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AN ANALYSIS OF THE INTERNATIONAL BUSINESS AND HUMAN RIGHTS STANDARDS: THEORY AND COMPARATIVE CASE-LAW. TOWARDS A FUTURE BINDING TREATY?

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INTRODUCTION

The present thesis addresses the topic of human rights abuses by transnational corporations which is discussed within the context of the Business and Human Rights movement.

At first, the several historical phases of development of this field will be addressed, along with some of the most important concepts that have been devised during the last decades, such as the concept of "corporate social responsibility" and the most recent "environment, social and corporate governance".

Relevantly, the most recent evolution of this movement has led to several attempts of drafting an international binding treaty, which is claimed to be a fundamental and desirable further step within the Business and Human Rights movement. However, these tries have not yet led to the conclusion and signing of the treaty and thus this field still shows significant lacks as far as enforcement is concerned.

In fact, the debated issue in the present thesis is that at the moment there are no binding instruments at the international level establishing standards for corporations to respect human rights. The international framework on Business and Human Rights consists only of soft law which by definition does not have any enforceable effect.

Despite the lack of binding value, the relevance of the Business and Human Rights standards is such that a specific space has been reserved for their analysis in the second chapter. In particular the study will address the United Nations Guiding Principles on Business and Human Rights, the concept of "human rights due diligence" and the two instruments drafted within the Organization for Economic Co-operation and Development, namely the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct. The second chapter of this thesis will focus on the importance of these instruments for the Business and Human Rights movement, as fundamental tools to change the business approach to human rights' protection. Yet, it will be emphasized that all these instruments are considered as

"recommendations" since they are not hard law and do not have any binding value.

The lack of binding value also emerges when analyzing the case-law of some regional human rights courts, namely for the purpose of this thesis the Inter-American Court of Human Rights and the European Court of Human Rights.

The cases discussed when addressing the two above mentioned regional human rights courts, clearly show that the issues concerning the violations of human rights by corporations are challenging to address because of the lack of a comprehensive and structured legal framework on Business and Human Rights. Due to this circumstance, these courts do not have binding instruments to apply to the cases brought before them and this renders it hard to condemn corporations which have actually violated human rights. In addition, the victims of human rights' abuses remain without the possibility to redress and thus to obtain compensation.

This can be seen also in the reports of the United Nations Committee on Economic, Social and Cultural Rights, which expressly states the importance of the Business and Human Rights standards, especially the United Nation Guiding Principles on Business and Human Rights, and highlights urgent necessity for States to commit to the Business and Human Rights standards to promote an effective legal framework both at national and international level.

Moreover, the case-law of the International Centre for Settlement of Investment Disputes has explicitly stated that corporations should be bound by obligations concerning human rights. This is a strong statement that is an exception in the international overview of human rights courts and that, for this reason, should be taken into consideration. In fact, there are not many international courts that have explicitly mentioned Business and Human Rights standards and that have stated the necessity that corporations should be bound by international obligations on the protection of human rights.

Eventually, the last chapter of this thesis includes a comparative discussion of five different countries, namely the United States, France, the Netherlands, the United Kingdom and Italy, to address the extent to which these States have implemented the Business and Human Rights standards in the national legislation

and whether and how these principles have been applied by domestic tribunals. This comparative study displays significant lacks in many of the countries taken into consideration. Some countries, such as the Netherlands and France, have recently adopted legislation on mandatory human rights due diligence. Yet, the case-law still has to develop in this direction. Other countries are still in the process of drafting this kind of legislation and are thus still characterized by gaps to be filled in the legal framework. Therefore, especially in these latter countries, the national case-law is still steps behind in the developments of the Business and Human Rights movement at the national level; the domestic case-law follows this trend. Indeed, it is arduous for national tribunals to apply Business and Human Rights standards because, as mentioned before, they do not have any binding value and thus cannot be applied concretely in cases before tribunals.

Therefore, as it will become evident throughout this thesis, giving a binding value and an enforceable effect to the Business and Human Rights standards would be essential in order to create a consistent legal framework that would be applicable by tribunals both at the international and national level in their case-law.

1. THEORY AND EVOLUTION OF BUSINESS AND HUMAN RIGHTS MOVEMENT

The present chapter has the aim of describing the history and developments of the Business and Human Rights (hereinafter "BHR") movement and introduce the main concepts, in particular those of corporate social responsibility (hereinafter "CSR"), environment social and corporate governance (hereinafter "ESG") and human rights due diligence (hereinafter "HRDD"). Lastly, it will also explain the most recent developments of the BHR movement and, in particular, the debate on a future binding treaty.

1.1 The BHR movement's history

Human rights are inevitably affected by the business world; for this reason, corporations detain a responsibility on them which has led to intense debates in the past years.[1]

Indeed, companies are bound to deal with certain human rights-related issues directly, such as the safety and health of workers, their labor conditions,[2] slave and child labor, corruption and cooperation with repressive regimes. In this regard, on the one hand, corporations try and use strategies to apply the most convenient rules and standards on BHR,[3] sometimes also deciding to move their activities to countries where there is absolutely no guarantee for human rights protection. On the other hand, during the years they are more and more cautious about human rights issues.[4]

[1] A Voiculescu and H Yanacopulos, 'Human Rights in business contexts: An Overview' in Aurora Voiculescu and Helen Yanacopulos (eds.), *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (1st edn Zed Books, 2011) 1.
[2] G Chandler, 'The Evolution of the Business and Human Rights Debate' in *Business and Human Rights Dilemmas and Solutions* (1st edn Routledge, 2003) 22, 22.
[3] D Kinley and J Nolan, 'Human Rights, Corporations and the Global Economy: An International Law Perspective' in Andreas Georg Scherer and Guido Palazzo (eds.), *Handbook of Research on Global Corporate Citizenship* (1st edn Edward Elgar Publishing, 2008) 343.
[4] S Mena, M de Leede, D Baumann, N Black, S Lindeman and L McShane, 'Advancing the Business and Human Rights Agenda: Dialogue, Empowerment, and Constructive Engagement' (2010) 93(1) Journal of Business Ethics 162, 162.

Despite the fact that, compared to the past, transnational corporations are now giving more space to human rights, unfortunately they are still often directly or indirectly involved in human rights' violations.[5] This circumstance is aggravated by the fact that, in case of violations of human rights by corporations, no binding instrument has been established at the international level to hold them responsible.[6]

For this reason, companies' compliance with human rights remains a debated topic and a serious current concern.[7]

1.1.1 The three phases of the BHR movement

Historically, the development of the BHR movement can be divided into three main phases: the first involved the 'precursors' of the BHR discussion between the 1970 and 1995, the second stage represented the 'formative years' of the debate and the third one its 'maturation'.[8]

1.1.1.1 The 'precursors' of the BHR discussion

The influence of corporations' activities, in particular on the environment and often with adverse repercussions on the local communities became prominent in the 1970s.[9] Yet, at the beginning the focus was mainly on the physical environment and not as much on human rights specifically. This was due to the fact that civil and political rights were seen as part of the governments' mandate and not as a responsibility of private actors such as corporations. This perspective started to change when the internationalization of global economy rapidly increased: privatization and foreign investments became more and more common and were adopted even in those countries that in the previous years supported

[5] J L Černič, 'Corporate Accountability for Human Rights From a Top-Down to a Bottom-Up Approach' in *The Business and Human Rights Landscape* (1st edn Cambridge University Press, 2015) 193, 193.
[6] Mena, de Leede, Baumann, Black, Lindeman and McShane (n 4) 162.
[7] A Giacomucci, 'Diritti umani e ruolo delle multinazionali' (2012) XXVIII/106 Notizie di Politeia 158.
[8] F Wettstein, 'The History of 'Business and Human Rights' and its Relationship with 'Corporate Social Responsibility' in *Research Handbook on Human Rights and Business* (1st edn Edward Elgar, 2020) 23, 24.
[9] Chandler (n 2) 22.

state control of the economy. All over the world the competition surged to obtain the latest technologies, skills and access to markets brought by foreign companies. This phenomenon was even more prominent in the developing countries in Asia, Africa and South America, which became socially controlled by big multinationals.[10]

However, these new opportunities also brought risks: corporations were catching as many occasions as they could but they did not consider the instability of the countries where they located their headquarters, and the risks deriving from it.[11] Indeed, often these countries did not have democratic governments and these circumstances led to injustices, corruption, internal clashes and violations of human rights, especially child exploitation and discrimination.[12] In addition, with the increasing use of the Internet and a broader and faster news media coverage, the world became more critical and strict towards the conduct of corporations. Those companies without adequate policies to protect human rights risked to endanger even more the situations of those instable countries. Thus, they were more likely to be accused of being the direct perpetrators, or at least of contributing to, violations of human rights.[13] Indeed, the globalization, and the profits coming from it, revealed the negative casualties deriving from the corporations' activities.[14]

Among the first manifestations of the relationship between corporations and human rights it is possible to include the apartheid period in South Africa throughout the 1970s and 1980s, which later inspired some of the early academic works in the BHR field.[15]

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[10] J Hall, S Matos and C H Langford, 'Social exclusion and transgenic technology: the case of Brazilian agriculture' (2008) 77 Journal of Business Ethics 45.
[11] E Giuliani and C Macchi, 'Multinational corporations' economic and human rights impacts on developing countries: a review and research agenda' (2014) 38(2) Cambridge Journal of Economics 479, 494.
[12] Chandler (n 2) 23.
[13] *ibid*.
[14] J Campagna, 'United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers' (2004) 37 J. Marshall L. REV. 1205, 1211; D Shelton, 'Protecting Human Rights in a Globalized World' (2002) 25 B.C. INT'L & COMP. L. REV. 273, 280.
[15] T Donaldson, *The Ethics of International Business* (1st edn Oxford University Press, 1989).

In South Africa, during the apartheid period many Western companies followed the discriminatory apartheid laws and policies; yet, others, in particular those under the leadership of the Baptist minister and General Motors board member Leon Sullivan, fought against the illegitimate laws and eventually left South Africa. Although the anti-apartheid movement mainly concerned racism and race discrimination, it ultimately revolved around human rights as a whole. Indeed, those companies that complied with the discriminatory laws and policies could be considered accomplices with the government that violated human rights.[16]

Thus, it does not surprise that the BHR movement started developing during those years. In particular, it emerged from the fast process of globalization and, on the one hand, the increase in the number, size and significance of the modern multinationals; on the other hand, the perception that governments were losing control over this process.[17] John Ruggie, and more in general the BHR literature of the following years, stated that the governance gaps were the main reason of the human rights crisis in this regard.[18] During the same period human rights advocates started developing an increasing frustration due to the lack of State accountability, and for this reason they moved their attention to business because it was seen as potentially more responsive to human rights campaigns.[19] Nevertheless, for a long time the targets of the latter were considered governments, not companies. Hence, the BHR movement only slowly developed by actively engage corporations.[20]

However, in the 1970s the first attempts to create rules to regulate corporate human rights responsibility took place. In those years, the UN started drafting specific rules regarding the investment activities of multinational

[16] M A Santoro, 'Sullivan Principles or Ruggie Principles? Applying the Fair Share Theory to Determine the Extent and Limits of Business Responsibility for Human Rights' (2012) XXVIII/106 Notizie di Politeia 171.
[17] Wettstein (n 8) 25.
[18] J G Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton & Company, 2013); P Simons and A Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge 2014).
[19] M A Santoro, 'Business and Human Rights in Historical Perspective' (2015) 14/2 JHR 155, 156.
[20] Chandler (n 2) 23.

corporations.[21] Indeed, developing countries started having concerns for the increasing power of multinational companies and, as a response, the UN created the Center on Transnational Corporations in 1974.[22] The most important goal of this Center was to draft a code of conduct for multinationals in order to highlight the importance of responsible and equitable investment activities and require them to "respect human rights and fundamental freedoms in the countries in which they operate".[23] The idea of the code was to promote equal opportunities and treatment and to avoid any kind of discrimination. However, the project for the draft code was abandoned due to the opposition from Western countries and from multinational corporations themselves; around twenty years later the Center dissolved.[24]

Then, in 1976, the Organisation for Economic Co-operation and Development (hereinafter "OECD") published the OECD Guidelines for Multinational Enterprises (hereinafter "OECD Guidelines" or "Guidelines"), drafted with a voluntary approach by addressing States instead of corporations directly. The OECD Guidelines discuss the topic of human rights responsibilities of corporations, and, after the last revised version of 2011, they have become aligned with the UN Guiding Principles on Business and Human Rights (hereinafter "UNGPs").[25]

Lastly, the activities of Western companies in South Africa induced the above-mentioned Leon Sullivan to create a coalition of businesses around the so-

[21] A Ramasastry, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (1st edn Cambridge University Press, 2013) 162, 165.
[22] K Hamdani and L Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (1st edn Taylor & Francis Group, 2015) 1, 13.
[23] United Nations Economic and Social Council (ECOSOC) 'Transnational corporations: issues involved in the formulation of a code of Conduct' UN Doc E/C.10/17 (20 July 1976).
[24] N Bernaz, 'Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty' (2021) 22 Hum Rights Rev 45, 51; R A Hedley, 'Transnational Corporations and their Regulation: Issues and Strategies' (1999) 40 International Journal of Comparative Sociology 215, 222.
[25] United Nations Human Rights Council (UNHRCo), 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc A/HRC/17/31 (21 March 2011) 1.

called ‘Sullivan Principles’.[26] These principles consisted of a number of norms asking businesses to exercise civil disobedience against the discriminatory apartheid laws and policies, in order to engage in the active dismantling of the apartheid regime.[27] Businesses following the Sullivan Principles were required to go beyond simply refraining from using apartheid in their own activities.[28] Indeed, although companies had neither established such discriminatory system nor had they engaged in it,[29] they were also asked to actively work on ending apartheid altogether, ultimately aiming at abolishing practices and regulations that impaired social, economic, and political justice.[30]

By doing so, the Sullivan Principles contributed to what is considered one of the most remarkable accomplishments for human rights’ protection in the 20th century,[31] namely the dismantlement of apartheid in South Africa.[32] Indeed, if businesses in South Africa wanted to uphold their moral standards, they essentially had two choices. One choice was to leave and withdraw their investments, either as a result of widespread opposition or because they came to the conclusion that it was impossible to continue business there without endangering human rights. Alternatively, businesses could continue operating and make an effort to do so without perpetrating any racial discrimination, by following the Sullivan Principles. Many international corporations, including the majority of those who first signed the Sullivan Principles, decided to leave South Africa as the apartheid campaign progressed. The roughly twenty-five businesses that remained and adhered to the Sullivan Principles made a commitment to conduct their operations in accordance with race-neutral principles, thus engaging in civil disobedience against the apartheid legislation. Additionally, they vowed to

[26] Z Larson, ‘The Sullivan Principles: South Africa, Apartheid, and Globalization’ (2020) 44(3) Diplomatic History 479, 479.
[27] F Wettstein, ‘Waiting for the Mountain to Move: The Role of Multinational Corporations in the Quest for Global Justice’ (2013) XXIX/111 Notizie di Politeia 13.
[28] Santoro (n 16); O F Williams, ‘A Lesson from the Sullivan Principles: The Rewards for Being Proactive’ in *Global Codes of Conduct: An Idea Whose Time Has Come* (1st edn University of Notre Dame Press, 2000).
[29] Santoro (n 16) 174.
[30] J A Levy, ‘Black Power in the Boardroom: Corporate America, the Sullivan Principles, and the Anti-Apartheid Struggle’ (2020) 21(1) Enterprise & Society 170, 173.
[31] J B Stewart, ‘Amandla! The Sullivan Principles and the Battle to End Apartheid in South Africa, 1975–1987’ (2011) 96(1) The Journal of African American History 62, 84.
[32] Levy (n 30) 194.

publicly advocate for Nelson Mandela's release and the end of the apartheid system.[33]

Against this backdrop, although no explicit reference to human rights was used in the Sullivan Principles, it is clear why nowadays they are commonly considered among the first BHR instruments.[34]

1.1.1.2 The 'formative years'

After the initial steps in the context of anti-apartheid movements, in the 1990s the international movement on BHR became more systematic.[35] Relevantly, with the execution of the Nigerian playwright and activist Ken Saro-Wiwa in 1995, the BHR movement originated in a systematic way, together with a more widespread discussion on companies' conduct in relation to human rights.[36]

Indeed, the complicity of Shell emerged in relation to Saro-Wiwa's execution. As a matter of fact, Shell was the major foreign investor in Nigeria at that time and it engaged through smaller shareholders with the local government.[37] The company was internationally condemned mainly because it did not try to stop the Nigerian government and it was accused of being silent in front of violations of human rights in order to safeguard its own profit. Additionally, Shell's image worsened even more because of the allegations concerning environmental damage caused by gas flaring in the Niger Delta and because of the allegations regarding the use of force by the Nigerian government to protect Shell's employees and plant leading to the murder of innocent civilians.[38]

This was only one example of companies, especially in the extractive sector, which had a role or colluded in human rights violations committed by authoritarian local governments repressing demonstrations and protests with the

[33] Santoro (n 16) 176.
[34] Wettstein (n 27) 13.
[35] Bernaz (n 24) 51.
[36] F Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22/4 BEQ 739, 742.
[37] U E Ite, 'Multinational and Corporate Social Responsibility in Developing Countries: A Case Study of Nigeria' (2004) 11 Corp. Soc. Responsib. Environ. Mgmt 1, 3.
[38] Chandler (n 2) 24.

use of force.[39] Other relevant examples include Enron in India,[40] Unocal in Burma,[41] ExxonMobil in Indonesia.[42]

From that moment, at the end of 1990s, the role of human rights NGOs became particularly relevant since many of them started to publish reports revealing the connection between Western companies and local regimes violating human rights around the world.[43] Increasingly, these NGOs became bigger and gained expertise and some of them created specific teams and divisions specifically focusing on BHR.[44] One relevant example is the Amnesty International Business Group in the United Kingdom (hereinafter "UK"), which had a fundamental impact on the BHR movement.[45] Indeed, in 1991 the United Kingdom Section of Amnesty International established a Business Group with the aim of motivating corporations to fairly use their influence to stand for civil and political rights.[46]

Moreover, another milestone in the institutionalization of the movement of BHR occurred in 2002, when the Business and Human Rights Resource Centre was created and became the most important information center and source for relevant news concerning the BHR field.[47]

In the same years, especially in the United States (hereinafter "US"), this new movement led to many lawsuits against multinationals whose operations abroad were in violations of human rights.[48] In particular, some famous

[39] R D Clark, 'Environmental disputes and human rights violations: a role for criminologists' (2009) 12(2) Contemporary Justice Review 129, 129.
[40] W Ahmed, 'From Militant Particularism to Anti-neoliberalism? The Anti-Enron Movement in India' (2012) 44(4) Antipode 1059, 1060.
[41] *Doe and others v. Unocal Corporation and others* [2002] 395 F.3d 932 (9 Cir).
[42] D Bachriadi and E Suryana 'Land grabbing and speculation for energy business: a case study of ExxonMobil in East Java, Indonesia' (2016) 37(4) Development Studies / Revue canadienne d'études du développement 578, 580.
[43] P Drahn, *Adoption of EU Business and Human Rights Policy - The Use of Discretion in the National Transposition of EU Directives* (1st edn Springer, 2020) 1, 25; D L Spar, 'The Spotlight and the Bottom Line: How Multinationals Export Human Rights' (1998) 77(2) Foreign Affairs 7.
[44] K Ballentine and J Sherman, 'Beyond Greed and Grievance: Policy Lessons from Studies in the Political Economy of Armed Conflict' (International Peace Academy Policy Report, 2003) 1, 12-15.
[45] Wettstein (n 8) 27.
[46] Chandler (n 2) 23.
[47] G Chandler, 'The Amnesty International UK Business Group: Putting Human Rights on the Corporate Agenda' (2009) 33 The Journal of Corporate Citizenship 29, 29.
[48] Wettstein (n 8) 28.

companies such as Chiquita,[49] Unocal,[50] or Shell[51] were involved in judicial proceedings that are now considered "pilot" cases regarding CSR.[52] These judicial decisions brought further attention to the BHR discussion during the second half of the 1990s and in the early 2000s and, due to the numerous NGOs' campaigns and the increasing risk of lawsuits concerning human rights, many companies felt the necessity and urgency either to adopt explicit human rights codes of conduct or at least to address the issue of human rights in their sustainability or CSR reports.[53]

In 2000, the UN Global Compact, containing ten universally accepted principles on human rights, labor, environment and anti-corruption, was launched by the Secretary General of the UN at that time, Kofi Annan.[54] At the time, corporations from all over the world were urged to voluntarily accept the principles contained therein and set their operations and strategies in line with them, and with the UN goals.[55]

The UN Global Compact is the "world's leading voluntary corporate citizenship initiative".[56] Today it includes 20,082 companies from all over the world and, for this reason, it is often seen as the most successful international soft-law initiative for sustainable business.[57] It is considered a fundamental instrument to develop, implement, and disclose sustainable corporate policies and practices.[58]

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[49] *Doe v. Chiquita Brands International* [2007] 965 F.3d 1238.
[50] *Doe and others v. Unocal Corporation and others* [2002] 395 F.3d 932 (9 Cir.).
[51] *Kiobel v Royal Dutch Petroleum Co.* [2013] 569 U.S. 108.
[52] Wettstein (n 8) 28.
[53] J Schrempf-Stirling and F Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies' (2017) 145 JBE 545, 554.
[54] C Rodríguez-Garavito, 'Business and Human Rights: Beyond the End of the Beginning' in *Business and Human Rights: Beyond the End of the Beginning* (1st edn Cambridge University Press, 2017) 11, 17.
[55] D G Arnold, 'The United Nations Business and Human Rights Framework' (2010) 20(3) Business Ethics Quarterly 371, 371.
[56] J M Amerson, 'The End of the Beginning - A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective' (2012) 17 FORDHAM J. CORP. & FIN. L. 871, 890; C Voegtlin and N M Pless, 'Global Governance: CSR and the Role of the UN Global Compact' (2014) 122(2) Journal of Business Ethics 179, 181.
[57] United Nations Global Compact (UNGC), '*Participants & Stakeholders: UN Global Compact Participants'* (2022) (https://www.unglobalcompact.org/what-is-gc/participants).
[58] UNGC (https://www.globalcompactnetwork.org/en/the-un-global-compact-eng/global-compact/overview.html) **Errore. Il segnalibro non è definito.**.

