup>680</sup> *Ibid.*, Article 7(2)(a).

<sup>681</sup> *Ibid.*, Article 7(2)(c).

<sup>682</sup> *Ibid.*, Article 8(1). The 'chain of activities' includes the activities of the company's upstream business partners 'related to the production of goods or the provision of services by that company, including the design, extraction, sourcing,

own operations and those of their subsidiaries and business partners in their chain of activities ‘in order to identify [...] where adverse impacts are most likely to occur and to be most severe’<sup>683</sup>. Based on the findings of this initial mapping, companies must then ‘carry out in-depth assessments’ of those operations where adverse impacts have been identified<sup>684</sup>. Where it is not possible to address all identified adverse impacts, companies must prioritize identified adverse impacts ‘based on the severity and likelihood of the adverse impacts’<sup>685</sup>. Once the higher-priority adverse impacts have been addressed, companies must address the ‘less severe and less likely adverse impacts’<sup>686</sup>.

After the identification and assessment of actual and potential adverse impacts, the third due diligence obligation for which Member States must legislate is the prevention and mitigation of potential adverse impacts through the adoption of appropriate measures<sup>687</sup>. When choosing the appropriate measures to prevent identified potential adverse impacts, companies must consider, *inter alia*, their degree of involvement in the adverse impact. Three degrees of involvement are referenced in the Directive, namely where the company causes the adverse impact by itself, where the company causes the adverse impact together with a subsidiary or a business partner in its chain of activities, and where the company is not itself involved in the adverse impact but is directly linked to a business partner in its chain of activities which causes the adverse impact<sup>688</sup>. In order to prevent potential adverse impacts, companies must be obliged to, among other things, develop and implement a prevention action plan which must be ‘adapted to companies’ operations and chains of activities’<sup>689</sup>. With respect to potential adverse impacts that could not be prevented or adequately mitigated by the measures provided for in Article 10, the company must be obliged, as a last resort, to ‘refrain from entering into new or extending existing relations with a business partner in connection with which, or in the chain of activities of which, the impact has arisen’<sup>690</sup>. The company must also adopt an enhanced prevention action plan and use or increase its leverage on the business partner by temporarily suspending the business relationship with the business partner, ‘provided

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manufacture, transport, storage and supply of raw materials, products or parts of products and the development of the product or the service’, as well as the activities of the company’s downstream business partners ‘related to the distribution, transport and storage of a product of that company, where the business partners carry out those activities for the company or on behalf of the company [...]’. See Article 3(1)(g).

<sup>683</sup> EU CSDDD, Article 8(2)(a).

<sup>684</sup> *Ibid.*, Article 8(2)(b).

<sup>685</sup> *Ibid.*, Article 9(1) and Article 9(2). Recital 44 provides that ‘the severity of an adverse impact should be assessed based on the scale, scope or irremediable character of the adverse impact, taking into account the gravity of the impact, including the number of individuals that are or will be affected [...] and the limits on the ability to restore affected individuals [...] to a situation equivalent to their situation prior to the impact within a reasonable period of time.

<sup>686</sup> *Ibid.*, Article 9(3).

<sup>687</sup> *Ibid.*, Article 10.

<sup>688</sup> *Ibid.*, Article 10(1)(a).

<sup>689</sup> *Ibid.*, Article 10(2)(a).

<sup>690</sup> *Ibid.*, Article 10(6).

that there is a reasonable expectation that those efforts will succeed’ with regards to the specific impacts<sup>691</sup>. Where there is no reasonable expectation that the efforts would succeed, the company must terminate the business relationship with respect to the activities concerned<sup>692</sup>. In this respect, Member States must provide for ‘an option to temporarily suspend or terminate the business relationship in contracts governed by their laws’<sup>693</sup>. Companies must, however, carefully assess whether the adverse impacts stemming from the temporary suspension or termination of business relationships with business partners could be more severe than the adverse impacts that could not be prevented or mitigated. Should this be the case, they must not be required to suspend or terminate the business relationship<sup>694</sup>.

The fourth due diligence obligation envisaged for companies is to bring to an end or to minimize actual adverse impacts that have been or should have been identified<sup>695</sup>. Along the lines of what set forth in Article 10, when determining the appropriate measures to cease and minimize adverse impacts, due account must be taken of, *inter alia*, the company’s degree of involvement in the adverse impact<sup>696</sup>. Among other things, companies must be obliged to take measures to neutralize adverse impacts or minimize their extent<sup>697</sup>. When adverse impacts cannot be immediately brought to an end, companies must adopt and implement a corrective action plan which must be ‘adapted to companies’ operations and chains of activities’<sup>698</sup>. With respect to actual adverse impacts that could not be brought to an end or the extent of which could not be minimized by the measures provided for in Article 11, the company must be obliged, as a last resort, to ‘refrain from entering into new or extending existing relations with a business partner in connection with which, or in the chain of activities of which, the impact has arisen’<sup>699</sup>. The company must also adopt an enhanced corrective action plan and use or increase its leverage on the business partner by temporarily suspending the business relationship with the business partner, ‘provided that there is a reasonable expectation that those efforts will succeed’ with regards to the specific impacts<sup>700</sup>. Where there is no reasonable expectation that the efforts would succeed, the company must terminate the business relationship with respect to the activities concerned<sup>701</sup>. In this respect, along the lines of what set

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<sup>691</sup> *Ibid.*, Article 10(6)(a).

<sup>692</sup> EU CSDDD, Article 10(6)(b).

<sup>693</sup> *Ibid.*, Article 10(6)(b), second subparagraph.

<sup>694</sup> *Ibid.*, Article 10(6)(b), first subparagraph.

<sup>695</sup> *Ibid.*, Article 11.

<sup>696</sup> *Ibid.*, Article 11(1)(a).

<sup>697</sup> *Ibid.*, Article 11(3)(a).

<sup>698</sup> *Ibid.*, Article 11(3)(b).

<sup>699</sup> *Ibid.*, Article 11(7).

<sup>700</sup> *Ibid.*, Article 11(7)(a).

<sup>701</sup> *Ibid.*, Article 11(7)(b).

forth in Article 10, Member States must provide for ‘an option to temporarily suspend or terminate the business relationship in contracts governed by their laws’<sup>702</sup>. Companies must also carefully assess whether the adverse impacts stemming from the temporary suspension or termination of business relationships with business partners could be more severe than the adverse impacts that could not be brought to an end or the extent of which could not be minimized. Should this be the case, they must not be required to suspend or terminate the business relationship<sup>703</sup>.

The fifth due diligence obligation foreshadowed for companies is to provide remediation for actual adverse impacts caused individually or jointly with their subsidiaries and business partners<sup>704</sup>. In cases where the actual adverse impact is caused only by the company’s business partner, remediation by the company may be provided on a voluntary basis<sup>705</sup>. The company may also use its ability to influence its business partner to provide remediation<sup>706</sup>.

The sixth obligation envisaged for companies in the due diligence process is to take measures to carry out effective engagement with stakeholders<sup>707</sup>. Companies must consult stakeholders at different stages of their due diligence, including when collecting information regarding actual or potential adverse impacts in order to identify, assess and prioritize impacts<sup>708</sup>, and when developing prevention and corrective action plans pursuant to their due diligence obligations under Article 10 and Article 11<sup>709</sup>.

The seventh due diligence obligation is for companies to enable specified persons or entities to submit complaints to them where those persons or entities ‘have legitimate concerns regarding actual or potential adverse impacts’ with respect to the companies’ own operations, the operations of their subsidiaries or the operations of their business partners in the chains of activities of the companies<sup>710</sup>. Member States must ensure that companies establish a ‘fair, publicly available, accessible, predictable and transparent’ procedure to handle complaints<sup>711</sup>. When complaints are well-founded, the adverse impacts identified must be addressed by companies in accordance with

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<sup>702</sup> *Ibid.*, Article 11(7)(b), second subparagraph.

<sup>703</sup> EU CSDDD, Article 11(7)(b), first subparagraph.

<sup>704</sup> *Ibid.*, Article 12(1).

<sup>705</sup> *Ibid.*, Article 12(2).

<sup>706</sup> *Ibid.*

<sup>707</sup> *Ibid.*, Article 13(1).

<sup>708</sup> *Ibid.*, Article 13(3)(a).

<sup>709</sup> *Ibid.*, Article 13(3)(b).

<sup>710</sup> *Ibid.*, Article 14(1) and (2).

<sup>711</sup> *Ibid.*, Article 14(3).

the due diligence obligations provided for in the Directive<sup>712</sup>. In addition to a complaints procedure, Member States shall ensure that companies establish an accessible notification mechanism for the submission by relevant parties of information regarding actual or potential adverse impacts with respect to the operations of the company, the operations of its subsidiaries and business partners in the chains of activities<sup>713</sup>.

Next, the Directive requires Member States to ensure that companies carry out periodic assessments of their own operations and measures, as well as those of their subsidiaries and those of their business partners in their chain of activities, ‘to assess the implementation and to monitor the adequacy and effectiveness’ of the due diligence measures<sup>714</sup>.

The final due diligence obligation foreshadowed in the Directive is one of communication. Member States are required to ensure that companies report on how they exercise due diligence and how they address their adverse impacts ‘by publishing on their website an annual statement’<sup>715</sup>.

To ensure enforcement of national law provisions transposing the obligations of the Directive, Member States must ‘lay down rules on penalties, including pecuniary penalties, and [...] take all measures necessary to ensure that they are implemented’<sup>716</sup>. Penalties must be ‘effective, proportionate and dissuasive’<sup>717</sup> and must take into account, among other things, ‘the nature, gravity and duration of the infringement, and the severity of the impacts resulting from that infringement’<sup>718</sup>.

To ensure victims’ access to justice and compensation, the Directive establishes a civil liability regime requiring Member States to ensure that a company can be held liable under their domestic law for damage to a natural or legal person caused by the company’s intentional or negligent failure to comply with its due diligence obligations<sup>719</sup>. When the damage is caused jointly by the company and its subsidiary, direct or indirect business partner, they are to be liable jointly and severally<sup>720</sup>. In contrast, ‘a company cannot be held liable if the damage was caused only by its business partners

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<sup>712</sup> *Ibid.*

<sup>713</sup> EU CSDDD, Article 14(5).

<sup>714</sup> *Ibid.*, Article 15.

<sup>715</sup> *Ibid.*, Article 16(1).

<sup>716</sup> *Ibid.*, Article 27(1).

<sup>717</sup> *Ibid.*

<sup>718</sup> *Ibid.*, Article 27(2)(a).

<sup>719</sup> *Ibid.*, Article 29(1).