Relevantly, with the UN Global Compact the issue of corporate human rights responsibility was for the first time the main focus of an international instrument. For this reason, the UN Global Compact had a fundamental effect on the BHR movement.[59] Indeed, from that moment the UN started focusing on businesses' social and environmental impact and recognizing corporations' role in the BHR movement, not only contributing to the problem but also to its solution.[60]

As a matter of fact, since the Global Compact, the UN has been conducting an evaluation of companies' human rights-related conduct,[61] mostly employing the standard of social expectations, since human rights – accordingly, also BHR – are fundamentally based on ethics considerations.[62]

Moreover, the UN Global Compact implied for the first time that corporations' compliance with human rights – rather than optional – should have been regarded as a core obligation, thus calling for a binding instrument to hold them accountable for human rights violations.[63]

For these reasons, the UN Global Compact is considered a key initiative in the historical development of the BHR movement.[64]

However, the UN Global Compact's role has changed over time. Indeed, at first, when it was launched it was a symbol of a new approach to the global economy, where corporations were considered fundamental in the resolution of global problems.[65] However, over the years it has become a strategic tool for multinational corporations to undermine the establishment of a more far-reaching and binding liability mechanism.[66] In addition, today it is often and strategically used by companies willing to show that, as they voluntarily adhere to the UN Global Compact, no binding regulations on corporate responsibility are needed.[67]

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[59] Wettstein (n 8) 28; Wettstein (n 36) 742; Amerson (n 56) 892.
[60] Amerson (n 56) 892; Wettstein (n 36) 742.
[61] Arnold (n 55) 16.
[62] D G Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20(3) Business Ethics Quarterly 371; W Cragg, 'Ethics, enlightened Self Interest and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the Proposed UN Human Rights Framework' 22(1) Business Ethics Quarterly 9.
[63] Amerson (n 56) 896.
[64] Wettstein (n 8) 28.
[65] Voegtlin and Pless (n 56) 181.
[66] Wettstein (n 8) 28.
[67] Wettstein (n 8) 28.

The importance of the introduction of a binding instrument had already been at the heart of another BHR-related initiative. Indeed, in 1998, the UN Sub-Commission on Human Rights had started to draft the "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (hereinafter "UN Draft Norms"),[68] which were intended to become the foundation of a legally binding global framework on corporate human rights responsibility.[69] However, this attempt to move towards a binding instrument was not successful and the idea was abandoned when John Ruggie (whose role will be detailed in the second chapter of this thesis) became the UN Special Representative to the Secretary General (hereinafter "SRSG").[70] Importantly, he was the mind of the 'Protect, Respect and Remedy Framework' of complementary human rights duties and responsibilities for States and business entities' (hereinafter "PRR Framework"), whose fundamental principles were later incorporated in the UNGPs.[71]

In addition, during his mandate, the debate on BHR – leading to discussions about legal redress, victims' access to justice and accountability mechanisms – developed among legal scholars,[72] later becoming more interdisciplinary and also receiving contributions from related fields such as CSR, business ethics and international relations.[73]

1.1.1.3 The 'maturation' of the BHR debate

The third wave of the BHR's history began in June 2011 with the publication of the UNGPs (more extensively analyzed in the second chapter of the

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[68] U Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus' (2016) 1 BHRJ 21, 22.
[69] D Weissbrodt and M Kruger, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights' (2003) 97 AJIL 901; D Weissbrodt, 'Corporate Human Rights Responsibilities' (2005) 6/3 ZFWU 279.
[70] Wettstein (n 8) 29.
[71] R C Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48 TEX. INT'l L. J. 33, 42 and 43.
[72] B A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153; S R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111/3 Yale Law Journal 443; P T Muchlinski, 'Human Rights and Multinationals: Is There a Problem?' (2001) 77/1 International Affairs 31.
[73] Wettstein (n 8) 30.

present thesis), which – fundamentally – codified that both States and corporations have the responsibility to guarantee that human rights are respected in the global economy.[74]

The implementation of the UNGPs is mandated to the UN Working Group on BHR (hereinafter "UNWG"), established in 2011 to support the application of the UNGPs and, for this purpose, gathering every year the UN Forum on BHR in Geneva, which brings together around 2,500 BHR professionals from government, practice, civil society and academia.[75]

The UNGPs are still considered the most significant instrument in the current BHR discussion.[76] Indeed, despite their voluntary and thus not mandatory character, they have become a fundamental standard on the conduct of corporations[77] and an essential instrument for guaranteeing human rights' protection by multinationals.[78]

Furthermore, the UNGPs have also influenced the drafting of other more recent instruments, in particular the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by the International Labour Organization (hereinafter "ILO Declaration"),[79] and the OECD Guidelines, which incorporated the UNGPs and mainly aimed at guaranteeing the principles of freedom and transparency in the investment field and at promoting responsible business conduct, by encouraging a social, economic and environmental progress.[80]

During the third wave of the BHR movement and in the context of the implementation of the UNGPs, there were more attempts to establish a binding

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[74] Ruggie (n 18).
[75] P Thielborger and T Ackermann, 'A Treaty on Enforcing Human Rights against Business: Closing the Loophole or Getting Stuck in a Loop' (2017) 24 IND. J. GLOBAL LEGAL Stud. 43, 48; Wettstein (n 8) 30.
[76] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[77] R Venkatesan, 'The UN Framework on Business and Human Rights: A Workers' Rights Critique' (2019) 157 J Bus Ethics 635, 635.
[78] S Deva, 'Business and Human Rights: Time to Move Beyond the "Present"?' in *Business and Human Rights: Beyond the End of the Beginning* (1st edn Cambridge University Press, 2017) 62, 62.
[79] International Labour Organization (ILO), Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017) (ILO Declaration).
[80] Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* (2000) (OECD Guidelines).

treaty regulating the conduct of corporations in relation to human rights. In this regard, NGOs acquired a significant role, due to their impact on companies' activity.[81]

For instance, in 2015 the governments of Ecuador and South Africa tried to start discussions – still ongoing – concerning the drafting of a binding treaty on BHR at the UN level.[82]

Additionally, there have been important developments both at the regional and domestic level.

Indeed, at the regional level, the EU Council in 2016 issued its 'Conclusions on Business and Human Rights' (hereinafter "Conclusions"),[83] where it reaffirmed the EU's support for the UNGPs and welcomed the European Commission's intention to develop an EU Action Plan on Responsible Business Conduct, which should outline an overall European policy framework to enhance further implementation of the UNGPs.[84]

In its Conclusions, the Council stated that "EU Member States have taken the lead internationally on developing and adopting National Action Plans to implement the Guiding Principles or integrating [them] into national [Corporate Social Responsibility (CSR)] Strategies".[85] Moreover, it urged the European Commission and the European External Action Service to "support peer learning on business and human rights, including cross-regional peer learning".[86]

Furthermore, at the domestic level, a number of States drafted and published the so-called National Action Plans (hereinafter "NAPs") on BHR and

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[81] W H Meyer, 'Activism and research on TNCs and human rights: building a new international normative regime' in Scott Pegg and Jedrzej George Frynas (eds), *Transnational Corporations and Human Rights* (1st edn Palgrave Macmillan, 2003) 33; Drahn (n 43) 28.

[82] Wettstein (n 8) 30 and 31.

[83] Council of the European Union, 'Council Conclusions on Business and Human Rights - 3477th meeting of the Foreign Affairs Council' DGC 2B OZ 10254/16 (20 June 2016) (https://data.consilium.europa.eu/doc/document/ST-10254-2016-INIT/en/pdf).

[84] D Augenstein, M Dawson and P Thielborger, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights' (2018) 3 BHRJ 1, 2.

[85] Council of the European Union, 'Council Conclusions on Business and Human Rights - 3477th meeting of the Foreign Affairs Council' DGC 2B OZ 10254/16 (20 June 2016) (https://data.consilium.europa.eu/doc/document/ST-10254-2016-INIT/en/pdf), para 6.

[86] Council of the European Union, 'Council Conclusions on Business and Human Rights - 3477th meeting of the Foreign Affairs Council' DGC 2B OZ 10254/16 (20 June 2016) (https://data.consilium.europa.eu/doc/document/ST-10254-2016-INIT/en/pdf), para 5; European Commission, *Corporate Social Responsibility: National Public Policies in the European Union: Compendium 2014* (European Union, 2014).

many more have started or have considered to start the process.[87] NAPs can be considered a commitment of governments with the aim of improving and encouraging business respect for human rights. However, the published NAPs mainly remain vague and too general in their content; they do not suggest to establish new binding measures and basically focus on past actions and developments instead of discussing future commitments.[88] At the same time, they are relevant since they show that the BHR issues and discussion have become and are becoming even more significant in the policy agendas of national governments.[89]

Ultimately, although the BHR movement began in the 1970s, both public and private actors are still far from complying with BHR standards.[90] Indeed, this is mainly due to two core weaknesses of the current BHR framework, namely its non-binding character,[91] and the lack of an enforcement mechanism, rendering restoration to victims particularly hard.[92]

1.1.2 Corporate social responsibility

At the core of BHR there is the "umbrella" notion of CSR, encompassing a broad variety of activities that corporations may voluntarily put in place in order to strike a balance between,[93] on the one hand, the ethical expectations stemming from society, i.e. the compliance with BHR and social and environmental standards, and on the other hand their own economic interests, namely profit.[94]

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[87] C Methven O'Brien, A Mehra, S Blackwell and C Bloch Poulsen-Hansen, 'National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool' (2016) 1/1 BHRJ 117.

[88] C Vargas, 'Assessment of Existing National Action Plans (NAPs) on Business and Human Rights (2017)' (Dejusticia, 22 August 2017) (https://www.dejusticia.org/en/publication/assessment-of-existing-national-action-plans-naps-on-business-and-human-rights-2017/).

[89] Wettstein (n 8) 30 and 31.

[90] Mena, de Leede, Baumann, Black, Lindeman and McShane (n 4) 162.

[91] Černič (n 5) 193.

[92] Mena, de Leede, Baumann, Black, Lindeman and McShane (n 4) 162.

[93] D McBarnet, 'Corporate Social Responsibility beyond Law, through Law, for Law' (2009) Edinburgh School of Law Working Paper Series 1, 2.

[94] D Fiaschi, E Giuliani, C Macchi and O Perrone, 'Corporate Social Responsibility and Human Rights Abuses. A Comparison of the Strategies Adopted by Advanced Country and BRIC Multinationals' (2012) Notizie di Politeia 34, 37; A G Scherer and G Palazzo, 'Toward a Political Conception of Corporate Responsibility: Business and Society Seen from a Habermasian Perspective' (2007) 32/4 AMR 1096, 1096.

Similarly to BHR, CSR focuses on business activities that go beyond the simple aim of profit-making,[95] also being reasonable and beneficial for the society, on the assumption that corporate behavior can have some effect on a broad range of human rights concerns, such as freedom of expression, sexual harassment, discrimination, health and safety, education, freedom of association.[96]

However, differently from the BHR movement, which only focalizes on human rights issues, CSR has always been characterized by a much broader scope both concerning the issues discussed and the methods used to deal with them.[97]

The idea of CSR began to develop in the 1930s, when the need of a business ethics started emerging. This implied the application of ethics in business activities in which the aim of corporations was not the maximization of profits but the adoption and implementation of the best possible choices for the entire society.[98]

Among the 1950s and 1960s, CSR developed as an autonomous concept.[99] Nevertheless, human rights were not a fundamental aspect of the debate around CSR, nor was human rights terminology used in this context, especially before the UNGPs were drafted.[100]

For this reason, until recently contributions to the CSR literature strictly addressing human rights were exiguous,[101] although the CSR debate was thematically and conceptually adopting a human rights perspective.[102]

In particular, three waves of human rights-related contributions in the CSR literature can be identified: the first started in the mid-1980s; the second one

[95] P K Shum and S L Yam, 'Ethics and Law: Guiding the invisible hand to correct corporate social responsibility externalities' 98 Journal of Business Ethics 549.
[96] Wettstein (n 8) 30 and 32.
[97] D Votaw, 'Genius Becomes Rare: A Comment on the Doctrine of Social Responsibility Pt. I' (1972) 15/2 CMR 25, 25.
[98] M R Mauro, *Diritto internazionale dell'economia – Teoria e prassi delle relazioni economiche internazionali* (1st edn Edizioni Scientifiche Italiane, 2019) 1, 106.
[99] H R Bowen, *The Social Responsibilities of the Businessman* (1st edn Harper and Row, 1953); K Davis, 'Can Business Afford to Ignore Corporate Social Responsibilities?' (1960) 2 CMR 70; D Votaw, 'The Politics of a Changing Corporate Society' (1961) 3/3 CMR 105; Votaw (n 102).
[100] T Campbell, 'A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations' (2006) 16(2) Business Ethics Quarterly 255, 256.
[101] Wettstein (n 27).
[102] Wettstein (n 8) 30 and 33.

began with the child labor controversy in the early to mid-1990s; and the third wave commenced with the creation of the position of the SRSG in 2005.[103]

1.1.2.1 The first wave

The first wave was characterized by isolated and fragmented contributions which mainly focused on labor rights and employment.

In this regard, the discussion on disinvestment from apartheid South Africa in the late 1980s was an exception.[104] Indeed, it revolved around discrimination in the workplace, which went beyond the scope of traditional labor issues, more broadly concerning governments committing systematic human rights abuses. Relevantly, these discussions on corporate complicity,[105] corporations' role in conflict zones,[106] and the relations between corporations and authoritarian governments later became core concerns.[107]

1.1.2.2 The second wave

The second wave began thanks to the widening of the focus beyond labor issues, which was preceded by the emergence of the BHR debate in the mid-1990s, and, more significantly for the CSR debate, by the ongoing controversy on child labor that began in those years.[108] Indeed, at the time, a series of multinational corporations such as Nike were involved in scandals about miserable labor conditions in factories located in developing countries, leading to a broader discussion on supply chain responsibility, and particularly on child

[103] Wettstein (n 36) 746.
[104] O F Williams, *The Apartheid Crisis. How We Can Do Justice in a Land of Violence* (1st edn Harper and Row Publishers, 1986) 72-117; V Di Norcia, 'The Leverage of Foreigners: Multinationals in South Africa' 8(11) Journal of Business Ethics 865; T Donaldson, *The Ethics of International Business*. (1st edn Oxford University Press, 1989) 129-144; S P Sethi, *The South African Quagmire: In Search of a Peaceful Path to Democratic Pluralism* (1st edn Ballinger Publishing Company, 1987).
[105] A Clapham and S Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 Hastings International and Comparative Law Review 339; A Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon; An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20(1) Berkeley Journal of International Law 91.
[106] S Tripathi, 'International Regulation of Multinational Corporations (2005) 33(1) Oxford Development Studies 117.
[107] Wettstein (n 36) 746.
[108] T Smith, 'The Power of Business for Human Rights' (1994) 88 Business and Society Review 36.

labor.[109] The discussion on child labor, similarly to what had happened in relation to apartheid in South Africa, went beyond the traditional debate on labor and employment.[110] The fact that global value chains revealed themselves to be more and more fragmented created doubts not only on the universality of labor standards, but also on how extended the corporate responsibility of contractors and suppliers would be.[111] This is exactly why traditional labor problems increasingly started to be addressed as human rights issues more generally.[112]

The widening of CSR's focus became more systematic when the UN Global Compact was drafted in 2000. The UN Global Compact, in its ten principles, differentiated between general human rights principles (principles 1 and 2) and principles specifically dealing with labor (principles 3, 4, 5, and 6).[113] The goal of the UN Global Compact was not only to add more general human rights to the labor issues, but also to make human rights more significant for corporations. This emerged in an increasing number of contributions regarding the human rights implications of the UN Global Compact itself and regarding the relation between CSR and human rights in general after 2000.[114]

For this reason, a clash arose between the UN Global Compact and the UN Draft Norms. Indeed, the UN Draft Norms can be considered the first comprehensive BHR instrument at the international level. [115] Instead, although it locates human rights at its core, the UN Global Compact has always been an initiative in the context of CSR. This implies a wider scope and focus, and a voluntary approach and nature.

The controversy between the UN Global Compact and the UN Draft Norms concerning their non-voluntary basis reached its peak in 2003 and led to

[109] L P Hartman, D G Amold and R E Wokutch, *Rising above Sweatshops: Innovative Approaches to Global Labor Challenges* (1st edn Praeger, 2003).
[110] Wettstein (n 36) 746.
[111] D G Arnold and L P Hartman, 'Worker Rights and Low Wage Industrialization: How to Avoid Sweatshops' (2006) 28(3) Human Rights Quarterly 676, 684–686.
[112] Wettstein (n 36) 747.
[113] Voegtlin and Pless (n 56) 181.
[114] P Frankental, 'The UN Universal Declaration of Human Rights as a Corporate Code of Conduct' (2002) 11(2) Business Ethics: A European Review 129.
[115] Wettstein (n 8) 29.

the creation of the specific role of the SRSG in 2005.[116] Both the UN Draft Norms and the establishment of the role of the SRSG were fundamental steps towards the harmonization of corporate conduct with human rights standards, in the transition into the third phase of the development of CSR.[117]

1.1.2.3 The third wave

Such third stage started when John Ruggie was appointed as SRSG in 2005. In particular, when he published the PRR Framework in 2008 the importance of the BHR discussion gained significance in the CSR debate, stimulating many publications on the relationship between CSR and human rights.[118]

However, despite the increased importance of the debate on CSR and human rights since the mid-1980s and over time, human rights concerns have not become fundamental yet in the context of CSR.[119] This does not mean that CSR and human rights are not interconnected but rather that the international community, apart from theoretically discussing CSR, does not put enough effort in concretely attributing a relevant role to human rights.[120]

Indeed, what is dividing CSR and the BHR discussion is the believed discrepancy between CSR and the inherent nature of human rights. This circumstance might have two possible causes: according to the first, that has been defined "the problem of voluntariness", the voluntary character of CSR is thought to be in contrast with the indispensable moral nature of human rights issues. Indeed, the divergence between traditional interpretations of CSR and the new debate on BHR shows exactly one main contrast: on the one hand, CSR historically has been largely focused on what is preferred, and thus voluntary;[121]

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[116] N Howen, 'Responsibility and Complicity from the Perspective of International Human Rights Law' in M Shinn (ed.), *The 2005 Business and Human Rights Seminar Report: Exploring Responsibility and Complicity* (1st edn Old Billingsgate, 2005) 12.
[117] Wettstein (n 36) 747.
[118] Wettstein (n 36) 747.
[119] Wettstein (n 36) 747.
[120] R McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87(2) Journal of Business Ethics 385.
[121] S Waddock and N Smith, 'Relationships: The Real Challenge of Corporate Global Citizenship' (2000) 105(1) Business and Society Review 47, 47.

on the other hand, human rights concerns discuss what is essential for human beings and, thus, what is mandatory to give them.[122]

The second possible reason, called "the problem of non-political responsibility", implies that the political nature of human rights duties mismatches perceived apolitical and private nature of the world of corporations, creating a clash between the political obligation regarding human rights and the non-political and social responsibility of corporations.[123] This conception derives from the idea that our society, in which Western liberalism has become prominent, is characterized by an evident demarcation between the private and public sector. Relevantly, this is generally acknowledged and commonly accepted as an implied presumption of the traditional notion of CSR. Therefore, traditionally companies have been considered within the private sector, while human rights have always been regarded as a political and thus public matter.[124]

In any case, both these two possible explanations show that no sufficient attention has been given to human rights within the CSR debate.[125]

1.1.2.4 Concluding remarks

Although the concept of CSR has been largely discussed in the academic world,[126] most of the sources establishing human rights duties for multinational corporations are soft-law instruments, therefore not binding.[127] Only in the specific context of investment arbitration, CSR and companies' codes of conducts, although drafted and implemented by companies as internal regulation and mainly concerning the domestic law level, are expressly referred to as binding obligations between the investor and the host State.[128] However, apart from this specific field,

[122] E Giuliani, 'Human Rights and Corporate Social Responsibility in Developing Countries' Industrial Clusters' (2016) 133(1) Journal of Business Ethics 39, 42.
[123] Wettstein (n 36) 747.
[124] F Wettstein, 'Beyond Voluntariness, Beyond CSR: Making a Case for Human Rights and Justice' (2009) 114(1) Business and Society Review 125.
[125] Wettstein (n 36) 747.
[126] J Zerk, *Multinationals and Corporate Social Responsibility* (1st edn Cambridge University Press, 2006).
[127] J E Viñuales, 'Investor diligence in investment arbitration: Sources and arguments' (2017) 32(3) ICSID Review-Foreign Investment Law Journal 349, 350.
[128] *ibid*.

the general consideration about CSR is that this principle does not have any binding value.[129]

Moreover, CSR has also been addressed at a regional level, in particular at the EU level. The European Commission has put a lot of effort in establishing a public policy to promote CSR.[130] Thanks to the EU public policy, in 2011 the number of EU enterprises that have signed up to the ten CSR principles of the UN Global Compact has reached over 1900, compared to 600 in 2011; more than 140 EU companies signed transnational company agreements with global or European workers' organizations, covering issues such as labor rights; and more than 850 enterprises published sustainability reports according to the guidelines of the Global Reporting Initiative.[131]

CSR today is considered a fundamental element in the business and regulatory discussion.[132] CSR changes the approach of corporate responsibility: its focus is no longer limited to profit maximization,[133] but it includes a wider range of common issues, such as the protection of the environment and liability for ethical and legal obligations. Indeed, it does not simply consider profit, but the planet and people are part of the debate.[134]

Indeed, this is also reflected in the corporations' CSR policies or in their codes of conduct. In such documents companies state their commitment with regard to legal and ethical obligations, with the aim of increasing the consideration that corporations give to human rights, the environment, the

[129] V Sundra-Karean and S Suhanah Syed Ahmad, 'The Role of Corporate Social Responsibility and Soft Law Options in the Protection of Migrant Workers' Interests in Host Countries — The Case of Malaysia' (2012) 40(4) Asian Journal of Social Science 509, 513.
[130] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A renewed EU strategy 2011-14 for Corporate Social Responsibility' [2001] COM(2011) 681 final, 4.
[131] *ibid.*
[132] McBarnet (n 93) 1.
[133] M Friedman, 'The Social Responsibility of Business is to Increase its Profits' *New York Times Magazine* (13 September 1970).
[134] H Wang, L Tong, R Takeuchi and G George, 'Corporate Social Responsibility: An Overview And New Research Directions: Thematic Issue on Corporate Social Responsibility [From the Editors]' (2016) 59(2) AMJ 534, 534 and 535.

principle of fair treatment towards suppliers and customers, as well as the business' awareness of risks such as corruption and bribery.[135]

Relevantly, the wider range of issues covered by CSR is evident also from the fact that corporate world has been giving significant consideration to more and more issues, such as ethical policies, responsible marketing and the promotion of diversity in the workforce.[136]

Indeed, CSR policies have been increasingly adopted by corporations from many sectors, such as the financial one.[137] Moreover, corporations have started to dedicate specific "ethics offices", especially in the US, with CSR managers and directors that deal precisely with CSR.[138]

It has been demonstrated that there may be many strategic reasons behind the adoption of CSR.[139] In particular, the four main strategies are the following: the 'simple reactive CSR strategy', the 'instrumental reactive CSR strategy', the 'instrumental proactive CSR strategy' and the 'simple CSR strategy'.[140]

The first strategy entails adopting CSR only after a firm engages in a human rights violation and upholds non-abusive behavior ever since.[141] This kind of strategy was mainly employed in the first period of the CSR development and it

[135] McBarnet (n 93) 1.
[136] H Liang and L Renneboog, 'On the Foundations of Corporate Social Responsibility' (2017) 72(2) The Journal of Finance 853, 853.
[137] S Biggs and D Messerschmidt, 'Social responsibility in the growing handmade paper industry in Nepal' (2005) 55(11) World Development 1821; O Damiani, 'Social upgrading in agriculture-based clusters: Common lessons from cases in Asia and Latin America' in J A Puppim de Oliveira (edn), *Upgrading clusters and small enterprises in developing countries: Environmental, labour, innovation and social issues* (1st edn Ashgate Publishing, 2008) 65.
[138] McBarnet (n 93) 2.
[139] R V Aguilera, D E Rupp, C A Williams, J Ganapathi, 'Putting the S back in corporate social responsibility: A multilevel theory of social change in organization' (2007) 32(2) Academy of Management Review 836; T Wagner, R K Weitz, 'Corporate Hypocrisy: Overcoming the Threat of Inconsistent Corporate Social Responsibility Perceptions' (2009) 73(6) Journal of Marketing 77; S R Fang, C Y Huang, S W L Huang, 'Corporate social responsibility strategies, dynamic capability and organizational performance: Cases of top Taiwan-selected benchmark enterprises' (2010) 4(1) African Journal of Business Management 120; M Kitzmueller and J Shimshack, 'Economic perspectives on Corporate Social Responsibility' 50(1) Journal of Economic Literature 51.
[140] Fiaschi, Giuliani, Macchi and Perrone (n 94) 40.
[141] D Cassel, 'Human Rights and Business Responsibilities in the Global Marketplace' (2001) 11(2) Business Ethics Quarterly 261, 268.

can be helpful for corporations to show their real commitment towards CSR fundamental principles.[142]

The 'instrumental proactive CSR strategy' is similar to the first, with the difference that the corporation is involved in human rights abuses even after adopting the CSR and there is evidence of this circumstance. Thus, the idea behind the adoption of this strategy could be both to restore the reputation and to put in place positive initiatives in order to prevent further violations, especially for those corporations whose brand or image is fundamental for their success in the market.[143]

The third possible strategy does not necessarily imply previous involvement in human rights violations, but it is usually used to establish a "reputational capital", which is tactical for business success.[144] Indeed, in the event certain businesses' activities are found in violation of human rights in the future, the strength of their institutional links will lessen the consequences associated with the abuse in terms of reputational damage or community reactions.[145]

The fourth and last possible strategy, the so called 'simple CSR strategy', consists of actively embracing CSR practices with the goal of upholding the fundamental CSR principles to which they pledge allegiance in the future. In this instance, the adoption of CSR policies is not a response to an abuse, but instead may be influenced by pressures inside the sector.[146] Additionally, CSR does not only concern ethical issues and human rights but it also assists corporations in promptly reacting to social and market pressure by corporations, preventing risks for the companies' reputation and aiming for market opportunities and cost-saving techniques.

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[142] Fiaschi, Giuliani, Macchi and Perrone (n 94) 40.
[143] S L Blanton and R G Blanton, 'A Sectoral Analysis of Human Rights and FDI: Does Industry Type Matter?' (2009) 53 International Studies Quarterly 469.
[144] C J Fombrun, N A Gardberg, M L Barnett, 'Opportunity Platforms and Safety Nets: Corporate Citizenship and Reputational Risk' (2000) 105(1) Business and Society Review 85.
[145] Fiaschi, Giuliani, Macchi and Perrone (n 94) 41.
[146] D Matten and J Moon, ''Implicit' and 'Explicit' CSR: A conceptual framework for a comparative understanding of corporate social responsibility' (2008) 33(2) Academy of Management Review 404; P Rivoli and S Waddock, 'First They Ignore You...: The time-context dynamic and corporate responsibility' (2011) 53(2) California Review 104.

For this reason, CSR is regarded as in line with the traditional goal of corporations, that is profit. The peculiarity of CSR is that it benefits the long-term shareholder value and thus it is fully coherent with business.[147]

1.1.3 Environmental, Social and Corporate Governance

Recently, there has been an increasing interest in ESG. Indeed, as investors' focus is more and more shifting towards such aspect, businesses are encouraged to pursue non-financial objectives.[148]

ESG is now also considered an important principles of CSR, aiming at increasing sustainable policies (such as building a sound work environment, efficient human capital management, and health and safety measures for staff) that affect the financial performance (hereinafter "FP") of corporations.[149]

Indeed, a business' due diligence in this field can be determined by means of the "ESG score", which can be identified as the added value of the CSR performance which comes from plenty of ESG behaviors.[150] More specifically, the ESG score is based on numerical ratings defined as "evaluations of a company based on a comparative assessment of their quality, standard or performance on environmental, social or governance issues".[151] These factors derive from an analysis of different (ESG) factors which, together with financial criteria, represent the essential elements influencing social investors' choices, since they are "the basis for an investment".[152] In general, social investors' choices (that sometimes are referred to as "Sustainable Investing") imply that the corporations' decisions on investments have to consider not only financial returns but also, and importantly, ethical values, necessarily linked to human rights. This means that

[147] McBarnet (n 93) 17.
[148] V D'Amato, R D'Ecclesia and S Levantesi, 'Fundamental ratios as predictors of ESG scores: a machine learning approach' (2021) 44 Decisions in Economics and Finance 1087, 1088.
[149] V Cherkasova and I Nenuzhenko, 'Investment in ESG Projects and Corporate Performance of Multinational Companies' (2022) 37(1) Journal of Economic Integration 54, 54.
[150] E Duque-Grisales and J Aguilera-Caracuel, 'Environmental, Social and Governance (ESG) Scores and Financial Performance of Multilatinas: Moderating Effects of Geographic International Diversification and Financial Slack' (2021) 168 Journal of Business Ethics 315, 318.
[151] SustainAbility, 'Rate the Raters 2018: Ratings Revisited' (SustainAbility, March 2018) (https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/sa-ratetheraters_ratings-revisited_march18.pdf) 1, 4.
[152] S Drempetic, C Klein and B Zwergel, 'The influence of firm size on the ESG score: corporate sustainability ratings under review' (2020) 167 J. Bus. Ethics 333, 334.

the ethical values become a priority and will be taken in even higher consideration than financial profits.[153]

Indeed, historically the foundation of Sustainable Investing can be found in the concept of CSR, since it was with the rise of the CSR concept that corporations' behaviors started to be influenced by social expectations.[154]

Sustainability rating agencies assess corporations' performance considering specific attributes within the three categories of environment, social and governance, for example they consider human rights, management and pollutant emissions.[155] In addition, they analyze individual ESG concerns in order to provide an overall evaluation of corporations' performance, including the corporate approach towards human rights concerns.[156]

The ESG score is determined by a company's performance in the single indices of environmental (E), social (S) and governance (G) in equal proportion. For this reason, a corporation can participate in individual environment, social and governance activities at different levels. In some cases, corporations launch initiatives in one of these three dimensions. This can add or decrease financial value.[157]

In particular, the environment (E) component involves the business behavior of corporations in relation to environmental responsibility. Relevantly, today the environment is considered a human right.[158] Different indicators can be considered, such as eco-sustainable product development, the implementation of actions for pollution control, use of renewable energy, emissions reduction policies, environmental standard establishment and environmental investment

[153] M Indriastuti and A Chariri, 'The role of green investment and corporate social responsibility investment on sustainable performance' (2021) 8(1) Cogent Business & Management 1, 17.
[154] D'Amato, D'Ecclesia and Levantesi (n 148) 1088.
[155] E Clementino and R Perkins, 'How Do Companies Respond to Environmental, Social and Governance (ESG) ratings? Evidence from Italy' (2021) 171 Journal of Business Ethics 379, 380.
[156] E M Veenstra and N Ellemers, 'ESG Indicators as Organizational Performance Goals: Do Rating Agencies Encourage a Holistic Approach?' (2020) 12 Sustainability 1, 1.
[157] J E Humphrey, D D Lee and Y Shen, 'The independent effects of environmental, social and governance initiatives on the performance of UK firms' (2012) 37(2) Australian Journal of Management 135; Duque-Grisales and Aguilera-Caracuel (n 150) 316.
[158] L H Leib, *Human Rights and the Environment: Philosophical, Theoretical, and Legal Perspectives* (1st edn Brill, 2011) 1, 54; UN Human Rights Committee (UNHRC), 'General Comment No 36: Article 6: right to life' UN Doc CCPR/C/GC/36 (3 September 2019), para 62; UNHRC, *Ioane Teitiota v. New Zealand* UN Doc CCPR/C/127/D/2728/2016 (7 January 2020).

making.[159] Thus, the environment index derives from a combination of both strengths and weaknesses of corporations concerning indicators related to: (a) emissions reduction, (b) product innovation and (c) resource consumption reduction.[160]

The second ESG index is the social (S) score. This factor shows how committed a corporation is towards the entire community,[161] not only towards the local community in which the company operates. The social index includes numerous indicators related to the policies and the programs implemented by the companies and concerning diversity in the workplace, labor rights, health, safety, employee and customer satisfaction, compliance with the CSR principles. Therefore, the social index mirrors a company's reputation, which is a fundamental element to establish its capacity to create long-term value. As the environment index, the social one is a merging of the corporations' strengths and weakness in this case related to: (a) product responsibility, (b) community, (c) human rights and (d) workforce.[162]

The last ESG index is the governance (G) score. This factor estimates to what extent a company's systems and internal procedures can guarantee that its members and board executives behave in the best interest of its shareholders while considering long-term operations. This index considers several indicators, such as the remuneration of executives, independent board members and audit committees, the levels of leadership team transparency with stakeholders and the completion of sustainability reports; minority shareholders' rights.[163] It shows whether a company is able, through the use of best management practices, to direct and control its rights and responsibilities while creating incentives. This index, as the two others mentioned above, is generated from a weighted score of a company's strengths and weaknesses in relation to: (a) management (board functions and structures) and (b) CSR strategies.[164]

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[159] Veenstra and Ellemers (n 156) 7.
[160] Duque-Grisales and Aguilera-Caracuel (n 150) 321.
[161] N Tamimi and R Sebastianelli, 'Transparency among S&P 500 companies: an analysis of ESG disclosure scores' (2017) 55(8) Management Decision 1660, 1662.
[162] Duque-Grisales and Aguilera-Caracuel (n 150) 321.
[163] Tamimi and Sebastianelli (n 161) 1673.
[164] Duque-Grisales and Aguilera-Caracuel (n 150) 322.

Following the traditional neoclassical approach, it is believed that investing in ESG activities implies additional costs for a corporation and this has an effect on FP.[165] For example, in order to decrease emissions or to increase the use of natural resources, huge investments are needed.[166] Additionally, the costs rise even more for those corporations using old technologies in their production processes. Indeed, obsolete technologies do not consider their effects on the environment and they do not have clear emissions reduction, noise control or waste management policies; this means that these corporations have to bear quite high costs of transforming these processes into new ones that use clean technologies. Thus, when these corporations choose to invest in environmental initiatives, their costs increase drastically and consequently their performance decreases since environmental goals and investment in environmental matters are not priorities for them.[167]

This renders evident that having financial resources is a fundamental factor affecting a corporation's ability to invest in ESG initiatives. When companies possess resources that can be displaced to other practices, it is increasingly common to see more innovative actions with the aim of satisfying the variety of corporate stakeholders' requests.[168] On the contrary, when resources are insufficient, corporations will probably tend to apply conservative strategies in order to protect their economic stability, while, at the same time, locating money in the activities they deem the most essential for their business, in particular operational activities.[169] Indeed, sustainability initiatives are considered expensive

[165] N Semenova and L G Hassel, 'Financial outcomes of environmental risk and opportunity for US companies' (2008) 16(3) Sustainable Development 195; J Derwall, N Guenster, R Bauer and K Koedijk,'The ecoefficiency premium puzzle' (2005) 61(2) Financial Analysts Journal 51.

[166] D G Rassier and D Earnhart, (2010). 'Does the Porter Hypothesis explain expected future financial performance? The effect of clean water regulation on chemical manufacturing firms' (2010) 45(3) Environmental & Resource Economics 353.

[167] Duque-Grisales and Aguilera-Caracuel (n 150) 318.

[168] G B Voss, D Sirdeshmukh and Z G Voss, 'The effects of slack resources and environmental threat on product exploration and exploitation' (2008) 51(1) Academy of Management Journal 147.

[169] J Aguilera-Caracuel, J Guerrero-Villegas, M D Vidal-Salazar and B L Delgado-Márquez, 'International cultural diversification and corporate social performance in multinational enterprises: The role of slack financial resources' (2015) 55(3) Management International Review 323.

and thus, in case of scarce resources, they cannot be a business priority.[170] Conversely, when corporations have enough resources, they will most probably invest in ESG.[171] ESG activities will have a huge impact on FP,[172] because of increased transparency and because they show whether and to what extent corporations are committed to respect human rights within the communities where they operate.[173]

1.2 The new developments of the BHR movement

1.2.1 The current state of art: lack of a binding treaty

Differently from the past, when States used to be considered the only entities bearing the duty to protect human rights,[174] which were solely considered part of the public domain, nowadays also private actors are involved in their safeguard.[175]

At least in theory, the traditional attribution of responsibility for human rights violations to States only is definitely overcome. Conversely, it is rather believed that, because of the social and economic power of corporations, such entities should also be responsible for these abuses.[176]

Thus far, corporations had only been in a victim-beneficiary relationship.[177] Instead, now human rights issues have also entered the "private sphere", changing the very foundations of the rationale behind human rights protection and leading to a transformation of its legal, political and social aspect.[178]

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[170] S Sharma, 'Managerial interpretations and organizational context as predictors of corporate choice of environmental strategy' (2000) 43(4) Academy of Management Journal 681.
[171] Duque-Grisales and Aguilera-Caracuel (n 150) 319.
[172] S Brammer and A Millington,'Does it pay to be different? An analysis of the relationship between corporate social and financial performance' (2008) 29(12) Strategic Management Journal 1325; P Velte, 'Women on management board and ESG performance' (2016) 7(1) Journal of Global Responsibility 98.
[173] Duque-Grisales and Aguilera-Caracuel (n 150) 319.
[174] J G Ruggie, 'Business and Human rights: The Evolving International Agenda' (2007) Working Paper No 38 , Harvard University, John F. Kennedy School of Government.
[175] Mena, de Leede, Baumann, Black, Lindeman and McShane (n 4) 161.
[176] Muchlinski (n 72) 31.
[177] Muchlinski (n 72) 32.
[178] A Clapham, *Human rights in the private sphere* (1st edn Clarendon Press, 1993).