<sup>720</sup> *Ibid.*, Article 29(5).

in its chain of activities<sup>721</sup>. In order to ensure individuals' right to an effective remedy, the Directive also addresses some of the procedural and practical barriers to justice traditionally encountered by victims of corporate-related adverse human rights impacts, including 'limited duration of limitation periods, prohibitive costs of civil liability proceedings, the absence of adequate mechanisms for representative actions, and difficulties in accessing evidence'<sup>722</sup>.

#### **4. The UNGPs in the CSDDD**

The aim of the present section of the chapter is to examine to what extent the UNGPs, a legally non-binding international instrument, have influenced and informed the obligations set forth in the adopted text of the CSDDD, in particular the obligation to exercise human right due diligence.

##### **4.1. Pillar I: The State Duty to Protect**

Pillar I of the UNGPs reaffirms the existing international human rights obligations of states to protect individuals' enjoyment of their human rights against interferences by third parties, including business enterprises, within their territory or jurisdiction. The CSDDD is arguably an important contribution to the state duty to protect. The following subsections analyse selected principles of Pillar I.

##### *Principles 1 and 3*

To recall, according to Principle 1 of the UNGPs, states are required to protect human rights against the harmful effects of corporate activities undertaken in their territory or otherwise within their jurisdiction. In order to discharge this obligation, Principle 1 provides that states are required to take appropriate steps to 'prevent, investigate, punish and redress' such adverse human rights impacts<sup>723</sup>. While states have the discretion to decide what steps are appropriate, the commentary to Principle 1 suggests that they should consider preventative and remedial measures such as 'effective policies, legislation, regulations and adjudication'<sup>724</sup>. The commentary to Principle 3 of the UNGPs, which provides guidance on the operationalization of, among others, foundational Principle 1, suggests that states should consider 'a smart mix' of measures, including national

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<sup>721</sup> *Ibid.*, Article 29(1).

<sup>722</sup> EU CSDDD, Article 29(3)(a) to (e).

<sup>723</sup> UNGPs, Principle 1.

<sup>724</sup> Commentary to Principle 1.

mandatory measures, to foster business respect for human rights, that is, to ensure that companies are not involved in adverse human rights impacts<sup>725</sup>.

The CSDDD arguably contributes to strengthen Member States' duty to protect human rights against the harmful effects of corporate activities as it requires them to adopt national legislation mandating business respect for human rights, through the exercise of human rights due diligence, with a view to prevent the adverse human rights impacts of relevant categories of companies.

The CSDDD also arguably places itself in the 'smart mix' of policy and regulatory measures adopted by the EU which seek to address the negative impacts of irresponsible business behaviour on, *inter alia*, individuals' enjoyment of their human rights through the regulation of corporate conduct in this respect. The explanatory memorandum to the CSDDD observes that the Directive is indeed expected to complement various EU-level existing and planned instruments on sustainability and due diligence<sup>726</sup>.

### *Principle 2*

As an aspect of states' duty to protect human rights against the harmful effects of corporate activities undertaken in their territory or otherwise within their jurisdiction, Principle 2 in the UNGPs provides that states should 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'<sup>727</sup>, including when carrying out business activities abroad.

The CSDDD arguably requires Member States to set out clearly the expectation that companies, albeit only the relevant categories of companies falling within the scope of the Directive, respect human rights throughout their operations, as urged by the UNGPs<sup>728</sup>. But more than setting out mere 'expectations' to respect, the CSDDD requires Member States to mandate business respect for human rights through an obligation to exercise due diligence which must cover the company's own operations, the operations of its subsidiaries and those of its business partners in its chain of activities. The explanatory memorandum to the CSDDD observes that the instrument will 'set out

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<sup>725</sup> Commentary to Principle 3.

<sup>726</sup> European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937', 23 February 2022, at 3-8.

<sup>727</sup> UNGPs, Principle 2.

<sup>728</sup> 'All business enterprises have a responsibility to respect human rights, which are universal, indivisible, interdependent and interrelated'. See EU CSDDD, Recital 7.

a horizontal framework to foster the contribution of businesses operating in the single market to the respect of human rights...in their own operations and through their value chains<sup>729</sup>.

The commentary to Principle 2 observes that one approach adopted by states to ‘set out clearly the expectation that businesses respect human rights throughout their operations’ is the enactment of ‘domestic measures with extraterritorial implications’<sup>730</sup>. Examples include domestic legislative measures that oblige parent companies to report in the regulating state on the global activities of the entire enterprise<sup>731</sup>.

Along the lines of what suggested by the UNGPs, the CSDDD arguably envisages the adoption by Member States of national legal measures on mandatory human rights due diligence that will have certain extraterritorial implications, potentially ‘prompting changes in the policies and practices of companies along value chains’<sup>732</sup>. More specifically, the Directive requires Member States to ensure that companies falling within the scope of the instrument exercise human rights due diligence with respect not only to their own operations but also to those of subsidiaries and of their business partners in their chain of activities<sup>733</sup>, irrespective of where these subsidiaries and other entities are domiciled and operate. In other words, companies falling within the scope of the Directive are obliged to exercise due diligence to address adverse impacts resulting from the operations of entities potentially domiciled and operating outside the respective regulating Member States, which is to say extraterritorially.

#### 4.2. Pillar II: The Corporate Responsibility to Respect

Reflecting the expectations of the UNGPs<sup>734</sup>, the CSDDD recognizes that ‘all business enterprises have a responsibility to respect human rights...’<sup>735</sup> and requires Member States to ensure that companies respect human rights through an obligation to conduct human rights due diligence. The

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<sup>729</sup> European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937’, 23 February 2022, at 3.