Increasingly, international – yet, not binding – instruments, such as the UNGPs, OECD Guidelines, OECD Due Diligence Guidance for Responsible Business Conduct ("OECD Guidance" or "Guidance"), UN Global Compact, and ILO Declaration, providing human rights standards not only for States but also for corporations are adopted.[179]

Nevertheless, such instruments only relatively facilitate the relationship between corporations and human rights, since grave violations keep happening.[180] As a matter of fact, economy keeps expanding every day, and the international community has not managed yet to effectively enforce regulatory mechanisms. Transnational corporations have to deal more and more with human rights challenges without being guided by any binding international instrument.[181]

Nowadays scholars and UN institutions believe that corporations should be subject to legally binding and enforceable obligations on the respect and protection of human rights.[182] Hence, it is essential to establish binding mechanisms in order to hold companies accountable, and be brought to court,[183] for alleged human rights violations.[184]

In particular, the lack of a binding instrument, which could represent an "authoritative focal point around which the expectations and behavior of the relevant actors can converge",[185] is a significant obstacle. Hence, the possibility to draft and adopt one is among the most relevant and recent debates in the field of BHR.[186] Thus, the aim of most experts and scholars in the fields of law, politics

[179] Černič (n 5) 196.
[180] N Bernaz and I Pietropaoli, 'Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime under the United Nations Convention on the Law ofthe Sea' (2020) 5 Business and Human Rights Journal 200, 200.
[181] Mena, de Leede, Baumann, Black, Lindeman and McShane (n 4) 162.
[182] K McPhail and J Ferguson, 'The past, the present and the future of accounting for human rights' (2016) 29(4) Accounting, Auditing & Accountability Journal 526, 527; Ramasastry (n 21) 167.
[183] Muchlinski (n 72) 32.
[184] O De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 Business and Human Rights Journal 41, 43; D Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1 Business and Human Rights Journal 203, 212.
[185] Ruggie (n 18).
[186] J Kolieb, 'Advancing the Business and Human Rights Treaty Project through International Criminal Law: Assessing the Options for Legally-Binding Corporate Human Rights Obligations' (2019) 50 GEO. J. INT'l L. 789, 790.

and business management, is to establish adequate and binding regulation in order to avoid, or at least limit, and tackle human rights violations by private actors.[187]

1.2.2 The need for a binding treaty

There are several reasons behind the importance of adopting a binding treaty. First of all, the requirement to set legally binding norms controlling business behavior towards human rights is the main justification for a binding treaty on BHR (hereinafter "BHR Treaty").[188] It is necessary to explicitly acknowledge and specify that enterprises are subject to legal obligations resulting from international human rights law. Only an international agreement has the authority to achieve this.[189] The BHR Treaty would articulate an essential normative perspective that fundamental rights under international law impose legally binding obligations upon corporations.[190]

In addition, in order to "fill certain governance gaps left by existing regulatory initiatives, including the [UNGPs]", the BHR Treaty is required.[191] It has been suggested that soft-law or CSR mechanisms have failed to deter corporations from violating or participating in violations of human rights.[192] Additionally, they have not been much of assistance to victims looking for remedy because they do not establish legally binding responsibilities whose breach could result in culpability. It has been claimed that the UNGPs' State duty to protect and corporate responsibility to respect human rights are "not backed by a commitment by states or corporations to take any concrete steps to implement effective remedies: the [UNGPs] are phrased as soft law, not binding obligations,

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[187] Drahn (n 43) 26.
[188] Ratner (n 72) 472; F Wettstein, *Multi-National Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (1st edn Stanford University Press, 2009) 285.
[189] Bilchitz (n 184) 205-210.
[190] V Rouas, *Achieving Access to Justice in a Business and Human Rights Context - An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (1st edn University of London Press, Institute of Advanced Legal Studies, 2022) 1, 339.
[191] S Deva, 'Scope of the Proposed Business and Human Rights Treaty' in Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (1st edn Cambridge University Press, 2017) 155.
[192] European Parliament, 'The EU's input on a UN binding instrument on transnational corporations with respect to human rights' [2018] P8_TA(2018)0382 (https://www.europarl.europa.eu/doceo/document/TA-8-2018-0382_EN.pdf).

contain no enforcement mechanisms and rely heavily on voluntary procedures designed and implemented by corporations with no state supervision".[193]

A BHR Treaty in this situation should be of aid in overcoming at least some of the hurdles in holding corporations accountable for human rights violations.[194] In particular, it is possible to imagine a framework resulting from the ongoing negotiations on the BHR Treaty, establishing effective remedies for corporate human rights violations.[195]

Furthermore, the introduction of human rights standards to be complied with by corporations would mark a philosophical change in the international legal system, with regard to unchecked corporate power and global capitalism. Indeed, the current treaty-making process offers a chance to oppose neoliberal hegemony and corporate control in global governance.[196] It has been claimed that the UN has mostly supported the neoliberal and global capitalist hegemonic project up to this point. Instead of holding multinational corporations accountable for human rights crimes, its recent initiatives on BHR contributed to legitimize those companies' globalization aspirations.[197] The BHR Treaty may be a chance for the UN to successfully engage with and commit to counterhegemonic demands anchored in the primacy of human rights. According to these demands, "regulations and processes that could restrain business' privileged status of rule and authority in contemporary global politics" are necessary.[198] Nevertheless, in order to avoid the establishment of a corporate primacy over the treaty negotiations and truly shift towards a people-centered approach to human rights, global public society should actively participate in the latter.[199]

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[193] B Stephens, 'Making Remedies Work' in Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (1st edn Cambridge University Press, 2017) 408, 408-409.
[194] Deva (n 191) 156.
[195] Stephens (n 193) 409.
[196] D Aragão and M Roland, 'The Need for a Treaty' in Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (1st edn Cambridge University Press, 2017) 152.
[197] R Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method' (1983) 12 Millennium Journal of International Studies 162.
[198] Aragão and Roland (n 196) 152.
[199] M Kenny and R Germain, 'The Idea(l) of Global Civil Society' in R. Germain and M. Kenny (eds) *The Idea of Global Civil Society: Politics and Ethics in a Globalizing Era* (1st edn Routledge, 2005) 1.

Moreover, a binding treaty would specify obligations and reinforce compliance mechanisms, while strengthening at the same time the remedy and participation mechanisms available to civil society.[200] In particular, a binding agreement would impose on States parties the adoption of mandatory HRDD legislation.[201]

Then, a binding treaty would help to align the UNGPs to the existing binding international human rights obligations. This kind of treaty would promote the creation of a regulatory global framework,[202] acknowledging human rights standards and benefiting from the power of a legislative framework enshrining them.[203]

Recent analyses have established that, although the creation of a binding treaty on BHR would not necessarily entail compliance thereto, it would still give higher consideration to BHR. Indeed, it would provide the civil society with more instruments and possibilities to put pressure on States in relation to the enforcement of BHR provisions.[204]

1.2.3 Towards the conclusion of a binding treaty?

In 2014 the UN Human Rights Council (hereinafter "UNHRCo") resolved to "create an open-ended intergovernmental working group on multinational corporations and other private entities with respect to human rights" (hereinafter "IGWG") with Resolution 26/9.[205] The IGWG's goal is to "elaborate an international legally-binding instrument to regulate, in international human rights law, the actions of multinational corporations and other business entities".[206]

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[200] Rodríguez-Garavito (n 54) 33.
[201] UNHRCo, '26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' UN Doc A/HRC/RES/26/9.
[202] L Bickford, 'What Next for Business and Human Rights? A Social Movement Approach' in *Business and Human Rights: Beyond the End of the Beginning* (1st edn Cambridge University Press, 2017) 150, 153.
[203] Rodríguez-Garavito (n 54) 33.
[204] C Vargas, 'A Treaty on Business and Human Rights? A Recurring Debate in a New Governance Landscape' in Beginning' in Rodríguez-Garavito (edn), *Business and Human Rights: Beyond the End of the Beginning* (1st edn Cambridge University Press, 2017) 111, 116.
[205] UNHRCo, UN Doc A/HRC/RES/26/9 (n 201).
[206] UNHRCo, UN Doc A/HRC/RES/26/9 (n 201).

Although the debate was already ongoing within academic scholarship, this decision by the UNHRCo was the climax of the discussion,[207] which was brought to an official level, inside a UN (inter-governmental) body. In particular, the idea of drafting a binding treaty has revived the dispute between the two opposing approaches promoting respectively hard-law instruments and soft-law instruments,[208] that has characterized the BHR field since its first developments in the 1970s.[209]

The focus of the IGWG's first two meetings was to discuss "on the substance, scope, character, and form of the future international instrument".[210] Since 2018, the IGWG has been releasing a draft of a prospective BHR Treaty every year: the Zero Draft,[211] with a Draft Optional Protocol to the Legally Binding Instrument,[212] the 2019 Revised Draft [213] and the Second Revised Draft in 2020.[214]

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[207] G Papalia, 'Doing Business Right: The Case for a Business and Human Rights Treaty' (2018) 3 PERTH ILJ 96, 96.
[208] Vargas (n 204) 111.
[209] Rodríguez-Garavito (n 54) 17.
[210] UNHRCo, 'Human rights and transnational corporations and other business enterprises' UN Doc A/HRC/RES/26/22 (15 July 2014), para 2; Open-Ended Intergovernmental Working Group (OEIGWG), 'Report of the First Session of the Open-ended Governmental 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; OEIGWG, 'Report of the Second Session of the Open-ended Governmental 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; Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9, 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (29 September 2017).
[211] UN Intergovernmental Group on proposed treaty, 'Zero Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises,' (16 July 2018) (ZD); H F Cantú Rivera, 'Negotiating a Treaty on Business and Human Rights: The Early Stages' (2017) 40(3) University of New South Wales Law Journal 1200; C Methven O'Brien, 'Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty' (2020) 5 Business and Human Rights Journal 150, 151.
[212] OEIGWG, 'Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (2018).
[213] OEIGWG, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises – Revised Draft' (16 July 2019).
[214] OEIGWG, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises – Second Revised Draft' (6 August 2020).

In October 2020, during the sixth meeting of the IGWG,[215] the UN High Commissioner for Human Rights, Michelle Bachelet, gave a powerful speech in support of the BHR Treaty process.[216] She stated that embedding respect for human rights across value chains is a crucial step and she invited all parties to participate constructively to advance moral, accountable, and responsible corporate practices.[217]

In 2021 the UNHRCo received the report of the sixth session in order to advance into actual text talks.[218]

The BHR Treaty process itself has contributed to a new legislative approach at the national and regional levels.[219] Indeed, the general understanding is that voluntary measures are insufficient to ensure the protection of human rights in international supply chains. As a matter of fact, both States and corporations demand more and more regulation, and in particular the establishment of some sort of liability for corporate violations of human rights in supply chains.[220]

The IGWG has examined a wide range of strategies for the proper management of BHR within the international law framework. However, the limitations imposed by the selection of human rights law as regulatory framework, and the UN as legislative forum, render the process complicated.[221]

It is also necessary to think more deeply about how a future BHR Treaty may make use of the resources already put out in the three-Pillar Framework and

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[215] UNHRCo, 'Report on the Sixth 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 (29 December 2021) 1; R Subasinghe, 'A Neatly Engineered Stalemate: A Review of the Sixth Session of Negotiations on a Treaty on Business and Human Rights' (2021) 6 Business and Human Rights Journal 384, 384.

[216] UNHRCo, 'Report on the Sixth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights' UN Doc A/HRC/46/73 (14 January 2021) 1.

[217] UNHRCo, UN Doc A/HRC/46/73 (n 216) 1.

[218] UNHRCo, UN Doc A/HRC/46/73 (n 216).

[219] Subasinghe (n 215) 389.

[220] Investor Alliance for Human Rights, 'The Investor Case for Mandatory Human Rights Due Diligence', (https://investorsforhumanrights.org/sites/default/files/attachments/201912/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL%20for%2011.25%20launch.pdf); European Brands Association, 'EU Mandatory Human Rights Due Diligence: AIM Contribution to the Debate' (February 2021) (https://www.aim.be/news/aim-launches-its-contribution-to-the-mandatory-human-rights-duediligence-debate/).

[221] Methven O'Brien (n 211) 154.

UNGPs by governments, corporations, civil society organizations, and others. During the Fifth Session, many governments discussed the steps they had taken to implement the UNGPs, such as NAPs.[222] Future treaties should try and implement these initiatives rather than undermining and abandoning them.[223] Furthermore, such a strategy is not to be dismissed as mere "pragmatism". Only a treaty that is signed, ratified, and implemented by the world's major capital exporting economies, which today is no longer limited to North America and Europe, as well as host States for foreign investments, can effectively guarantee both corporate and governmental accountability as well as justice for rights-holders.[224]

1.2.4 The content of a future binding treaty

As far as the content of a possible BHR Treaty is concerned, it should address the asymmetries between transnational business operations and the primarily territorial structure of human rights law, in order to enhance the current regulatory environment.[225] This viewpoint is supported by a more recent argument that connects the requirement for a BHR Treaty to the expanding adoption of national and regional HRDD standards that are required. As will be described more extensively later in the second chapter of this thesis, an increasing number of nations, including the EU Members, are requiring or considering to require mandatory HRDD criteria for businesses. The implementation of a global agreement requiring HRDD legislation would eliminate the differences in the legal frameworks of the States parties to the agreement.[226] It would undoubtedly inspire additional States to adopt binding HRDD criteria.[227]

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[222] J Ford and C Methven O'Brien, 'Empty rituals or workable models? Towards a business and human rights treaty' (2017) 40(3) University of New South Wales Law Review 1223.
[223] Ford and Methven O'Brien (n 222); Methven O'Brien, 'Experimentalist Global Governance and the Case for a Framework Convention Based on the UN Guiding Principles on Business and Human Rights' in Matthew Mullen (edn), *Navigating a New Era of Business and Human Rights: Challenges and Opportunities under the UNGPs* (1st edn Nakhon Pathom, Article 30, 2019).
[224] Methven O'Brien (n 211) 154.
[225] Deva (n 191) 168.
[226] M Krajewski, 'Aligning Internal and External Policies on Business and Human Rights – Why the EU Should Engage Seriously with the Development of the Legally Binding Instrument' (OpinioJuris, 11 September 2020) (http://opiniojuris.org/2020/09/11/bhr-symposium-aligning-internal-and-external-policies-on-business-and-human-rights-why-the-eu-should-engage-seriously-with-the-development-of-the-legally-binding-instrument/).
[227] Rouas (n 190) 339.

Moreover, the BHR Treaty should have provisions imposing universal obligations on States in order to guarantee access to justice and efficient remedies, through judicial and non-judicial methods,[228] to the victims of business-related human rights violations, in accordance with the UNGPs.[229] Such provisions have been included in the various drafts of the BHR Treaty, for example concerning business legal liability, jurisdiction, applicable law, victims' rights, procedural and practical barriers, and remedy.[230]

Additionally, the BHR Treaty should promote efficient access to redress through "operational-level grievance channels" set up by corporations. However, victims ought to have the option to decide whatever procedure they want to follow to get justice, depending on the type of harm suffered.[231] The BHR Treaty may stipulate that both State and non-State non-judicial grievance channels must adhere to the effectiveness standards established in principle n. 31 of the UNGPs.[232] In particular, they ought to be built on interaction and communication for business operational level processes and lawful, accessible, predictable, equitable, transparent, rights-compatible, and a source of continual learning.[233]

In particular, the proposed BHR Treaty would be "unique" compared to other human rights agreements.[234] Generally speaking, human rights treaties set forth rights that all people or specific vulnerable groups, such women or children, are entitled to, and they place duties on States to uphold, defend, or implement these rights. Conversely, the BHR Treaty would place a greater emphasis on the regulation of a particular type of non-State actors, namely companies, in order to ensure that they respect human rights and it may even contribute to their implementation.[235]

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[228] De Schutter (n 184); Rodríguez-Garavito (n 54) 44.
[229] OEIGWG, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises – Second Revised Draft' (6 August 2020).
[230] Rouas (n 190) 351.
[231] Stephens (n 193) 416.
[232] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[233] Rouas (n 190) 366.
[234] D Bilchitz, 'Corporate Obligations and a Treaty on Business and Human Rights' in Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (1st edn Cambridge University Press, 2017) 185; Rouas (n 190) 333.
[235] Bilchitz (n 234).

A substantial opportunity to both broaden the application of international human rights law to business actors and to "envision a system that could actually offer effective remedies for corporate human rights violations"[236] would be presented by the approval of the BHR Treaty. It could specifically address the logistical, substantive, and procedural obstacles that victims of business-related human rights violations encounter when seeking redress, particularly against MNEs.[237]

Nevertheless, a BHR Treaty might be difficult to negotiate, adopt, and put into effect due to the long-standing State and business opposition to binding international human rights norms for corporate actors and the complexity of the subject.[238]

Despite the difficulties, governments and the UN should keep their focus on the primary goal of the BHR Treaty process, which is to combat impunity and provide justice for workers and communities.[239]

Indeed, a more harmonized approach on BHR might potentially be useful in order to diminish the risk of overlapping and inconsistent regulatory requirements, to deal with the issue of gaps between regimes and, therefore, facilitate business compliance.[240] Additionally, regarding the transnational dimension of human rights violations involving corporations, an international instrument seems to be the most appropriate instrument.[241] For this reason, the adoption of a binding international treaty would be an essential step in this area.[242]

After the description of the historical development of the BHR movement, the importance of a future binding treaty on BHR emerged.

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[236] Stephens (n 193) 409.
[237] Rouas (n 190) 333.
[238] M Taylor, 'A Business and Human Rights Treaty? Why Activists Should Be Worried' (Institute for Human Rights and Business, 4 June 2014) (https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-why-activists-should-be-worried).
[239] C Methven O'Brien, 'Transcending the Binary: Linking Hard and Soft Law Through a UNGPs-Based Framework Convention' (2020) 114 American Journal of International Law Unbound 186.
[240] United Nations Human Rights Office of the High Commissioner, "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies June 2020 (https://www.ohchr.org/sites/default/files/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf).
[241] Rouas (n 190) 339.
[242] Rodríguez-Garavito (n 54) 32.

The second chapter of this thesis will now analyze the theory of the most relevant international standards on BHR, that will then be examined in their practical application in the third chapter, in light of the relevant case-law of regional human rights courts and bodies and in the context of a comparative analysis.

2. THE INTERNATIONAL STANDARDS CONCERNING THE RESPONSIBILITY OF CORPORATIONS FOR VIOLATION OF HUMAN RIGHTS

The second chapter of this thesis will address the international instruments establishing the global standards on the behavior of corporations in relation to human rights.

Firstly, the focus will be on the UNGPs, since, as mentioned in the first chapter of this thesis, they are now considered the global standard for businesses' approach towards human rights. The second section will address the concept of HRDD and the new trend on mandatory HRDD. Both sections will also discuss the role of the UNWG established in 2011 by the UNHRCo in the development of such standards. Indeed, its primary aim is to promote and implement the UNGPs and HRDD among corporations.

The last section of this chapter will then address the two main instruments on BHR drafted within the OECD, which are the OECD Guidelines and the OECD Guidance. They both have a relevant role in establishing fundamental principles for the behavior of corporations in relation to human rights.

2.1 The United Nations Guiding Principles on Business and Human Rights (UNGPs)

The UNGPs are the main instrument to be examined when analyzing the international framework on BHR.[243] As already mentioned, they are considered "the current global standard regarding corporate conduct"[244] and have been described as "the single most important innovation in the human rights and business field in the last 25 years."[245]

[243] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[244] Venkatesan (n 77) 635.
[245] M Jungk, 'Q&A: The Future of Business and Human Rights, Business for Social Responsibility' (25 Sep. 2017) (https://www.bsr.org/en/our-insights/blog-view/q-a-thefuture-of-business-and-human-rights); A Rosser, K Macdonald and K M P Setiawan, 'Implementing the United Nations Guiding Principles on Business and Human Rights: Insights from Indonesia' (2022) 44(1) Human Rights Quarterly 56, 57.

Hence, they represent a fundamental step in guaranteeing that companies respect human rights and comply with their human rights responsibility.[246]

The UNGPs are the most recent development in the establishment of an international framework that has the goal of providing effective protection against human rights' abuses committed by corporations.[247] Their aim is to help States improve the respect of human rights by corporations and facilitate the access to justice for victims of human rights' abuses by corporations.[248] These principles include governance mechanisms and they insist on the idea that the complementary responsibilities of all relevant stakeholders are fundamental in order for the UNGPs to be effectively applied.[249]

Although they are a soft-law instrument, the UNGPs derive partially from already existing international law principles and obligations and they apply to States and corporations, both national and multinational ones.[250]

The UNGPs have been outlined as "a common global normative platform and authoritative policy guidance as a basis for making cumulative step-by-step progress without foreclosing any other promising longer-term developments".[251]

2.1.1 History and development of UNGPs

In the past decades, several non-binding international codes of conduct for corporations have been adopted, addressing the behavior of corporations towards human rights.[252] The idea of the UNGPs derives from the – vain – attempt by the UN to establish international human rights obligations (i.e. hard law) for

[246] Deva (n 78) 62; V Srinivasan and P Venkatachalam, 'A Decade of the UNGPs in India: Progressive Policy Shifts, Contested Implementation' (2021) 6 Business and Human Rights Journal 279, 279.
[247] M Neglia, 'The UNGPs – Five Years on from Consensus to Divergence in Public Regulation on Business and Human Rights' (2016) 34(4) Netherlands Quarterly of Human Rights 289, 289.
[248] Ruggie (n 18); M K Addo, *Human rights standards and the responsibility of transnational corporations* (1st edn Kluwer, 1999).
[249] M K Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 Human Rights Law Review 133, 136.
[250] L C Reif, 'The UN Guiding Principles on Business and Human Rights and Networked Governance: Improving the Role of Human Rights Ombudsman Institutions as National Remedies' (2017) 17 HUM. Rts. L. REV. 603, 607.
[251] Ruggie (n 18) 81.
[252] G Mantilla, 'Emerging International Human Rights Norms for Transnational Corporations' (2009) 15 Global Governance 279, 282-284.

multinational corporations.[253] Indeed, the UN's efforts to draft a code of conduct and, later, the UN Draft Norms mentioned in the first chapter of this thesis, were unsuccessful.[254] The idea behind them was to create a "comprehensive restatement of the international legal principles applicable to business with regard to human rights".[255] This "comprehensive restatement" would be achieved by enforcing an obligation to encourage the respect of human rights directly on corporations and other business entities.[256]

However, the 2004 UN Draft Norms were not approved, demonstrating that the international law system was and is still focused on States and on their obligations, rather than on those of other stakeholders, such as corporations. For this reason, it was essential to identify a different solution to the issue of human rights violations committed by corporations, while filling the "governance gap".[257]

Against this backdrop, Ruggie's intervention was crucial. Indeed, after years in the academic field as professor at Harvard University and a mandate as United Nations Assistant Secretary-General for Strategic Planning, in 2005 he was appointed as SRSG of the UN on the issue of human rights and transnational corporations. Mainly, Ruggie's initial task as SRSG was to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business entities with regard to human rights".[258]

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[253] Neglia (n 247) 290.
[254] Mantilla (n 252) 282; Economic and Social Council (ECOSOC) - UN Sub-Commission on the Promotion and Protection of Human Rights, Res, No 16/2003: 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003), 52.
[255] ECOSOC UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (n 254).
[256] Weissbrodt and Kruger (n 69); J L Černič, *Human rights and business: direct corporate accountability for human rights* (1st edn Wolf Legal Publishers, 2015); D Kinley and R Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 Human Rights Law Review 447, 452.
[257] O De Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in De Schutter (edn), *Transnational Corporations and Human Rights* (1st edn Hart Publishing, 2006).
[258] Office of the High Commissioner for Human Rights (OHCHR), 'Responsibilities of Transnational corporations and related business enterprises with regard to human rights' UN Doc E/CN.4/Dec/2004/116 (22 April 2004).

In particular, reckoning that "no shared understanding of the [BHR] problem, nor consensus and solutions"[259] existed as such – Ruggie developed an approach to BHR defined as "principled pragmatism",[260] which he illustrated 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".[261]

His goal was to achieve a "thick stakeholder consensus", which would have guaranteed a better normative compliance than "weak state consent".[262] His view was that a "polycentric governance" was needed to regulate in an effective way the activities of corporations.[263] Moreover, he believed that corporate governance and civil society governance were as pivotal as public governance.[264]

In order to achieve this goal, in 2008 he finalized the PRR Framework,[265] which had been under discussion since his appointment as SRSG in 2005.[266]

The PRR Framework aimed at improving the approach to BHR, which was still characterized by inconsistency and incompleteness, by identifying three main goals, which would have later been at the core of the UNGPs as well.[267]

Namely, the first aim was the establishment of States' duty to protect human rights against abuses by third parties. In order to do so, the adoption of adequate policies at the State level and the drafting of due diligence reports at the corporations' level would have been necessary.[268]

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[259] J G Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights' (2014) 20 Global Governance 5.
[260] Ruggie (n 18) xlii.
[261] ECOSOC, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' UN Doc E/CN.4/2006/97 (22 February 2006), paras 70-81.
[262] Neglia (n 247) 292.
[263] J D Prenkert and S J Shackelford, 'Business, Human Rights, and the Promise of Polycentricity' (2014) 47 VAND. J. Transnat'l L. 451, 454.
[264] Reif (n 250) 607.
[265] R Mares, 'A Gap in the Corporate Responsibility to Respect Human Rights' (2010) 36 Monash U. L. REV. 33, 34.
[266] Blitt (n 71) 42 and 43; UN Commission on Human Rights, Res No 2005/69 UN Doc E/CN.4/2005/L.87 (15 April 2005); UNHRCo, UN Doc A/HRC/17/31 (n 25).
[267] Blitt (n 71) 42 and 43.
[268] M Murphy and Jordi Vives, 'Perceptions of Justice and the Human Rights Protect, Respect, and Remedy Framework' (2016) 116(4) Journal of Business Ethics 781, 784.

The second was the identification of certain due diligence standards to be imposed upon corporations by States, in order to avoid human rights violations by the companies.[269]

Lastly, the third was the introduction of enforcement mechanisms, granting victims access to both judicial and non-judicial remedies.[270]

These three goals became the focus of Ruggie's approach and also served as a basis for the UNGPs, later endorsed by the UNHRCo in 2011.[271] In particular, the PRR Framework laid down theoretical legal duties and principles, identifying "*what* should [have] be[en] done", while the UNGPs operationalized them in a more concrete way, clarifying "*how* to do [what had been abstractly identified]".[272]

In this manner, the PRR Framework became a fundamental resource to provide corporations with practical guidance in the context of human rights,[273] and more generally a crucial step in the development of the BHR framework.

2.1.2 The three Pillars of the UNGPs

The UNGPs' starting point was the idea that consensus upon them among the different actors was the only way of achieving an effective result.[274] Accordingly, they were based upon Ruggie's "polycentric governance" theory, rotating around the creation of a global governance model where all the various actors and stakeholders could interact at multiple levels and within different types of organizations from the public, private, and non-profit sectors.[275] This

[269] Mares (n 265) 34.
[270] L Lizarazo-Rodríguez, 'The UN 'Guiding Principles on Business and Human Rights': Methodological Challenges to Assessing the Third Pillar: Access to Effective Remedy' (2018) 36(4) Nordic Journal of Human Rights 353, 353.
[271] D Bulan Hampton, Modern Slavery in Global Supply Chains: Can National Action Plans on Business and Human Rights Close the Governance Gap' (2019) 4 BHRJ 239, 241.
[272] Ruggie (n 18) 82-83.
[273] G G Brenkert, 'Business, Respect and Human Rights' in Martin and Bravo (eds) *Business And Human Rights Landscape: Moving Forward, Looking Back* (1st edn Cambridge University Press, 2015).
[274] Neglia (n 247) 291.
[275] E Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 100 The American Economic Review 641; J Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes' (2008) 2 Regulation & Governance 137.

strengthened the UNGPs' structure, allowing the concrete participation of all relevant stakeholder groups in the consultation process.[276]

The UNGPs are based on three principles (hereinafter "Pillars"), drawn from the three main aims of the PRR Framework described above, namely States' duty to *protect* human rights, the corporate responsibility to *respect* human rights and victims' access to *remedy*.[277]

The first Pillar of the UNGPs establishes the States' duty to protect human rights against abuses within their territory and/or jurisdiction by third parties, including business enterprises.[278] As part of the obligation to protect, States must create and put into action policies that will deter third parties from violating those rights.[279] This also involves the adoption and implementation of laws preventing or mitigating human rights violations, as also stated by the decisions of the bodies monitoring the implementation of the various human rights treaties.[280] This includes civil and criminal laws with sufficient penalties,[281] as well as laws governing labor, health, and security. If a State refuses to provide protection to people while those people's human rights are being violated, that State is in violation of its human rights obligations. As a result, the State must not only pass laws but also make sure they are effectively implemented and upheld by its judicial system and administrative agencies.[282]

It is the responsibility of the State where the human rights violations occurred to provide protection. Based on the idea of territorial jurisdiction,[283] this

[276] Ruggie (n 18).
[277] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[278] M M Barnes, 'The United Nations Guiding Principles on Business and Human Rights, the State Duty to Protect Human Rights and the State-business Nexus' (2018) 15 Braz. J. Int'l L. 42.
[279] M Krajewski, 'The State Duty to Protect against Human Rights Violations through Transnational Business Activities' (2018) 23 DEAKIN L. REV. 13, 19.
[280] UN Human Rights Committee (UNHRC): 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 7; UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/20 (2 July 2009) para 11.
[281] *Siliadin v. France* (European Court of Human Rights, Application No 73316/01, 26 July 2005) para 89.
[282] Krajewski (n 279) 19.
[283] G I Hernández, *International Law* (Oxford University Press, 2019) 1, 196.

State has complete control over all regulatory functions.[284] On the basis of this, the State has the authority to control both local businesses and subsidiaries and branches of global corporations situated on its soil. Therefore, the territorial State has the authority to control the operations of multinational corporations and to impose labor, health, safety, and environmental standards on them. If the multinational corporation's subsidiaries are domestically incorporated, which is frequently the case, the State may additionally exercise regulatory authority based on the concept of personal jurisdiction.[285]

States' duty to protect, however, does not entail that States are responsible when private actors commit human rights abuses. Indeed, a State's responsibility for an internationally wrongful act can only emerge, as explained in the Draft Articles on State Responsibility for Internationally Wrongful Acts (hereinafter "DARS"), "when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State".[286] Clearly, human rights abuses committed by corporations or other private entities may hardly be attributed to States, unless the violation also represented a breach of the international human rights obligations binding upon such States (also in terms of States' failure to establish effective measures to prevent, investigate, punish and redress private actors' abuses).

Hence, the UNGPs emphasize that States have a responsibility under international law to prevent violations of human rights within their borders, including a duty to prevent violations by third parties (including business enterprises).[287] Essentially, States may violate their international commitments to protect human rights when they are directly responsible for a violation or when they fail to take the necessary precautions to stop, look into, punish, or otherwise

[284] P Muchlinski, *Multinational Enterprises & the Law* (2nd edn Oxford University Press, 2007) 1, 83.
[285] Krajewski (n 279) 19.
[286] International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS) (adopted December 2001) UN Doc A/56/83, Art. 2.
[287] B Baade, 'Due Diligence and the Duty to Protect Human Rights' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (1st edn Oxford University Press, 2020) 94.

address a violation by a private actor.[288] Indeed, States have also the responsibility to respect human rights and this requires them to take action at the legislative, administrative, or judicial levels to defend human rights from breaches by third parties.[289] Consequently, the duty to respect also serves as the foundation for the adoption of adequate State laws governing economic activities and their relation with human rights.[290]

In this regard, the UNGPs provide some operational principles which suggest a series of policies that States should put in place in order to ensure that corporations comply with human rights obligations.[291] In particular, States should adopt different kinds of measures – national and international, statutory and voluntary – to enhance business respect for human rights.[292]

However, often States fail to enforce existing laws (covering everything from anti-discrimination, to conditions to the environment, privacy and anti-bribery and corruption) that either directly or indirectly regulate respect for human rights by corporations, causing a relevant implementation gap.[293] Therefore, it is crucial for States to think about whether such laws are currently being properly enforced, and if not, why this is the case and what steps could be legitimately taken to address the situation.[294]

It is equally crucial that States assess whether these laws offer the appropriate protection and whether, when combined with pertinent policies, they foster an atmosphere where businesses do not violate human rights.[295]

Indeed, although States remain the primary duty-bearers of international human rights, while multinational corporations, are normally not considered

[288] J Zerk - Office of the UN High Commissioner for Human Rights, 'Corporate liability for gross human rights abuses - Towards a fairer and more effective system of domestic law remedies' (May 2013) 1, 54.
[289] F Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn Oxford University Press, 2017) 102.
[290] Krajewski (n 279) 18.
[291] M Fasciglione, 'Corporate Human Rights Responsibility, States' Duty to Protect and UN GPs' National Action Plans: Some Thoughts After the UK 2016 NAP Update' (2016) 1(2) European Forum 621, 623.
[292] O Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?'(2013) 31 Netherlands Quarterly of Human Rights 44, 62.
[293] Krajewski (n 279) 14.
[294] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[295] Krajewski (n 279) 19.

subjects of international law and addressees of international human rights obligations,[296] this does not imply that businesses operating transnationally should be exempt from compliance with human rights law.

On the contrary, the obligations of corporations (including the need to maintain good working and employment conditions, the health and safety of the population and of the environment)[297] are increasingly defined in domestic legislation, which is often based on international norms and standards.

Indeed, the second Pillar of the UNGPs establishes the "corporate responsibility to respect" human rights,[298] demanding companies' compliance with human rights obligations as well as their prompt reaction in the event their activity is prejudicial to their enjoyment.[299] In particular, businesses shall do so by appropriately assessing the human rights impact of their conduct, as well as taking the appropriate precautions in order to minimize such impact, *via* a proper due diligence activity,[300] i.e. HRDD,[301] which will be analyzed in more detail in section 2.2 below.

Eventually, the third Pillar of the UNGPs establishes the right to access remedies for the victims of human rights violations,[302] which implies a system combining State-base judicial and non-judicial grievance mechanism, and non-State-based grievance mechanism.[303]

2.1.3 The impact of the UNGPs

The huge consensus received by the UNGPs in 2011 gave a new importance to human rights in the context of businesses.[304]

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[296] A Gatto, *Multinational Enterprises and Human Rights* (1st edn Edward Elgar, 2011) 1, 93; J Crawford, *Brownlie's Principles of Public International Law* (8th edn Oxford University Press, 2012) 1, 122.
[297] Krajewski (n 279) 17 and 18.
[298] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 11.
[299] C Methven O'Brien and S Dhanarajan, 'The corporate responsibility to respect human rights: a status review' (2016) 29(4) Accounting, Auditing & Accountability Journal 542, 544.
[300] Zerk (n 288) 56.
[301] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[302] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 25.
[303] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 26, 27 and 28.
[304] D Augenstein, 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' (2022) 40(1) Netherlands Quarterly of Human Rights 35, 53.

In particular, the UNGPs are having a great influence on law and policy-making both at the international and regional level, witnessing their key role in the development and enhancement of BHR.[305]

Indeed, they served – either explicitly or implicitly – as a basis for several international soft-law instruments, such as the UN Global Compact,[306] the 2011 OECD Guidelines (which included a new 4th chapter essentially taken from the UNGPs and specifically addressing human rights and their relation to business activities),[307] the guidance on social responsibility adopted in 2010 by the International Organization for Standardization (hereinafter "ISO"),[308] and the new International Finance Corporation's Performance Standards on Environmental and Social Sustainability.[309]

Furthermore, the UNGPs also laid the foundations for some private and multi-stakeholder initiatives such as the Fair Labor Association,[310] the Global Network Initiative[311] and the Voluntary Principles on Security and Human Rights.[312]

Moreover, the UNGPs are also concretely employed and applied by UN bodies monitoring the implementation of international human rights treaties, such

[305] Neglia (n 247) 295.
[306] Reif (n 250) 608.
[307] OECD Guidelines (n 80) 31-34; Neglia (n 247) 295.
[308] Neglia (n 247) 295; International Organization for Standardization (ISO) 26000, Guidance on Social Responsibility (2010) (https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100258.pdf).
[309] International Finance Corporation, *Performance Standards on Environmental and Social Responsibility* (2012) (https://firstforsustainability.org/risk-management/implementing-ifc-environmental-and-social-requirements/establish-and-maintain-an-esms/ifc-environmental-and-social-performance-requirements/ifc-performance-standards/#:~:text=The%20IFC%20Performance%20Standards%20are,environmental%20and%20social%20risk%20management) .
[310] Shift, 'Implication of UNGPs for the Fair Labour Association in Shift Project' in *Discussing The Implications of The UN Guiding Principles On Business And Human Rights For FLA* (New York 2012).
[311] Global Network Initiative, 'Letter to the UN Working Group on Business and Human Rights' (8 December 2011).
[312] Ipieca, 'Voluntary Principles on Security and Human Rights: Implementation Guidance Tools' (January 2012 (https://www.ipieca.org/resources/good-practice/voluntary-principles-on-security-and-human-rights-implementation-guidance-tools/#:~:text=The%20Voluntary%20Principles%20on%20Security,applicable%2C%20for%20international%20humanitarian%20law).

as the Committee on the Rights the Child[313] and the Committee on Economic, Social and Cultural Rights (hereinafter "CESCR").[314]

Lastly, at a regional level, the UNGPs have also been strongly supported by the EU, that is encouraging its institutions and its member States to implement them.[315] Specifically, the EU has started to request its member States to implement the UNGPs by drafting NAPs on BHR,[316] i.e. "government-drafted policy documents that articulate state priorities and indicate future actions to support implementation of legal obligations or policy commitments on a given topic".[317]

2.1.4 The implementation of the UNGPs through the Working Group on Business and Human Rights (UNWG)

A fundamental role in the implementation of the UNGPs has been given to the UNWG which was established by the UNHRCo in 2011 by the Resolution No 17/4.[318] Because of its valuable tasks, the UNHRCo renewed its mandate in 2014,[319] in 2017[320] and eventually in 2020.[321]

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[313] UN Committee on the Rights of the Child, 'General Comment No 16: on State Obligations Regarding the Impact of the Business Sector on Children's Rights' UN Doc CRC/C/GC/16 (17 April 2013), Part III.

[314] CESCR, '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 (10 August 2017).

[315] Reif (n 250) 608; H F Cantú Rivera, 'The United Nations Guiding Principles on Business and Human Rights in the European Union: From Regional Action to National Implementation' in *The Business and Human Rights Landscape Moving Forward, Looking Back* (1st edn Cambridge University Press, 2015) 498.

[316] Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (28 June 2012) Doc 11417/12, Annex III, para 25(c); Cantú Rivera (n 315) 500-501.

[317] Methven O'Brien, Mehra, Blackwell and Bloch Poulsen-Hansen (n 87) 118; D de Felice and A Graf, 'The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights' (2015) 7(1) Journal of Human Rights Practice 40; UN Working Group on Business and Human Rights (UNWG), 'Guidance on National Action Plans on Business and Human Rights' (November 2016) 1.

[318] UNHRCo, 'Human rights and transnational corporations and other business enterprises' UN Doc A/HRC/RES/17/4 (6 July 2011).

[319] UNHRCo, UN Doc A/HRC/RES/26/22 (n 210).

[320] UNHRCo, 'Business and human rights: mandate of the Working Group on the issue of human rights and transnational corporations business enterprises' UN Doc A/HRC/RES/35/7 (14 July 2017).