<sup>730</sup> Commentary to Principle 2.

<sup>731</sup> *Ibid.*

<sup>732</sup> Bueno N and others, ‘The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise’ (2024) 1 *Business and Human Rights Journal* 1, at 5.

<sup>733</sup> EU CSDDD, Recital 19.

<sup>734</sup> See UNGPs, Principle 11. In the UNGPs the corporate responsibility to respect human rights refers to the entire spectrum of internationally recognized human rights (see Principle 12). It has been noted that the CSDDD departs from the UNGPs in this regard. See Bueno N and others, ‘The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise’ (2024) 1 *Business and Human Rights Journal* 1, at 2.

<sup>735</sup> *Ibid.*, Recital 7.

substantive requirements of the due diligence obligation generally align to the steps of the due diligence process envisaged in the UNGPs.

### *Principle 17*

The core of the corporate responsibility to respect human rights under Pillar II of the UNGPs is the exercise of human rights due diligence<sup>736</sup>. The CSDDD refers to the UNGPs which recognize that companies have a responsibility to ‘exercise human rights due diligence by identifying, preventing and mitigating the adverse impacts of their operations on human rights and by accounting for how they address those impacts’<sup>737</sup>.

The UNGPs observe that companies can cause or contribute to adverse human rights impacts either through their own activities, or through their business relationships. In light of these different degrees of involvement in adverse human rights impacts, Principle 17(a) provides that due diligence processes ‘should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships’. ‘Business relationships’ are understood to cover relationships with, among others, business partners and entities throughout the company’s value chain<sup>738</sup>.

The different degrees of company involvement in adverse human rights impacts recognized in the UNGPs are arguably reflected in the CSDDD, albeit with some terminological departures. The CSDDD distinguishes where the company causes the adverse impact by itself from where the company causes the adverse impact together with a subsidiary or a business partner in its chain of activities from where the adverse impact is caused only by a business partner in the chain of activities of the company. The terminology of ‘causing’ adopted in the CSDDD departs from the UNGPs, where the tripartite terminology of ‘causing’, ‘contributing’ and ‘being directly linked to’ is adopted instead. Notwithstanding these terminological distinctions, the CSDDD explains that the different degrees of involvement referred to in the Directive correspond to those enshrined in the existing international frameworks, including the UNGPs<sup>739</sup>.

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<sup>736</sup> UNGPs, Principle 17.

<sup>737</sup> EU CSDDD, Recital 5.

<sup>738</sup> UNGPs, Principle 13.

<sup>739</sup> EU CSDDD, Recital 45 and 53.

In light of these degrees of involvement in adverse human rights impacts, Member States are required to ensure that companies exercise due diligence to address adverse impacts that might be caused by them alone or jointly with subsidiaries and business partners, as well as adverse impacts caused only by business partners in their chain of activities<sup>740</sup>. In the CSDDD, the company's 'chain of activities' covers both the activities of upstream business partners related to the production of goods and the provision of services by that company and the activities of downstream business partners, but only with respect to the distribution, transport and storage of a product of that company, provided that the business partners carry out those activities for the company or on behalf of the company<sup>741</sup>. In this regard, the scope of due diligence in the CSDDD is narrower than the scope of due diligence in the UNGPs, where due diligence is expected to be conducted 'along the full value chain'<sup>742</sup>.

### *Principles 18, 19, 20 and 21*

The steps of the human rights due diligence process envisaged by the UNGPs are respectively dealt with in separate principles under Pillar II. Principle 18 expects businesses to identify and assess any actual or potential adverse human rights impacts in the context of their own business activities or their business relationships. Principle 19 states that, in order to prevent, mitigate and cease any adverse human rights impacts identified, businesses should integrate the findings of their human rights impact assessments across relevant internal functions and processes and take appropriate action. Such action will vary according to whether the company has caused or contributed to the adverse impact or is involved 'solely because the impact is directly linked to its operations, products or service by a business relationship'<sup>743</sup>. According to Principle 20, in order to verify whether they are addressing any adverse impacts identified, businesses should track and assess the effectiveness of their response. Finally, according to Principle 21, companies should account for how they address their human rights impacts.

The due diligence obligations enshrined in the CSDDD arguably generally align to the core elements of the human rights due diligence process envisaged by the UNGPs. The CSDDD refer to the UNGPs and the fact that the exercise of human rights due diligence by companies means

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<sup>740</sup> *Ibid.*, Recitals 45 and 53.

<sup>741</sup> *Ibid.*, Article 3(1)(g).

<sup>742</sup> Bueno N and others, 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise' (2024) 1 *Business and Human Rights Journal* 1, at 3.

<sup>743</sup> UNGPs, Principle 19(b).

‘identifying, preventing and mitigating the adverse impacts of their operations on human rights and...accounting for how they address those impacts’<sup>744</sup>.

Article 8 of the Directive appears to reflect the expectations of Principle 18 of the UNGPs. It requires Member States to ensure that companies take appropriate measures to identify and assess actual and potential adverse impacts stemming from their own operations, as well as from the operations of their subsidiaries and their business partners in their chain of activities. In gathering the necessary information on actual and potential human rights impacts, in order to identify and assess adverse impacts, companies must be obliged to engage meaningfully with stakeholders<sup>745</sup>. Along similar lines, Principle 18 of the UNGPs expects companies to consult potentially affected groups and other stakeholders in order to identify and assess actual and potential adverse human rights impacts.