Its main functions are to promote the three Pillars of the UNGPs,[322] to encourage the widespread adoption and effective implementation of the UNGPs and to increase access to effective remedies accessible to people whose human rights are harmed by corporations' behaviors at the national, regional, and international levels.[323]

Its duties also include evaluating the UNGPs' implementation, sharing best practices and lessons gained, and making recommendations through reports to the UNGA and the UNHRCo.[324] In this context, it must engage in discussions and meetings with governments and non-governmental stakeholder groups, such as transnational corporations and business enterprises, national human rights institutions, civil society, and rights-holders, in line with the Ruggie's multi-stakeholder approach that characterizes its mandate.[325]

It must support initiatives that encourage capacity-building and the application of the UNGPs and, upon request, it must offer guidance and recommendations for the creation of domestic laws and policies pertaining to BHR. Indeed, it is tasked with finding, exchanging, and promoting good practices and lessons since it will serve as the guarantor of the integrity of the UNGPs.[326]

Moreover, it visits countries, making suggestions at the national, regional, and global levels for improving access to effective remedies for people whose human rights are violated by corporate activity, including those in conflict zones.[327] Country visits are an extremely helpful instrument for direct engagement with national authorities and other stakeholders on efficient ways to move the

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[321] UNHRCo, 'Business and human rights: the Working Group on the issue of human rights and transnational corporations and other business enterprises, and improving accountability and access to remedy' UN Doc A/HRC/RES/44/15 (23 July 2020).
[322] UNWG, 'Corporate human rights due diligence – identifying and leveraging emerging practices' (2018) (https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices).
[323] S Bijlmakers, 'Business and human rights governance and democratic legitimacy: the UN "Protect, Respect and Remedy" Framework and the Guiding Principles' (2013) 26(3) The European Journal of Social Science Research 288, 292.
[324] UNHRCo, UN Doc A/HRC/RES/17/4 (n 318); E Partiti, 'Polycentricity and polyphony in international law: interpreting the corporate responsibility to respect human rights' (2021) 70(1) I.C.L.Q. 133, 158.
[325] Addo (n 249) 139.
[326] UNWG, 'Guidance on National Action Plans on Business and Human Rights' (n 332) 11.
[327] S Lagoutte, 'New Challenges Facing States within the Field of Human Rights and Business' (2015) 33(2) Nordic Journal of Human Rights 158, 161.

UNGPs from abstract ideas to reality, with a special focus on the promotion of the distribution and implementation of the UNGPs. Indeed, the mere existence of the UNWG in any nation increases the chances to raise awareness that might be used in the implementation of the UNGPs at the national level.[328]

Furthermore, the UNWG collaborates closely with other pertinent special procedures of the UNHRCo, pertinent UN and other international entities, applicable treaty bodies, and regional human rights organizations. Additionally, it establishes regular communication and talks about potential areas of collaboration to increase the implementation of the UNGPs with all pertinent parties, including, in addition to governments, relevant UN bodies, specialized agencies, funds, and programs, in particular the Office of the UN High Commissioner for Human Rights, the Global Compact, the ILO and the World Bank.[329]

Even though the UNWG's mandate does not involve command and control, its establishment and its approach helped to increase the UNGPs' significance.[330]

Lastly, the UNWG submits to the UNGA[331] and the UNHRCo[332] reports containing evaluations of the current situation on BHR and providing recommendations on possible solutions and improvements.

The UNWG acknowledges that the BHR field is in constant development and reflects this in its strategy. For instance, in order to reach new audiences and expand the debate on BHR and the diffusion of the UNGPs, it plans periodical regional meetings in Africa, Asia, and Latin America.[333]

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[328] Addo (n 249) 138.
[329] UNWG, 'Mandate' (https://www.ohchr.org/en/special-procedures/wg-business/about-mandate).
[330] Lagoutte (n 327) 160.
[331] UNGA, 'Report of Working Group on the issue of human rights and transnational corporations and other business enterprises: "Developments in the embedding of the Guiding Principles into global governance frameworks"' UN Doc A/67/285 (10 August 2012); UNGA, 'Report of Working Group on the issue of human rights and transnational corporations and other business enterprises: "Business-related impacts on the rights of indigenous peoples"' UN Doc A/68/279 (6 August 2013).
[332] UNHRCo, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' UN Doc A/HRC/20/29 (10 April 2012); UNHRCo, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' UN Doc A/HRC/23/32 (14 March 2013).
[333] Addo (n 249) 137.

Thus, due to its role, the UNWG is a fundamental forum for the current development of the BHR movement.[334]

2.2 Human Rights Due Diligence (HRDD)

As anticipated above, a proper HRDD is essential to implement BHR in practice.[335]

In general, due diligence is understood as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation".[336] The concept of due diligence as a standard of conduct derives from Roman law.[337] Roman law held that a person was responsible for any unwanted harm against others if that harm was the result of them not acting in a way that would be expected of a *diligens* (or *bonus*) *paterfamilias*, which can be translated as a responsible head of home.[338]

Today it has become common to the majority of legal systems,[339] and it is also considered an essential principle of international law.[340]

More specifically due diligence is typically used in the business context to describe a process of analysis carried out by a business to detect and manage commercial risks:[341] "[the] main purpose [of due diligence] is to confirm facts, data and representations involved in a commercial transaction in order to determine the value, price and risk of such transactions, including the risk of future litigation".[342]

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[334] Addo (n 249) 136; UNHRCo, UN Doc A/HRC/RES/17/4 (n 318) para 6 (a) and (e).
[335] Partiti (n 324) 133.
[336] Black Law Dictionary (9th edn West 2009).
[337] R Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1st edn Clarendon Press, 1996) 1, 1009.
[338] C Lobingier, *The Evolution of the Roman Law: From Before the Twelve Tables to the Corpus Juris* (2nd edn The Macmillan company, 1923) 1, 105.
[339] M Buscemi, *Legal sources in business and human rights: evolving dynamics in international and European law* (1st edn Brill Nijhoff, 2020) 1, 13.
[340] L Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 Israel Yearbook on Human Rights 233, 240.
[341] J Bonnitcha and R McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) E.J.I.L. 899, 902.
[342] Martin-Ortega (n 292) 51.

From the general concept of due diligence and because of the relevance of new private actors, in particular corporations, in the protection of human rights,[343] the separate and autonomous concept of HRDD was introduced in the UNGPs and its challenges have been discussed both in the 2018 Report to the UN General Assembly of the Working Group on the issue of human rights and transnational corporations and other business enterprises (hereinafter "2018 UNWG Report")[344] and in the OECD Guidance.[345]

John Ruggie worked on the idea of HRDD between 2005 and 2011,[346] when his term came to an end and the UNHRCo endorsed the UNGPs.[347]

In particular, within the UNGPs the HRDD has been identified as a core part of the duty of both States and corporations which respectively have to protect and respect human rights.[348] Relevantly, as mentioned in the first section of this chapter, the UNGPs establish that States should put in place policies and laws in order to promote the respect of human rights by corporations. This implies the duty to conduct a proper HRDD, i.e. an internal analysis aiming at evaluating the potential human rights impact deriving from business activities.[349]

Moreover, HRDD is a key component of the second Pillar of the UNGPs, i.e. companies' duty to respect human rights.[350] In particular, in this context, HRDD is identified as "the steps a company must take to become aware of, prevent and address adverse human rights impacts",[351] entailing the establishment

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[343] Mena, de Leede, Baumann, Black, Lindeman and McShane (n 4) 162.
[344] UNGA, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: "Corporate human rights due diligence emerging practices, challenges and ways forward"' UN Doc A/73/163 (2018).
[345] Organisation for Economic Co-operation and Development, *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD Guidance) (2018) 1.
[346] UNHRCo, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: Summary of five multi-stakeholder consultations', A/HRC/8/5/Add.1 (23 April 2008), para 152.
[347] UNHRCo, UN Doc A/HRC/RES/17/4 (n 318).
[348] J Harrison, 'Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment' (2013) 31(2) Impact Assessment and Project Appraisal 107, 107.
[349] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[350] G Quijano and C Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) 6 Business and Human Rights 241, 241.
[351] UNHRCo, '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' UN Doc A/HRC/8/5 (7 April 2008), para 56.

of internal procedures to foresee risks and prevent possible violations of human rights deriving from the corporation's activities.[352] Indeed, such activities may interfere with several "internationally recognized rights",[353] all of which should be taken into consideration when putting in place HRDD, with a particular focus on those specifically relevant for the field in which the single company operates.[354]

As part of the UN Framework on BHR, HRDD is considered the foundation for all future initiatives regarding BHR at the international level. Indeed, according to the UNWG, "corporate human rights due diligence has become a norm of expected conduct for all business enterprises",[355] which are therefore expected to put in place adequate HRDD procedures,[356] in order to have a more responsible approach towards human rights.[357]

2.2.1 HRDD in the 2018 UNWG Report to the UNGA

In addition to the UNGPs, the HRDD has also been addressed in the 2018 UNWG Report, as mentioned above. This Report is an important standard for the protection of human rights within corporations' activities. It reiterates and promotes the implementation of HRDD, as stated in the UNGPs.[358]

In particular, it has been stated that progress has been made since 2011; however, at present, there are still developments to be achieved for a better protection of human rights within the business world. For this reason, the UNWG has encouraged the adoption of mandatory measures to reach the goals established in the UNGPs. The aim is to cover all human rights obligations acknowledged at the international level and to establish procedures to monitor and enforce compliance with them, in order to facilitate access to effective justice and remedy.[359]

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[352] UNGA, UN Doc A/73/163 (n 344).
[353] UNHRCo, UN Doc A/HRC/8/5 (n 351), para 52.
[354] Harrison (n 348) 108.
[355] UNGA, UN Doc A/73/163 (n 344) para 92.
[356] Partiti (n 324) 139.
[357] Harrison (n 348) 108.
[358] Quijano and Lopez (n 350) 243.
[359] S van't Foort, 'Due Diligence and Supply Chain Responsibilities in Specific Instances. The Compatibility of the Dutch National Contact Point's Decisions with the OECD Guidelines for Multinational Enterprises in the Light of Decisions Made by the UK, German, Danish and Norwegian National Contact Points' (2019) 12 Erasmus L. REV. 61, 65.

In particular, the 2018 UNGA Report aimed at implementing HRDD, as set out in the second Pillar of the UNGPs, in all types of business enterprises (i.e., regardless of their size, industry, operational context, ownership and structure), in order to translate into practice their responsibility to respect human rights.

2.2.2 HRDD in practice

In practice, HRDD implies that corporations must put in place procedures in order to guarantee their business activity complies with the human rights principles established in international instruments such as the UNGPs, the UN Global Compact, the Children's Rights and Business Principles, the Universal Declaration of Human Rights, the International Labor Organization Declaration on Fundamental Principles and Rights at Work and OECD Guidelines.[360]

Conducting a proper HRDD presupposes the establishment of an internal procedure allowing corporations to identify their potential human rights impact and deal with the disadvantageous effects their activities may bring about.[361]

More specifically, a HRDD procedure entails four main steps: first of all, companies have to identify and assess human rights impacts that are likely to be caused by corporations or to which corporations contribute to during their business, or which may be directly linked to their operations, products or services.[362] Secondly, they should integrate findings obtained through risk assessment and act accordingly, depending whether their activity was the direct cause of the violation or if they only partially contributed to it. Thirdly, enterprises should keep track of how much the measures and the processes are effective to adverse human rights effects in order to understand whether HRDD functions. Lastly, HRDD requires and promotes a clear communication on how

[360] Sanofi, 'Human Rights Due Diligence Factsheet' (2021) (https://www.sanofi.com/dam/jcr:e42579fb-1618-473b-b814-8826aefafe59/Human-Rights-Due-Diligence.pdf) 1, 4.
[361] van't Foort (n 359) 71.
[362] L Smit, G Holly, R McCorquodale and S Neely, 'Human rights due diligence in global supply chains: evidence of corporate practices to inform a legal standard' (2021) 25(6) The International Journal of Human Rights 945, 951.

effects on human rights are addressed in order to show stakeholders that appropriate policies and processes are in place.[363]

In order to be effective, HRDD should satisfy three requirements: transparency,[364] external participation and verification, and independent monitoring and review.[365]

As far as transparency is concerned, Ruggie mainly referred to it in relation to external communication.[366] Indeed, principle 21 of the UNGPs requires companies to exchange information with relevant stakeholders on the management of the effects of business activities on human rights; it also requires a formal reporting where "operations or operating contexts pose risks of severe human rights impacts".[367] It is fundamental that companies provide enough information to establish whether the company's response is adequate to the human rights effect that occurred in that specific situation.[368]

Transparency is considered essential for three reasons: firstly, the experts conducting due diligence procedures need to have adequate access to all relevant information, as well as to communicate with each other, in order to carry out a proper HRDD. Secondly, transparency in reports is fundamental in order to engage stakeholders who can then verify the impact of their involvement. In this regard, civil society actors, academics, UN actors, State officials and consumers can understand the conduct of corporations only insofar as they have information on the due diligence procedures that are performed and on their outcomes.[369] Thirdly, only through the publication of the methodology used and the results obtained, it is possible to assess the efficiency and efficacy of a HRDD procedure and constantly improve it.[370]

[363] UNGA, UN Doc A/73/163 (n 344) para 10.
[364] R McCorquodale, L Smith, S Neely and R Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 3(2) Business and Human Rights Journal 195, 221.
[365] Harrison (n 348) 108.
[366] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 21.
[367] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 21.
[368] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[369] van't Foort (n 359) 62.
[370] Smit, Holly, McCorquodale and Neely (n 362) 959.

The second requirement for an adequate HRDD consists of external participation and verification. Indeed, interacting with actors outside the corporation is fundamental for an adequate impact assessment.[371] According to Ruggie, the procedures that determine the effects of a specific conduct should imply "meaningful consultation with potentially affected groups and other relevant stakeholders" and should take into consideration the limits of their involvement.[372] When this is not possible, corporations should acknowledge the alternative of consulting external human rights experts.[373]

The third requirement for an effective HRDD is the independent monitoring and review, which implies an overall scrutiny of the corporations' attitude in engaging with HRDD.[374] In particular, on the one hand a trustworthy independent body shall be established to control corporations' activities. This is essential to guarantee that the due diligence procedure is beneficial to the company and that the corporate performance advances over time.[375] On the other hand, companies should carry out risk assessments in relation to their own activities and to the whole supply value chain, continuously updating such procedures as risks are changing over time.[376]

2.2.3 Mandatory HRDD

Through the UNGPs, HRDD has become a standard for the daily activities of most corporations.[377] However, as long as HRDD is left to companies' choices and codes of conduct, it can only bring a limited benefit to the protection of human rights and to the prevention of violations.[378]

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[371] Harrison (n 348) 113.
[372] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[373] Smit, Holly, McCorquodale and Neely (n 362) 954.
[374] K Salcito and M Wielga, 'Corporate Human Rights Risk Assessment: Aligning what is Measured and Managed' (2018) 36(4) Nordic Journal of Human Rights 411, 417.
[375] Harrison (n 348) 114.
[376] UNWG, 'Corporate human rights due diligence – identifying and leveraging emerging practices' (n 322).
[377] UNGA, UN Doc A/73/163 (n 344) para 10.
[378] International Federation for Human Rights (FIDH), 'Business and human rights: enhancing standards and ensuring redress' (https://www.fidh.org/IMG/pdf/201403_briefing_paper_enhance_standards_ensure_redress_web_version.pdf); FIDH, 'Business and Human Rights: Time for Genuine Progress (submission to the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other

For this reason, in the last years, there has been a global trend, with a particular development in Europe, aiming at promoting a better behavior of corporations towards human rights through the adoption of a BHR framework encompassing reporting activities, the establishment of transparency requirements and a mandatory HRDD.[379]

In particular, initially a series of legislative proposals focused on promoting transparency and reporting requirements in order to push companies to unveil human rights risks deriving from their operations and supply chains. However, the reporting mechanism was lacking fundamental provisions on enforcement and remedies available to victims and, for this reason, it raised doubts among the civil society.[380] The second phase of legislation introduced mandatory HRDD.[381] Such development was also in line with the idea behind the UNGPs, whereby there should be a mix between voluntary and binding measures.[382]

Against this backdrop, more and more countries have started or are starting to adopt binding HRDD legislations.[383]

In the US, mandatory due diligence was introduced by the 1789 Alien Tort Claims Act (hereinafter "ATCA"), concerning the import of conflict minerals.[384] The ATCA requires companies to report on the due diligence measures they have taken to eliminate conflict minerals from their supply chains.[385]

Business Enterprises)' (2015) (https://www.fidh.org/IMG/pdf/fidh_igwg_submission_22062015-5.pdf); ActionAid International and 19 civil society organizations, 'Citizens demand the EU stops stalling on a treaty to ensure that businesses respect human rights' (2019) https://actionaid.org/stories/2019/citizens-demand-eu-stops-stalling-treaty-ensure-businesses-respect-human-rights).

[379] E Aristova, 'Exploring Trends in Corporate Human Rights Due Diligence' (Business and Human Rights Resource Centre, 2020) (https://www.business-humanrights.org/en/blog/exploring-trends-in-corporate-human-rights-due-diligence/); A Triponel, 'Business and human rights legislation: an overview' (Triponel Consulting, 2019) (https://triponelconsulting.com/business-and-human-rights-legislation/).

[380] Aristova (n 379).

[381] Quijano and Lopez (n 350) 253.

[382] Aristova (n 379).

[383] Human Rights International Corner ETS, 'Italian Legislative Decree No 231/2001: A model for Mandatory Human Rights Due Diligence Legislation?' (2019) 3, 5.

[384] H Cullen, 'The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and beyond' (2016) 48 George Washington International Law Review 743, 744.

[385] Alien Tort Claims Act (ATCA), 28 U.S.C. §1502.

This act is particularly relevant also because it allows non-US citizens to file civil lawsuits in US courts. This holds true even if the events concerned took place abroad.[386] Indeed, according to the ATCA, "[t]he district courts shall have jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations".[387]

However, more recently the US Supreme Court introduced significant obstacles in bringing BHR cases before US courts, as evident from the development of its case-law on the matter. Indeed, first in 2013, in *Kiobel v Shell*, it established a presumption against the extraterritorial application of the ATCA, then in 2018, in *Jesner v Arab Bank*, it further limited the scope of application of ATCA by banning all lawsuits against non-US corporations.[388]

In the meantime, in Europe, the issue of HRDD is being addressed more thoroughly.[389]

For instance, in 2015 the UK adopted the UK Modern Slavery Act, establishing a mandatory reporting mechanism with the aim of eliminating trafficking and modern slavery.[390] Additionally, in 2019 the Netherlands adopted the Child Labour Due Diligence Law establishing mandatory due diligence, limitedly to child labor.[391]

Furthermore, most relevantly, France and Germany adopted the two most significant examples of mandatory due diligence in Europe.

Indeed, the French Law on mandatory HRDD, called the Duty of Vigilance Law (*Loi de Vigilance*), was passed in 2017. This law established mandatory HRDD for the largest corporations in the country, i.e. those having

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[386] E A Young, 'Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After "Kiobel" (2015) 64(6) Duke Law Journal 1023, 1023.
[387] Alien Tort Claims Act (ATCA), 28 U.S.C. §1350.
[388] Wettstein (n 8) 31.
[389] S Brabant, D Hudson, A Crockett and E Savourey, '2021 Law Will Make Human Rights Due Diligence Mandatory for EU Companies' (Business and Human Rights Resource Centre 2020) (https://www.business-humanrights.org/en/latest-news/2021-law-will-make-human-rights-due-diligence-mandatory-for-eu-companies/).
[390] UK Modern Slavery Act 2015 (2015 c. 30) (entered into force October 2015).
[391] D Sharma, 'Human Rights Due Diligence Legislation in Europe – Implications for Supply Chains to India and South Asia' (DLA Piper, 26 March 2021) (https://www.dlapiper.com/en/middleeast/insights/publications/2021/03/human-rights-due-diligence-legislation-in-europe/#:~:text=The%20Duty%20of%20Vigilance%20Act,is%20structured%20around%20two%20mechanisms.).

more than 10,000 workers worldwide or more than 5,000 in France.[392] Under this law, French companies, after consulting stakeholders and trade unions, are legally bound to develop a "vigilance plan".[393] The Duty of Vigilance Law aims at preventing risks and serious violations of fundamental rights, as well as any negative impacts on health, safety and the environment that can derive from the activity of companies.[394] In order to achieve this goal, the vigilance plan should address the potential risks for human rights and for the environment deriving from the company's activities and should also establish adequate measures to reduce such risks. Moreover, the plan should be periodically monitored in order to check whether it is effective.[395] Lastly, the plan and its implementation report shall be rendered public for stakeholders so that they can engage in the development of the plan and have access to information concerning the risks deriving from the corporations' activities.[396]

Similarly, the German Law on Supply Chain Due Diligence (hereinafter "German Law") was adopted in June 2021 in order to promote corporate respect for human rights at a domestic level and as an encouragement for a possible future EU framework.[397] Pursuant to the German Law, a situation that has a reasonable likelihood of leading to a violation of human rights is a human rights risk. In this regard, the German Law includes an extensive, but not exhaustive, list of human rights abuses, including discrimination, inadequate remuneration, child labor, forced labor, infringement of the freedom of collective bargaining,[398] and other rights guaranteed by the two fundamental international covenants on human rights (the International Covenant on Civil and Political Rights and the International

[392] S Cossart, J Chaplier and T Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 BHRJ 317.
[393] Sharma (n 391).
[394] Quijano and Lopez (n 350) 244.
[395] Cossart, Chaplier and Beau De Lomenie (n 392) 320.
[396] Sharma (n 391).
[397] M Krajewski, K Tonstad and F Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6 Business and Human Rights Journal 550, 550.
[398] F Bierbrauer, 'Sustainability Goals and Supply Chain Due Diligence Laws' (2022) 102(5) Wirtschaftsdienst 344, 344.