Arguably reflecting the expectations of Principle 19 of the UNGPs, Article 10 of the Directive requires Member States to ensure that companies take appropriate measures to prevent and mitigate potential adverse impacts, while Article 11 requires Member States to ensure that companies take appropriate measures to bring actual adverse impacts to an end. Furthermore, in determining the appropriate measures to prevent, mitigate, cease and minimize adverse human rights impacts, companies must be required to take into account their degree of involvement in the adverse impacts<sup>746</sup>, as Principle 19 of the UNGPs suggests<sup>747</sup>.

Article 15 of the Directive appears to reflect the expectations of Principle 20 of the UNGPs in that it requires Member States to ensure that companies assess the implementation of measures adopted to address adverse impacts, while tracking their adequacy and effectiveness. An important element of the obligation to assess the due diligence measures adopted is ‘due consideration of relevant information from stakeholders’, as the UNGPs also recognize<sup>748</sup>.

Finally, arguably reflecting the expectations of Principle 21 of the UNGPs, Article 16 of the CSDDD requires Member States to ensure that companies publicly communicate how they address

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<sup>744</sup> EU CSDDD, Recital 5.

<sup>745</sup> EU CSDDD, Article 13(3)(a).

<sup>746</sup> *Ibid.*, Article 10(1)(a) and Article 11(1)(a).

<sup>747</sup> See UNGPs, Principle 19(b).

<sup>748</sup> *Ibid.*, Principle 20(b).

adverse human rights impacts through the exercise of human rights due diligence by publishing an annual statement on their website.

#### *Principle 22*

Principle 22 of the UNGPs states that, ‘where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation [...]’. In cases where the business enterprise has not caused or contributed to the adverse impact but it is directly linked to the adverse impact through its business relationships, the UNGPs provide that ‘the responsibility to respect does not require that the enterprise itself provide for remediation, though it may take a role in doing so’<sup>749</sup>.

The CSDDD is arguably consistent with the expectations of Principle 22 of the UNGPs. In this respect, as part of the due diligence obligations, the Directive obliges Member States to ensure that ‘where a company has caused or jointly caused an actual adverse impact, that company shall provide remediation’<sup>750</sup>. In cases where the company has not caused or contributed to the adverse impact but the impact is caused only by the company’s business partner in its chain of activities, remediation may be provided by the company on a voluntary basis while it is not specifically required to do so<sup>751</sup>.

#### *Principle 24*

Principle 24 of the UNGPs focuses on the issue of prioritisation of adverse impacts. The commentary provides that ‘while business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously’<sup>752</sup>. In such cases companies are allowed to prioritize actual and potential adverse human rights impacts on the basis of severity<sup>753</sup>.

The CSDDD arguably adopts a similar approach to prioritisation of adverse impacts, albeit with some departures from the UNGPs. Specifically, Article 9 requires Member States to ensure that,

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<sup>749</sup> Commentary to Principle 22.

<sup>750</sup> EU CSDDD, Article 12(1).

<sup>751</sup> *Ibid.*, Article 12(2).

<sup>752</sup> Commentary to Principle 24.

<sup>753</sup> ‘Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable’. UNGPs, Principle 24.

‘where it is not feasible to prevent, mitigate, bring to an end or minimise all identified adverse impacts at the same time and to their full extent, companies prioritise adverse impacts [...]’ for the purpose of fulfilling their due diligence obligations<sup>754</sup>. According to Article 9, however, the prioritisation of identified adverse impacts ‘shall be based on the severity and likelihood of the adverse impacts’<sup>755</sup>. It is in this respect that the CSDDD partially departs from the UNGPs, which expect companies to prioritize actual and potential adverse human rights impacts on the basis of their severity only, irrespective of how likely the impacts are.

#### 4.3. Pillar III: Access to Remedy

Pillar III of the UNGPs elaborates on the roles of states and corporations in ensuring that victims of corporate-related adverse human rights impacts have access to an effective remedy when adverse impacts occur. Aspects of the CSDDD arguably reflect the expectations of Pillar III of the UNGPs.

##### *Principles 25 and 26*

To recall, Principle 25 of the UNGPs affirms that, as part of their obligation to protect human rights against the adverse impacts of business enterprises, ‘states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when abuses occur within their territory and/or jurisdiction those affected have access to effective remedy’<sup>756</sup>. Remedies can be provided by State-based or non-State-based, judicial or non-judicial, grievance mechanisms<sup>757</sup>. Principle 26 of the UNGPs specifically focuses on State-based judicial mechanisms, placing them ‘at the core of ensuring [victims’] access to a remedy’<sup>758</sup>. In order to ensure the effectiveness of such mechanisms, Principle 26 expects states to consider ways to address ‘legal, practical and other relevant barriers that could lead to a denial of access to remedy’.

The CSDDD arguably reflects the expectations of the UNGPs with respect to ensuring that those affected by corporate activities have access to effective remedy, specifically through judicial mechanisms. In this regard, in order to ensure that ‘victims of adverse impacts have effective access

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<sup>754</sup> EU CSDDD, Article 9(1).

<sup>755</sup> *Ibid.*, Article 9(2).

<sup>756</sup> UNGPs, Principle 25.