Covenant on Economic, Social and Cultural Rights)[399] and the most important conventions drafted within ILO.[400]

Among the requirements for an adequate HRDD, the German Law includes the adoption of a policy statement, the creation of a risk management system, regular risk analyses, the implementation of preventive and corrective measures in the company's own business and towards direct suppliers, the introduction of a complaints mechanism and a documentation and reporting system.[401] In particular, the appropriateness principle regulates the scope of the due diligence obligation. More specifically, "appropriateness" refers to the nature and scope of the business activity, the company's leverage over the party directly responsible for the immediate human rights or environmental risk, the gravity, likelihood, and reversibility of the violation, as well as the specifics of the company's causal involvement in the violation.[402]

According to the German Law, businesses shall undertake annual risk analyses to find vulnerabilities in their own – and their direct suppliers' – internal business procedures. Once risks have been identified, the company shall act promptly to prevent them. This includes adopting sound procurement strategies and practices, providing training in pertinent business areas, implementing risk-based control measures, and obtaining contractual guarantees from each direct

[399] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[400] International Labour Organization (ILO), Freedom of Association and Protection of the Right to Organise Convention (adopted 9 July 1948, entered into force 4 July 1950); ILO, Right to Organise and Collective Bargaining Convention (adopted 1 July 1949, entered into force 18 July 1951); ILO, Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932); ILO, Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959); ILO, Minimum Age Convention (adopted 26 June 1973, entered into force 19 June 1976); ILO, Worst Forms of Child Labour Convention (adopted 17 June 1999, entered into force 19 November 2000); ILO, Equal Remuneration Convention (adopted 29 June 1951, entered into force 23 May 1953); ILO, Discrimination (Employment and Occupation) Convention (adopted 25 June 1958, entered into force 15 June 1960); ILO, Occupational Safety and Health Convention (adopted 22 June 1981, entered into force 11 August 1983); ILO, Promotional Framework for Occupational Safety and Health Convention (adopted 15 June 2006, entered into force 20 February 2009).

[401] Simmon&Simmons, 'The Supply Chain Due Diligence Act – Part 2' (Simmons&Simmons, 27 January 2022) (https://www.simmons-simmons.com/en/publications/ckywrxlwg164u0b009g6l2uov/the-supply-chain-due-diligence-act-part-2).

[402] Krajewski, Tonstad and Wohltmann (n 397) 555.

supplier that it will uphold the company's expectations with regard to human rights and the environment.[403] Moreover, pursuant to the German Law, a firm shall take adequate remedial action to avoid, stop, or mitigate a human rights violation or environmental damage if it has already happened or is about to.[404]

These examples demonstrate the significant impact of the UNGPs at the national level,[405] as well as the developing trend towards widespread mandatory HRDD.[406]

2.3 The Organisation for Economic Co-operation and Development (OECD)

Starting from 2011, businesses trying to put the UNGPs into practice have made great progress.[407] This advancement has also been possible thanks to the intervention of other international instruments, in particular the OECD Guidelines for Multinational Enterprises (hereinafter "OECD Guidelines" or "Guidelines") and OECD Due Diligence Guidance for Responsible Business Conduct (hereinafter "OECD Guidance" or "Guidance").[408]

Indeed, the governments of thirty-eight democratic States, including France, Germany, Italy and the US, cooperate within the OECD, and share views on their policy experiences, in order to address the economic, social, and environmental concerns brought about by globalization, in an attempt to coordinate domestic and international policies in these areas.[409] More specifically, the OECD has long been paying attention to the human rights impact of transnational corporation and has developed the two above-mentioned instruments in order to emphasize the relevance of a human rights-based approach in the context of international business.

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[403] Krajewski, Tonstad and Wohltmann (n 397) 555.
[404] Simmon&Simmons (n 401).
[405] Bierbrauer (n 398) 344.
[406] Human Rights International Corner ETS (n 383) 5.
[407] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[408] OECD Guidelines (n 80).
[409] OECD, 'OECD Framework for the Evaluation of SME and Entrepreneurship Policies and Programmes' (2007).

2.3.1 OECD Guidelines for Multinational Enterprises (OECD Guidelines for MNEs)

Against this backdrop, in 1976 the first version of the OECD Guidelines was adopted.[410] Since then, five reviews of the OECD Guidelines followed, in order to update their content to the ever-evolving challenges of the global economy.

In particular, corporations, NGOs, non-adhering countries, and international organizations actively participated in the last review of 2011,[411] which was fundamental in order to align the OECD Guidelines to the UNGPs.[412] Relevantly, during the 2011 update process,[413] the OECD and non-OECD adhering States, with the contribution of Ruggie,[414] decided to add a new chapter specifically focusing on BHR,[415] which "draws upon the United Nations Framework for Business and Human Rights "Protect, Respect and Remedy" and is in accordance with the UNGPs for its implementation".[416]

2.3.1.1 Characteristics and goals

The OECD Guidelines are non-binding recommendations concerning responsible business conduct (hereinafter "RBC"),[417] drafted by governments for multinational enterprises operating in or out of OECD member States.[418] This non-binding document establishes standards of conduct to encourage ethical business practices in a variety of areas (such as transparency, respect for human

[410] van't Foort (n 359) 62.
[411] OECD Guidelines (n 80).
[412] Addo (n 249) 144.
[413] Special Representative of the United Nations Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG), '10th OECD Roundtable on Corporate Responsibility - Updating the Guidelines for Multinational Enterprises' Discussion Paper (30 June 2010).
[414] R Saner and L Yiu, 'Business Diplomacy Competence: A Requirement for Implementing the OECD's Guidelines for Multinational Enterprises' (2014) 9 Hague J. Dipl. 311, 325.
[415] OECD Guidelines (n 80) 1-20; K Buhmann, 'Analysing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findings and Outlook' (2018) 36(4) Nordic Journal of Human Rights 390, 391.
[416] OECD Guidelines (n 80) 31.
[417] L Chiuzzi Curzi, *General Principles for Business and Human Rights in International Law* (1st edn Brill Nijhoff, 2020) 1, 24.
[418] Saner and Yiu (n 414) 323.

rights, the environment, and taxation) among corporate players working in a global setting.[419]

The OECD Guidelines stand out from other corporate responsibility instruments and procedures due to their international scope, government support, and dispute resolution process for addressing disputes surrounding alleged company misbehavior. [420]

Despite the non-binding character of the Guidelines, the OECD member States are obliged to monitor their implementation in practice.

The Guidelines have two main goals. The first is to "promote multinational firms to positively contribute to national and social progress and to minimize and resolve any challenges that may arise from their varied operations".[421] The second aim is to avoid different treatments between multinational and domestic enterprises.[422]

Nevertheless, the Guidelines, one the one hand, recognize and stimulate the positive results that businesses can have on economic, environmental and social progress, and, on the other hand, they acknowledge that business activities can result in negative effects on workers, human rights, the environment, consumers and corporate governance.[423]

In this regard, with the aim of promoting ethical business practices throughout the world, the OECD Guidelines introduce an international corporate-accountability mechanism. They specify procedures for resolving disputes between corporations and the communities or people who are adversely impacted by their activity and outline criteria for socially and ecologically responsible corporate behavior.[424]

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[419] R C Brown, 'Due Diligence "Hard Law" Remedies for MNC Labor Chain Workers' (2018) 22(2) UCLA Journal of International Law and Foreign Affairs 119, 121.
[420] R Nieuwenkamp, 'The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct: Soft Law and Hard Consequences' (2013) 4 The Dovenschmidt Quarterly 171.
[421] C Hägg, 'The OECD Guidelines for Multinational Enterprises: A Critical Analysis' (1984) 3(1) Journal of Business Ethics 71, 71.
[422] L Liberti, 'OECD 50th Anniversary: The Updated OECD Guidelines for Multinational Enterprises and the New OECD Recommendation on Due Diligence Guidance for Conflict-Free Mineral Supply Chains' (2012) 13 Bus. L. INT'l 35, 37; OECD Guidance (n 345) 18.
[423] OECD Guidance (n 345) 18.
[424] Saner and Yiu (n 414) 323.

Moreover, pursuant to the OECD Guidelines, enterprises are urged to exercise risk-based due diligence, which is defined as the process of identifying, preventing and mitigating actual and potential adverse impacts,[425] in addition to upholding the internationally recognized human rights of those who are impacted by their activities.[426] Moreover, businesses are encouraged to refrain from activities that could result in negative or risky consequences.[427]

2.3.1.2 The National Contact Points

Governments that follow the OECD Guidelines are expected to establish a National Contact Point (hereinafter "NCP").[428] NCPs are a State-based non-judicial grievance mechanism monitoring the application of voluntary recommendations concerning business behavior at the national level. They are all supported by the governments of States that have signed the Guidelines. Most of them are constituted within the government itself (for example in Italy at the Ministry of Health, in the US at the Economic and Business Affairs Bureau or in Germany at the Federal Ministry for Economic Affairs and Energy); yet, more and more NCPs are operating independently of the State, such as in The Netherlands, in Norway or in Denmark.[429]

In particular, the NCPs provide an official complaint procedure, known as the "particular instance" procedure.[430] Combining elements of different procedures,[431] it aims at resolving disputes concerning practical issues relating to

[425] Liberti (n 422) 39.
[426] OECD Guidelines (n 80) 20.
[427] Liberti (n 422) 40.
[428] J C O Sanchez, 'The Roles and Powers of the OECD National Contact Points regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation' (2015) 84(1) Nordic Journal of International Law 89, 91.
[429] OECD, 'Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises' (2018).
[430] Liberti (n 422) 48.
[431] L Davarnejad, 'In the Shadow of Soft Law: the Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises' (2001) 2011(2) Journal of Dispute Resolution 351, 365.

the implementation and non-observance of the OECD Guidelines, and it provides a platform to redress harm resulting from corporate malfeasance.[432]

Anyone who can show an "interest" (defined broadly) in the alleged breach may have access to such procedure. By way of example, NGOs from all over the world employed it in order to address negative social and environmental effects brought about by corporate misbehavior.[433]

2.3.1.3 Final considerations

The current version of the OECD Guidelines expresses States' common need to urge corporations to adopt better practices in the business world. The increasing participation in the Guidelines, not only by more and more States but also by many other different stakeholders, including corporations, labor unions, and civil society organizations,[434] mirrors an enhanced attention towards BHR.

Moreover, although the Guidelines are not enforceable against businesses,[435] the OECD and member States are expected to make sure corporations are in compliance with them.[436] For this reason, corporations are pressured by the OECD Guidelines to improve their practices in line with the standard of a good business behavior and to achieve the key goals of BHR, CSR and ESG.[437]

Nevertheless, despite the importance of the Guidelines and their impact on the corporations' behaviors, they remain an example of a soft-law tool in the BHR field. Therefore, they are not strictly legally binding and cannot be enforced before national or supranational courts. [438] For this reason, a recent debate on the OECD Guidelines, as in general on the BHR movement, is whether the Guidelines should be turned into a hard-law mechanism, i.e. a legally enforceable

[432] D Carolei, 'Survival International v. World Wide Fund for Nature: Using the OECD Guidelines for Multinational Enterprises as a Means of Ensuring NGO Accountability' (2018) 18 HUM. Rts. L. REV. 371, 373; Davarnejad (n 431) 363.
[433] Saner and Yiu (n 414) 324.
[434] Liberti (n 422) 38.
[435] Cullen (n 384) 763.
[436] Saner and Yiu (n 414) 324.
[437] Cullen (n 384) 759 and 760; Sanchez (n 428) 126.
[438] Davarnejad (n 431) 352.

intergovernmental agreement with the authority to impose sanctions on those who do not uphold the obligations contained therein.[439]

2.3.2 OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance)

Alongside the Guidelines, the OECD Guidance concretely addresses the practical aspects of the risk-based due diligence procedures that businesses are expected to put in place, in order to avoid the adverse human rights impacts deriving from their operations, the supply chains and other business relationships.[440]

The OECD Guidance derives from a multi-stakeholder procedure including a public consultation featuring OECD member States and non-member States, as well as representatives from business, commerce, and civil society,[441] and supervised by the OECD Working Party on Responsible Business Conduct, which is still entrusted with the task of implementing the Guidance.[442]

Such procedure led, in 2018, to the endorsement of the OECD Guidance by forty-eight States, which also promised to assist and oversee its implementation.[443]

2.3.2.1 Characteristics and goals

The OECD Guidance is based upon the OECD Guidelines and it aims at offering practical assistance in their implementation,[444] while promoting an enhanced shared understanding of what constitutes competent due diligence for ethical business behavior across governments and stakeholders.[445]

The OECD believes that the OECD Guidance will serve as the main resource for businesses implementing responsible business practices, including

[439] Saner and Yiu (n 414) 331.
[440] van't Foort (n 359) 65.
[441] OECD Guidance (n 345) 3.
[442] Sanchez (n 428) 93.
[443] OECD Guidance (n 345).
[444] C Shavin, 'Unlocking the Potential of the New OECD Due Diligence Guidance on Responsible Business Conduct' (2019) 4 BHRJ 139, 139.
[445] Brown (n 419) 135.

HRDD, in accordance with the OECD Guidelines, the UNGPs, and the ILO Declaration.[446]

Nevertheless, the goals of the OECD Guidance go beyond practically supporting businesses and fostering consensus among governments and other stakeholders on the importance of performing due diligence in accordance with the OECD Guidelines. Indeed, the OECD Guidance also specifically aims at explaining in a simple and plain manner the due diligence recommendations contained in the OECD Guidelines, as well as harmonizing the RBC standards stemming from them and from other international instruments,[447] so that enterprises are able to actually implement them.[448]

Relevantly, the OECD, the UN and the ILO all seem to share the goal of reaching convergence on the idea of due diligence on RBC. This is also reflected in the 2018 UNWG Report to the UNGA, which mentions the OECD Guidance as a key reference for HRDD.[449]

However, the extent to which the business community complies with the OECD Guidance's suggestions will determine whether their goals are accomplished. The OECD Guidance has a number of positive characteristics that may make it a realistic and valuable tool for business practitioners. Nevertheless, in order to fully realize its potential, it needs to be widely accessible and taken into consideration. This can increase business awareness of the Guidance and mainstream the due diligence approach recommended therein.[450]

Indeed, the OECD Guidance gives corporations the flexibility to adapt the proposed measures and procedures of due diligence to their own peculiar characteristics, with a view to truly assisting businesses in developing and strengthening their own due diligence mechanisms.[451]

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[446] Partiti (n 324) 148.
[447] Ruggie (n 18).
[448] OECD Guidance (n 345) 3; Saner and Yiu (n 414) 218; Shavin (n 444) 140.
[449] UNGA, UN Doc A/73/163 (n 344) paras 5, 20 and 90(d); OECD, 'Global Forum on Responsible Business Conduct: Expert Letters and Statements on the Application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the Context of the Financial Sector' (26-27 June 2014, OECD Conference Centre, Paris, France) (https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-3.pdf) .
[450] Shavin (n 444) 140.
[451] Liberti (n 422) 38.

Moreover, the OECD Guidance for the first time outlines – for all kinds of corporations and business activities – the structure of corporate due diligence for RBC.[452] It illustrates the steps businesses should take in order to carry out a proper due diligence on all the issues covered by the OECD Guidelines,[453] namely consumer interests, disclosure, fighting bribery, bribe solicitation and corruption, industrial relations and employment, human rights and the environment.[454]

In this regard, the Guidance offers a detailed explanation of the due diligence procedure,[455] it lists some examples of human rights on which business activities can have an impact (e.g. violence based on gender or sexual harassment, forced labor, discrimination on salary for equal work or work of equal value)[456] and its Annex provides further explanations, advice, and examples of RBC's due diligence.[457]

2.3.2.2 Methods to increase the OECD Guidance implementation in practice

Two requirements are essential in order for the OECD Guidance to reach their main goal, namely that of becoming an international standard for responsible business behavior.[458]

Firstly, broad dissemination of the Guidance is required. Indeed, if, on the one hand, some business professionals are acquainted with the OECD Guidance, on the other hand far too many are unfamiliar with them, as well as with other resources that have been introduced by the OECD to assist companies in implementing RBC. The OECD Guidance will be able to become a truly common standard on RBC only inasmuch as it is actually spread among business practitioners around the world.[459] Moreover, the OECD NCPs can convene people and help businesses understand the OECD Guidance. However, to ensure that the

[452] J Bartels and W Schramade, 'Investing in human rights: overcoming the human rights data problem' (2022) Journal of Sustainable Finance & Investment 1, 5.
[453] Martin-Ortega (n 292) 59.
[454] Shavin (n 444) 140.
[455] Liberti (n 422) 38.
[456] OECD Guidance (n 345) 38.
[457] Shavin (n 444) 140.
[458] Shavin (n 444) 144.
[459] Cullen (n 384) 744.

recommendations become globally accepted,[460] the OECD will need to extend its reach outside the OECD member States. In order to do so, cooperation with other networks and associations will be essential.[461]

Secondly, it is fundamental that the current debate and practice in key RBC areas, and the principles outlined in the OECD Guidance, are aligned. Indeed, the main aim of the OECD Guidance is to implement the UNGPs' HRDD standards, as contained in the OECD Guidelines.[462] In this regard, the Guidance represented a positive step towards promoting the implementation of HRDD for RBC by applying this standards to many RBC areas, for example the environment, bribery and corruption, and consumer interests.[463] However, for a further development in the implementation of the OECD Guidance, HRDD should be applied in a wider range of RBC sectors, as the full potential of the OECD Guidance can only be realized by operationalizing HRDD into business enterprises' practices across as many RBC areas as possible.[464]

2.3.2.3 The advantages of the OECD Guidance for practitioners

The importance and impact of the OECD Guidance will depend upon its concrete ability to provide useful assistance and advice to practitioners. The Guidance, in this regard, has a number of features pointing towards its potential use by business practitioners.

First of all, rather than being academic, the OECD Guidance is practical. Whereas the OECD Guidelines define what is expected of business, the Guidance clarifies it in straightforward terms with a focus on the actions that a company should actually perform.[465] The emphasis on activities will be highly beneficial to business professionals, especially those who are just starting to adopt RBC and are trying to understand global standards and expectations.[466] Its pragmatic

[460] Mares (n 265) 51.
[461] Shavin (n 444) 144.
[462] Salcito and Wielga (n 374) 411.
[463] Shavin (n 444) 145.
[464] Martin-Ortega (n 292) 63.
[465] Liberti (n 422) 38.
[466] Shavin (n 444) 142.

character is increased also by the fact that the Annex contains relevant examples to clarify its concrete application.[467]

Moreover, the OECD Guidance acknowledges that enterprises must adopt a flexible, context-specific approach to RBC due diligence.[468] More importantly, it offers practitioners useful advice on how to make decisions when events do not unfold in a tidy, linear manner. The Guidance provides a beneficial tool for business practitioners by being extremely realistic about how due diligence for RBC actually occurs in practice. This also ensures that governments and other important stakeholders better appreciate the scope of BHR and their related obligations, increasing their awareness on such topics.[469]

Furthermore, the Guidance is applicable to every industry and to every topic covered in the OECD Guidelines. This helps establish a common reference point for businesses and governments looking for a useful benchmark for determining whether corporations are in line with the standards established by the OECD Guidance.[470] In particular, the Guidance may be valuable for those businesses operating across multiple industries as well as those attempting to develop an integrated approach to RBC due diligence.[471]

The practical focus of the advice may also make it a useful tool for small and medium-sized businesses. Indeed, the recommendations contained within the Guidance provide a better understanding on how to adjust due diligence procedures to a company's circumstances, and specifically acknowledge that the resources and circumstances of small and medium-sized businesses may differ from those of bigger organizations.[472]

Lastly, the OECD Guidance represents a reference point for all the OECD member States. This could be a useful tool to create uniformity and clarity in the area of BHR, for all businesses and stakeholders attempting to transpose RBC requirements into domestic law.[473]

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[467] OECD Guidance (n 345), Annex.
[468] Cullen (n 384) 758.
[469] Shavin (n 444) 142.
[470] Mares (n 265) 51.
[471] Shavin (n 444) 142.
[472] Cullen (n 384) 758.
[473] Cullen (n 384) 744; Mares (n 265) 51.