<sup>757</sup> In the context of the UNGPs a grievance is understood as ‘a perceived injustice invoking an individual’s or a group’s sense of entitlement’. A grievance mechanism is therefore understood as a process through which grievances concerning corporate adverse human rights impacts can be raised and remedy can be sought. See Commentary to Principle 25.

<sup>758</sup> Commentary to Principle 26.

to justice and compensation<sup>759</sup>, the CSDDD requires Member States to provide for civil liability under their domestic law for a company that causes damage to a natural or legal person as a result of its intentional or negligent failure to comply with its due diligence obligations<sup>760</sup>. When the damage is caused jointly by the company and its subsidiary, direct or indirect business partner, they are to be liable jointly and severally<sup>761</sup>. In contrast, ‘a company cannot be held liable if the damage was caused only by its business partners in its chain of activities’<sup>762</sup>. In order to ensure the effectiveness of judicial mechanisms, reflecting the expectations of Principle 26 of the UNGPs with respect to reducing barriers to justice, the CSDDD addresses some of the procedural and practical barriers to justice traditionally encountered by victims of corporate-related adverse impacts, including ‘limited duration of limitation periods, prohibitive costs of civil liability proceedings, the absence of adequate mechanisms for representative actions, and difficulties in accessing evidence’<sup>763</sup>.

#### *Principles 28 and 29*

In addition to State-based grievance mechanisms, the UNGPs encourage states to ‘consider ways to facilitate access to effective non-state-based grievance mechanisms dealing with business-related human rights harms’<sup>764</sup>. The commentary to Principle 28 provides that ‘one category of non-state-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group’<sup>765</sup>, which are referred to as operational-level grievance mechanisms. These mechanisms might play an important role with respect to the corporate responsibility to respect human rights because they provide a channel for individuals and communities affected by the activities of the company ‘to raise concerns when they believe they are being or will be adversely impacted’<sup>766</sup>. This contributes to support the identification by the company of adverse human rights impacts, as part of its on-going human rights due diligence<sup>767</sup>.

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<sup>759</sup> EU CSDDD, Recital 79.

<sup>760</sup> *Ibid.*, Article 29(1).

<sup>761</sup> *Ibid.*, Article 29(5).

<sup>762</sup> *Ibid.*, Article 29(1).

<sup>763</sup> *Ibid.*, Article 29(3)(a) to (e).

<sup>764</sup> UNGPs, Principle 28.

<sup>765</sup> Commentary to Principle 28.

<sup>766</sup> Commentary to Principle 29.

<sup>767</sup> *Ibid.*

The CSDDD arguably reflects the expectations of the UNGPs with respect to the establishment by companies of operational-level grievance mechanisms and their function. The Directive requires Member States to ensure that, as part of their human rights due diligence obligations, companies enable specified persons and entities to submit complaints to them where those persons or entities ‘have legitimate concerns regarding actual or potential adverse impacts’ with respect to the companies’ own operations, the operations of their subsidiaries or the operations of their business partners in the chains of activities of the companies<sup>768</sup>. To this end, Member States must ensure that companies establish a ‘fair, publicly available, accessible, predictable and transparent’ procedure to handle complaints<sup>769</sup>. In this respect, the Directive explains that ‘fair, publicly available, accessible, predictable and transparent’ are to be understood in line with Principle 31 of the UNGPs, which addresses the criteria for ensuring that non-judicial grievance mechanisms, including operational-level grievance mechanisms, are effective in practice<sup>770</sup>.

When complaints raised by specified persons and entities are well-founded, the CSDDD requires Member States to ensure that the adverse impact that is the subject matter of the complaint is identified and addressed by companies in accordance with their human rights due diligence obligations<sup>771</sup>. In other words, having in place a complaint mechanism supports the identification by the company of actual and potential adverse human rights impacts, enabling the company to address the impacts as part of its due diligence process, as the UNGPs observe<sup>772</sup>.

## 5. Conclusion

The EU has in recent years worked towards adopting regulatory measures that would require EU Member States to place due diligence obligations on certain categories of companies under their domestic law. These regulatory efforts, which culminated with the approval of the CSDDD in April 2024, have resulted from the need to strengthen business respect for human rights and to avoid the potential legal fragmentation stemming from the national initiatives on mandatory human rights due diligence of individual Member States.

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<sup>768</sup> EU CSDDD, Article 14(1) and (2).

<sup>769</sup> *Ibid.*, Article 14(3).

<sup>770</sup> *Ibid.*, Recital 59. See also Commentary to Principle 29: ‘Operational-level grievance mechanisms should reflect certain criteria to ensure their effectiveness in practice (Principle 31).’

<sup>771</sup> EU CSDDD, Article 14(3).

<sup>772</sup> UNGPs, Commentary to Principle 29.

The CSDDD requires Member States to place on relevant categories of EU-domiciled companies and foreign companies active in the EU market an obligation to exercise, *inter alia*, human rights due diligence. In doing so, as observed in the explanatory memorandum to the CSDDD, the Directive is in accord with the EU Action Plan on Human Rights and Democracy 2020-2024, which includes a commitment for the EU and its Member States to ‘actively promote the implementation of international standards on responsible business conduct such as the UNGPs’<sup>773</sup>.

The present chapter has preliminarily sought to examine the extent to which the CSDDD and the obligations it introduces for relevant categories of companies under domestic law have been influenced and informed by the UNGPs. With specific regards to the corporate responsibility to respect enshrined in Pillar II, the human rights due diligence expectations of the UNGPs are arguably generally reflected in the human rights due diligence obligations set forth in CSDDD, albeit with some departures in terms of terminology and scope.

The CSDDD arguably represents the latest example of the role that the UNGPs, a legally non-binding instrument on business and human rights, continue to play in law-making efforts to address the harmful impacts of unregulated corporate conduct on, *inter alia*, human rights. Two additional considerations should be made with respect to the potential effect that the CSDDD might have on the other regulatory developments examined. First, with respect to the ongoing process to elaborate an international binding treaty on business and human rights, the adoption of the CSDDD might signal that it is indeed possible to incorporate elements of international non-binding instruments into binding legislation<sup>774</sup>. Second, the adoption of the CSDDD might call for reforms of the national legislative measures on mandatory human rights due diligence adopted in countries such as France, Germany and Norway. Such reforms might in turn contribute to strengthen these instruments’ alignment to the UNGPs.

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<sup>773</sup> European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937’, 23 February 2022, at 9. See also Joint Communication to the European Parliament and the Council on the EU Action Plan on Human Rights and Democracy 2020-2024 (JOIN/2020/5 final).

<sup>774</sup> Bueno N and others, ‘The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise’ (2024) 1 *Business and Human Rights Journal* 1, at 6.



## **CHAPTER 8**

### **Conclusion**

This thesis has examined the story to-date of the regulatory journey in the field of business and human rights, looking at the interplay between recent international and national regulatory efforts and between non-binding and binding norms. This concluding chapter recapitulates the analysis undertaken in the substantive chapters of the thesis and summarises the move back and forth from the national to the international and from non-binding to binding. It concludes with some final remarks.

#### **1. From National to International and Back Again**

In examining the business and human rights regulatory journey and its recent developments, the thesis has discussed why and how regulatory efforts have proceeded from the national level to the international and then back to the national level.

In light of the unwillingness or inability of states effectively to regulate the conduct of TNCs and to permit the adjudication of TNCs for their adverse human rights impacts, various constituencies have looked to international human rights law. But while international human rights law obliges states parties to the universal and regional treaties to protect the enjoyment by individuals in their territory of their human rights against interference by private business actors, the substantive requirements of this obligations remain vague and underdeveloped. In addition, international human rights law permits but does not oblige states parties to exercise their prescriptive jurisdiction to regulate the conduct of their corporate nationals abroad. Moreover, corporations, for their part, remain unbound by international human rights law. In response to these limitations of international human rights law in relation to the adverse human rights impacts of corporations, international non-binding regulatory standards on business and human rights have been relied on instead. Of these, the UNGPs have become the global authoritative standard on business and human rights. In turn, the non-binding UNGPs have acted as catalyst for attempts at international 'legalization' in the area of business and human rights and, more significantly at present, for legalization in a number of national jurisdictions and at the EU level.

## 2. From Non-Binding to Binding

Collaterally to the examination of the business and human rights regulatory journey and its recent developments, the thesis has examined the specific role of non-binding standards in law-making processes at the international and national level.

The academic literature has long emphasized that non-binding standards become legally relevant in the context of international and national law-making<sup>775</sup>. For the purpose of the present thesis, two interactions of non-binding standards in law-making processes have been particularly relevant<sup>776</sup>.

At the international level, the role of non-binding standards in the development of formal sources of international law is well-recognized. Among others<sup>777</sup>, non-binding standards might anticipate the conclusion of international treaties. Indeed, it is generally accepted that a non-binding standard can serve as a ‘precursor’ to treaty negotiations on certain issues<sup>778</sup>. In this case, the process of adopting a non-binding standard can signal the achievement of the ‘consensus necessary to produce a binding multilateral agreement’<sup>779</sup> that places binding obligations to resolve issues in certain areas. By way of example, in the specific context of international human rights law, non-binding standards such as declarations have served as precursors to the development and adoption of human rights treaties. The most cited instrument is perhaps the UDHR<sup>780</sup>, which has been

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<sup>775</sup> Shelton D, 'Normative Hierarchy in International Law' (2006) 100 *The American Journal of International Law* 291, at 320.

<sup>776</sup> Examined in two separate chapters of the thesis.

<sup>777</sup> Although outside the scope of the thesis, it should be noted that ‘soft’ law might contribute to the development of international law by providing evidence for the existence of emerging rules of customary international law. Two elements are required for the development of rules of customary international law, namely, consistent and widespread state practice (either acts or omissions), as well as the *opinio juris* element that the practice is undertaken with a sense of customary international legal right or obligation. See, in this regard, *North Sea Continental Shelf (Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands)*, Judgment, 20 February 1969, ICJ Rep. 1969, p. 3, para. 77: ‘not only must the acts concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment, 3 february 2012, ICJ Rep. 2012, p. 99, para. 55; International Law Commission, ‘Draft Conclusions on Identification of Customary International Law with Commentaries’, 2018, UN Doc. A/73/10, Conclusion 2 and Commentary. It is generally recognized that soft law instruments can represent state practice, as well as provide evidence of the *opinio juris* element necessary for the establishment of a rule of customary international law. See, in this regard, Boyle A, 'Soft Law in International Law-Making' in Evans MD (ed), *International Law* (Fourth edn, Oxford University Press 2014) 118, at 130; Shelton D, 'Soft Law' in Armstrong D (ed), *Handbook of International Law* (Routledge 2008) at 8.

<sup>778</sup> Boyle A, 'Soft Law in International Law-Making' in Evans MD (ed), *International Law* (Fourth edn, Oxford University Press 2014) 118, at 123.

<sup>779</sup> Shelton D, 'Soft Law' in Armstrong D (ed), *Handbook of International Law* (Routledge 2008) at 11.

<sup>780</sup> It should be noted, however, that the soft law nature of the UDHR is still highly debated. It is today generally accepted that a number of human rights principles enshrined in the Declaration have, in some form or other, become legally binding by way of acquiring status of rules of customary international law. However, whether the Declaration *in toto* constitutes customary international law remains debated. See, in this regard, Olivier M, 'The Relevance of ‘Soft

considered ‘a prime example of the capacity of a non-binding, soft law instrument to influence [...] hard law’<sup>781</sup>. The UDHR has inspired the development of the ICCPR and the ICESCR. The preambles to these two multilateral treaties specifically make reference to the UDHR in recognizing that ‘the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights’<sup>782</sup>.

In addition to international law-making processes, for the purpose of the present thesis, non-binding standards are legally relevant to law-making processes at the domestic level. Suffice to say, non-binding norms enshrined in non-binding international standards ‘may provide a model for domestic legislation and thus become legally binding internally, while remaining non-binding internationally’<sup>783</sup>. In other words, norms enshrined in non-binding international standards may ‘harden’ at the domestic level once incorporated by states into domestic law<sup>784</sup>.

The thesis has incidentally illustrated this function of non-binding standards in the specific context of business and human rights, by examining the role of the UNGPs in the development of law at the international and national levels. With respect to the international level, the thesis has highlighted the role of the UNGPs as precursor to the ongoing elaboration of an international binding instrument on business and human rights, examining how a number of provisions in the latest 2023 revised draft treaty align with and are grounded on substantive elements of principles enshrined in the three Pillars of the UNGPs. With respect to the national level, the thesis has shown how the non-binding corporate responsibility to respect has provided a model for domestic legislation, becoming legally binding in countries such as France, Germany and Norway through a legal requirement placed on relevant categories of companies to exercise human rights due diligence, a concept that was introduced for the first time to the business and human rights discourse by the UNGPs. The substantive elements of the human rights due diligence obligation in the legislation examined are modelled on the core components of the human rights due diligence process enshrined in Pillar II of the UNGPs. In addition, the thesis has preliminarily examined the extent to which the UNGPs have informed the recently-adopted EU Corporate Sustainability Due

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Law’ as a Source of International Human Rights’ (2002) 35 *Comparative and International Law Journal of Southern Africa* 289.

<sup>781</sup> Olivier M, ‘The Relevance of ‘Soft Law’ as a Source of International Human Rights’ (2002) 35 *Comparative and International Law Journal of Southern Africa* 289, at 298.

<sup>782</sup> See Preambles to ICCPR and ICESCR.

<sup>783</sup> Shelton D, ‘Soft Law’ in Armstrong D (ed), *Handbook of International Law* (Routledge 2008) at 2.

<sup>784</sup> *Ibid.*, at 13. See also Chinkin C, ‘The Challenge of Soft-Law: Development and Change in International Law’ (1989) 38 *The International and Comparative Law Quarterly* 850, at 858.

Diligence Directive, which requires EU Member States to place mandatory human rights due diligence obligations on relevant categories of companies under their national law. With specific regard to the corporate responsibility to respect in Pillar II, the human rights due diligence expectations enshrined in the UNGPs appear to be generally reflected in the human rights due diligence obligations set forth in CSDDD. This latest development at the EU level arguably confirms the role that the UNGPs, as a legally non-binding international instrument, continue to play in law-making efforts at different regulatory levels to address the harmful impacts of corporate conduct on, *inter alia*, individuals' enjoyment of their human rights.

### 3. Concluding Remarks

When business and human rights emerged as an area of academic research, 'human rights and business were commonly still seen as two entirely separate domains'<sup>785</sup>. Over the last three decades, however, consensus has coalesced around the idea that, more than a concern just for states, human rights are a fundamental part of the responsibilities of business actors like corporations<sup>786</sup>. Even more so, since the adoption of the UNGPs, consensus has been building around the idea that human rights are not merely part of the responsibilities of corporations but, more significantly, of national obligations for these actors. The recent adoption of the EU Corporate Sustainability Due Diligence Directive in 2024 arguably confirms the continued perceived necessity to transform the human rights responsibilities of companies into binding obligations.

Business and human rights is an ever-evolving field, one characterized to date by oscillation between national and international and non-binding and binding solutions to the challenges posed by corporate activities with respect to human rights. It remains to be seen whether the legal developments inspired by the UNGPs, namely the latest developments on mandatory human rights due diligence in national jurisdictions and at the EU level, as well as the ongoing efforts to elaborate an international treaty on the matter, will succeed in strengthening corporate conduct with respect to human rights and in bridging the persisting regulatory gaps. Either way, this thesis has sought to highlight how the UNGPs continue to mark 'the end of the beginning'<sup>787</sup> in business and human

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<sup>785</sup> Wettstein F, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives* (Cambridge University Press 2022) at 364.

<sup>786</sup> *Ibid.*

<sup>787</sup> OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie', 21 March 2011, UN Doc. A/HRC/17/31, para. 13.

rights 'by establishing a common global platform for action, on which cumulative progress [has] built', allowing for other 'promising longer-term developments'<sup>788</sup>.

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<sup>788</sup> *Ibid.*



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