This last step will likely be essential towards the effective success of the OECD Guidance and Guidelines, and of BHR as a whole. Indeed, domestic laws are unavoidably country-specific. However, the vast majority of businesses nowadays operate internationally.[474] Accordingly, the existence of shared and consistent RBC requirements to comply with will be pivotal in ensuring success to the Guidance.[475]

Ultimately, the OECD Guidance's accuracy and practical focus will be crucial for accomplishing the OECD's objectives in the context of BHR.[476]

2.3.2.4 The latest developments

The corporate community is currently strongly motivated to adopt due diligence procedures for RBC. In the upcoming years, such procedures are likely going to increase.

There is a great deal of pressure on many businesses to live up to the expectations of important stakeholders like governments, investors, business partners, civil society, customers, and other stakeholders.[477] Some businesses are strongly motivated by the willingness to avoid reputational, legal, and financial repercussions. In addition, as new legislative initiatives in many States harden compliance obligations, more businesses are starting to take human rights and other ethical business concerns seriously.

For instance, several nations have passed laws requiring businesses to disclose non-financial risks as well as information on their management of modern slavery throughout their value chains.[478] The recent French Duty of Vigilance Law mandates that certain major French businesses conduct due

[474] L G Skinner, *Transnational corporations and human rights: overcoming barriers to judicial remedy* (1st edn Cambridge University Press, 2020) 1, 7.
[475] Mares (n 265) 51.
[476] Shavin (n 444) 144.
[477] Davarnejad (n 431) 355.
[478] UK Modern Slavery Act 2015 (2015 c. 30) (entered into force October 2015); California Transparency in Supply Chains Act (entered into force January 2012); Australian Modem Slavery Bill (entered into force January 2019).

diligence on human rights issues throughout their internal operations and supply networks.[479]

In the upcoming years, it seems likely that this trend toward the so-called "legalization" of corporations' RBC obligations will continue. If it does, one highly possible consequence is that a lot more businesses will need to quickly acquire the knowledge necessary to execute due diligence – in particular HRDD – for RBC.[480]

The OECD Guidance can play a valuable role in assisting businesses implement due diligence for RBC, and in helping governments and legal institutions consider what constitutes a responsible business behavior in terms of meeting not only international standards but also potentially emerging domestic requirements. If the Guidance gains widespread acceptance as the primary practical reference guide for due diligence as defined by the UNGPs and by the OECD Guidelines, this role may become especially relevant.[481]

The second chapter has described and analyzed the most significant international standards on BHR.

In particular, it focused on the UNGPs and the duties they establish for States and corporations, on the concept of HRDD both from a theorical point of view and in practice, and on the two most relevant instruments drafted within the OECD, i.e. the OECD Guidelines and Guidance.

These tools are necessary to analyze the approach of corporations towards human rights and to help them ameliorate their business behavior in order to guarantee the best human rights protection possible.

The practical application of these standards before both international and regional committees and courts, from a comparative viewpoint, will be addressed in the third chapter.

[479] Loi n 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (entered into force 2019).
[480] Shavin (n 444) 142.
[481] Shavin (n 444) 142.

3. EVALUATION OF THE APPLICATION OF THE BHR STANDARDS IN PRACTICE

The third chapter of this thesis will analyze how the international standards on BHR have been applied in practice at the global level, especially in the case-law of supra-national human rights courts and of the domestic courts of several countries, namely the United States, France, the Netherlands and the United Kingdom, as well as in the decisions by international quasi-judicial bodies.

3.1 The non-State-based grievance mechanisms under the third Pillar of the UNGPs

Fundamentally, rights and remedies are interconnected. The right to an effective remedy is crucial to ensure that substantive rights are fully safeguarded, according to international human rights law (hereinafter "IHRL").[482]

This has also been extensively acknowledged in the area of BHR, and it is essential to the design of the UNGPs. In accordance with the UNGPs, the State shall offer efficient legal and non-judicial recourse mechanisms to resolve human rights violations associated with business.[483]

The UNGPs argue that non-State-based non-judicial grievance mechanisms and other private regulatory initiatives have a significant role to play in enhancing and complementing State-based laws and judicial procedures, in contrast to most UN instruments, which are only concerned with the obligations of States. For this reason, "States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms".[484]

Thus, the ratification of the UNGPs has fueled ongoing discussions about the function and efficiency of private regulatory activities as well as the

[482] S Deva, A Ramasastry, F Wettstein and M Santoro, 'Business and Human Rights Scholarship: Past Trends and Future Directions' (2019) 4(2) Business and Human Rights Journal 201, 202.
[483] M Wielga and J Harrison, 'Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil' (2021) 6 Business and Human Rights Journal 67, 69.
[484] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 28.

connection between these initiatives and States' obligations to protect human rights.[485]

In this debate, there is a fair amount of disagreement. Some contend that private regulatory initiatives are ineffective,[486] while others argue that any effective plan to strengthen business governance of its obligations under IHRL must unavoidably include efforts to strengthen private regulatory initiatives.[487] The dearth of a complete empirical study on the ways in which communities and workers, particularly in the Global South, engage with private regulatory activities as part of their efforts to encourage corporations to respect their rights, is one of the major gaps in the debate.[488]

Under the third Pillar of the UNGPs, there are three main phases to implement the operational principles recommended in the UNGPs to make the access to remedy as most efficient as possible. In particular, these three phases have been developed by the Office of the UN High Commissioner for Human Rights (hereinafter "OHCHR") in the 'Accountability and Remedy Project', launched in 2014. The three phases focused on maximizing the efficacy of three different mechanisms: State-based judicial mechanisms (first phase), State-based non-judicial mechanisms (second phase) and non-State-based grievance mechanisms (hereinafter "NSBGMs") (third phase).[489]

In terms of legal mechanisms, a transnational corporation may be held liable in court for violating legal human rights standards in both its home country and the host States where it conducts business.[490] On the other hand, States should

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[485] S Rennie, T Connor, A Delaney and S Marshall, 'Orchestration from below? Trade Unions in the Global South, Transnational Business and Efforts to Orchestrate Continuous Improvement in Non-State Regulatory Initiatives' (2017) 40 U.N.S.W.L.J. 1275, 1275.
[486] Rennie, Connor, Delaney and Marshall (n 485) 1275-6.
[487] Ruggie (n 18) 77-78.
[488] Rennie, Connor, Delaney and Marshall (n 485) 1275-6.
[489] OHCHR, 'Business and Human Rights: The OHCHR Accountability and Remedy Project An initiative to contribute to a fairer and more effective system of domestic law remedies, in particular in cases of gross human rights abuses' (2014) (https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/RemedyWorkPlans.pdf).
[490] Y Aftab and A Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy* (1st edn LexisNexis Canada, 2019); R Meeran 'Access to remedy: the United Kingdom experience of MNC tort litigation for human rights violations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (1st edn Cambridge University Press, 2013).

develop their own internal control systems and collaborate through organizations like the NCP system of the OECD when it comes to non-judicial remedies.[491]

In fact, the empirical data on the efficacy of private BHR mechanisms is "spotty", and many private regulation initiatives in the BHR field have severe flaws in regard to their design or structural aspects.[492] However, as suggested by Ruggie, the private voluntary initiatives are growing fast in scope and this will ensure that the latter, despite their limits,[493] "provide an essential building block in any overall strategy" for enhancing governance of the link between business and human rights,[494] especially considering that – as also suggested by many "transnational new governance" believers – both individual States and intergovernmental organizations (hereinafter "IGOs") have failed to successfully impose answers on a wide range of complicated international issues through unilateral action.[495]

In particular, the "transnational new governance" theories contend that improving the coherence between State regulatory tactics and many other governing factors is the most effective strategy to address this governance deficiency, and it is in this context that Ruggie's work on the UNGPs can be located, as focusing on coordinating the objectives and operations of three "governance systems": pressure from civil society using mechanisms like advocacy campaigns; corporate governance in the private sector; and laws and other regulatory procedures implemented by States and IGOs.[496]

Relevantly, the institutions analyzed in the present chapter belong to the third phase of the 'Accountability and Remedy Project' which, as mentioned above, entails the establishment of NSBGMs.[497]

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[491] Wielga and Harrison (n 483) 70.
[492] Ruggie (n 18) 71.
[493] R D Lipschutz, 'Sweating It Out: NGO Campaigns and Trade Union Empowerment' (2004) 14 Development in Practice 197; R D Lipschutz and J K Rowe, *Globalization, Governmentality, and Global Politics: Regulation for the Rest of Us?* (1st edn Routledge, 2005); D L Owen et al, 'The New Social Audits: Accountability, Managerial Capture or the Agenda of Social Champions?' (2000) 9 European Accounting Review 81; R B Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (1st edn Alfred A Knopf, 2007).
[494] Ruggie (n 18) 77-78.
[495] Ruggie (n 259).
[496] Rennie, Connor, Delaney and Marshall (n 485) 1280.
[497] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 28.

The inherent ability of these mechanisms to play any type of genuine or significant role in solving human rights-related issues between businesses and rightsholders is debatable when compared to alternative forms of recourse.[498] While some contend that such procedures are inadequate for resolving disputes between businesses and communities, other observers and significant UN actors emphasize that NSBGMs do have a significant role to play. In addition to government-sponsored non-judicial procedures and NSBGMs, Ruggie stated that government-sponsored judicial remedies were essential for providing access to remedies globally. The UNWG has recently made it plain that NSBGMs are still seen as a crucial part of the "bouquet of remedies" that should be available to rightsholders:[499] as Ruggie specified, they complement State-based judicial and non-judicial mechanisms, by providing a way to potential early resolution of any issues, and a path to redress in cases where national courts and government-sponsored nonjudicial procedures are unavailable,[500] as well as an early warning system enabling preemptive action on problems that might otherwise escalate.[501]

3.2 The case-law of regional human rights courts

The research on the case-law on BHR shows that only few regional courts and committees have addressed this specific topic and the related application and implementation of the UNGPs.

The most significant regional courts in terms of case-law on BHR are the Inter-American Court of Human Rights (hereinafter "IACtHR") and the European Court of Human Rights (hereinafter "ECtHR"). The latter, however, has never explicitly mentioned the UNGPs in its judgments.

3.2.1 The Inter-American Court of Human Rights

[498] F Haines and K Macdonald, 'Nonjudicial Business Regulation and Community Access to Remedy' (2020) 14 Regulation & Governance 840.
[499] UNGA, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc A/72/162 (18 July 2017).
[500] S Zagelmeyer, L Bianchi and A R Shemberg, 'Non-State Based Non-Judicial Grievance Mechanisms (NSBGM): An Exploratory Analysis. A report Prepared for the Office of the UN High Commissioner for Human Rights' The University of Manchester Alliance Manchester Business School (13 July 2018).
[501] Ruggie (n 18) 102-104 and 116.

The Inter-American Court of Human Rights (hereinafter "IACtHR") has a relevant role in developing case-law in the BHR field.

The IACtHR was established in 1979, together with the Inter-American Commission on Human Rights (hereinafter "Inter-American Commission" or "IACHR"), by the American Convention on Human Rights, an IHRL convention ratified by members of the Organization of American States (hereinafter "OAS").[502]

The OAS is affiliated with the Inter-American Human Rights System (hereinafter "Inter-American System"), which was established by the Inter-American Commission and the IACtHR.[503]

The Inter-American System has long dealt with the problem of corporate involvement in violations of human rights,[504] and, as in the last two decades foreign investment, development projects, and extractive industries in the region were increasing, the Inter-American Commission and the IACtHR began to address the issue of BHR, notably in the context of indigenous rights.[505]

Indeed, indigenous communities are among the most impacted by multinational corporations' activities.[506] In particular, in the American continent, a number of NGOs have recorded corporate violations of human rights of indigenous people, ranging from the forced relocation of entire villages with severe repercussions for the right to a healthy environment to the lack of previous consultation procedures with indigenous peoples. Currently, unstoppable operations carried out by extractive businesses,[507] as well as development

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[502] P Pustorino, *Lezioni di tutela internazionale dei diritti umani* (2nd edn Cacucci, 2020) 1, 72.
[503] A Gonza, 'Integrating Business and Human Rights in the Inter-American Human Rights System' (2016) 1 BHRJ 357, 357.
[504] Gonza (n 503) 357.
[505] K Salazar, 'Business and Human Rights. A new challenge for the OAS?' (Blog de la Fundación para el Debido Proceso Legal, 14 October 2015) (http://dplfblog.com/2015/10/14/business-and-human-rights-a-new-challenge-forthe-oas/).
[506] N Reguart-Segarra, 'Business, Indigenous People's Rights and Security in the Case Law of the Inter-American Court of Human Rights' (2019) 4 BHRJ 109, 110.
[507] F J Zamora Cabot, 'Desarrollo Sostenible y Empresas Multinacionales: Un Estudio sobre los Acaparamientos de Tiera en Clave de Responsabilidad' in *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastian*, XV (1st edn Navarra: Thomson Reuters Aranzadi, 2016); V Camarero Suarez and F J Zamora Cabot, 'El Acceso al Agua Limpia y al Saneamiento: Un Derecho Humano Crecientemente Asediado' in Maria Chiara Marullo and Francisco Javier Zamora Cabot (eds), *Empresas y Derechos Humanos: Temas Actuales* (1st edn Editoriale Scientifica, 2018).

projects, are annihilating the environment and indigenous lands and ways of life. Accordingly, multiple disputes between governments and multinational businesses on the one hand, and indigenous populations on the other, are emerging in this scenario.[508]

However, on the one hand, the legal frameworks and institutions of the countries of the Americas have shown to be ineffective at stopping corporate violations of human rights and safeguarding victims' rights. On the other hand, there are significant legal gaps in the current international systems of responsibility that make it difficult to hold companies accountable in these situations,[509] especially since they are not considered subjects of international law and thus cannot be held liable for human rights' abuses.[510]

In this regard, it should be emphasized that the Inter-American System of Human Rights is not unfamiliar with the conversation about BHR, even though the IACtHR has only once explicitly referred to the UNGPs in its case-law on the rights of indigenous peoples.[511]

Yet, the awarding of remedies under the Inter-American System has rarely resulted in explicit duties being placed on corporations.[512] Recent advancements in the BHR agenda have been made by civil society and victims who have advocated for more explicit acknowledgement of corporate responsibilities in the IACtHR's and Inter-American Commission's work. The latter has been requested by these parties to continue developing standards that specifically address companies and to implement the UNGPs.[513]

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[508] F G Isa, 'El Derecho de los Pueblos Indigenas sobre sus Tierras y Recursos Naturales: Conflicto Social y Ambiental a la Luz del Caso Awas Tingni' (2012) 5(7) Conflicto Social 88.
[509] A M Mondragón, 'Corporate Impunity for Human Rights Violations in the Americas: The Inter-American System of Human Rights as an Opportunity for Victims to Achieve Justice (Online Symposium, 2016) (https://harvardilj.org/2016/07/corporate-impunity-for-human-rights-violations-in-the-americas-the-inter-american-system-of-human-rights-as-an-opportunity-for-victims-to-achieve-justice/).
[510] J E Alvarez, 'Are Corporations Subjects of International Law' (2011) 9 Santa Clara J. INT'l L. 1, 3.
[511] *Kaliña and Lokono Peoples v Suriname (Kaliña case)* IACtHR Series C No 309 (25 November 2015), para 224.
[512] Gonza (n 503) 357.
[513] Due Process of Law Foundation, 'The impact of Canadian mining in Latin America and Canada's responsibility' (May 2014) (http://dplf.org/en/resources-topics/human-rights-extractive-industries); Gonza (n 503) 357.

The Inter-American System has a lot of room for developing State obligations relating to corporate accountability. In particular, the State duty to ban or stop human rights' abuses through the improvement of local governance, new laws and policies for both host and home nations, and effective access to national and international justice for victims of corporate human rights' violations.[514]

Relevantly, the Inter-American System acknowledges that there are situations in which specific acts or omissions by private actors can be directly treated as State acts and constitute a violation of the obligations of States to safeguard citizens from violations of their human rights and to provide victims with adequate redress. This happens when such actors operate with the "acquiescence, collaboration, support or tolerance of state agents" and are "empowered to act in State capacity" (for example, through a contract[515]). Failure to stop, look into, and punish rights violations can also result in State liability.[516]

Moreover, the Inter-American System helped develop the idea of horizontal effects of IHRL by recognizing the "obligation" of non-State actors, including private employers, to protect human rights.[517] Indeed, even when human rights violations occur outside the jurisdiction of a State, that State may still be held responsible because of extraterritorial duties imposed by the Inter-American Commission. A similar extension could apply in relation to multinational corporation, although so far the Inter-American Commission has carried out an extraterritorial application of human rights breaches only in instances of military occupation, action, or detention.[518]

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[514] S Khoury, 'Corporate (Non-)Accountability and Human Rights' (2018) 46(4/5) Asian Journal of Social Science 503, 512.
[515] *Ximenes-Lopes v Brazil,* IACtHR Series C No 149 (4 July 2006), para 87; *Gonzales Lluy et al. v Ecuador,* IACtHR Series C No 298 (1 September 2015).
[516] *Mapiripan Massacre v. Colombia,* IACtHR Series C No 134 (15 September 2005), para 162.
[517] *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03, IACtHR Series A No 18 (17 September 2003), para 140.
[518] D Cerqueira, 'The Attribution of Extraterritorial Liability for the Acts of Private Parties in the Inter-American System: Contributions to the Debate on Corporations and Human Rights' (2015) 20 Aportes DPLF, Magazine 20.

Furthermore, the Inter-American Commission has engaged the discussion on State accountability for BHR in its case-law, also by adopting preventive measures and issuing thematic reports.[519]

In this regard, in November 2012 the Inter-American Commission established the Special Unit on Economic, Social, and Cultural Rights (hereinafter "Unit"), which is still in charge of spearheading the endeavor to create more specific criteria for BHR.[520] In order to "delve deeper into the cross-cutting work the Commission does in this area", the Inter-American Commission decided to start the procedure of turning the Unit into a Special Rapporteurship with financial independence and a full-time expert in March 2014.[521]

Moreover, as a result of a directive adopted by the OAS in 2016,[522] its General Assembly launched a study on Inter-American standards for BHR, focused on promoting the implementation of the UNGPs, and based on an analysis of conventions, case-law, and reports indicated by the Inter-American System.[523]

In this respect, two years later the OAS General Assembly entrusted the Inter-American Commission with working on the "promotion and application of States and business commitments in the area of human rights and business", advocating the use of the UNGPs.[524] In order to fulfill this purpose, the Unit is in charge of the Inter-American Commission's attendance at OAS colloquia in order to promote "an open and informal dialogue" between stakeholders.[525] It also entered into a contract with the Danish Institute for Human Rights in order to get their assistance, among other things, in incorporating BHR issues into the Inter-

[519] C Anicama, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System* (1st edn Aspen Publishers, 2008).
[520] Gonza (n 503) 359.
[521] Organization of American States (OAS), 'IACHR to Create an Office of the Special Rapporteur on Economic, Social, and Cultural Rights' (3 April 2014) (http://www.oas.org/en/iachr/media-center/PReleases/2014/034.asp).
[522] OAS General Assembly, 'Promotion and Protection of Human Rights', AG/RES 2887 (XLVI-0/16) (14 June 2016). (http://www.oas.org/en/sla/dil/docs/AG-RES-2887_XLVI-0-16.pdf).
[523] Reguart-Segarra (n 506) 113.
[524] Promotion and protection of human rights in business, OAS, (4 June 2014), AG/RES. 2840 (XLIV-0/14) (http://www.oas.org/es/sla/ddi/docs/AG-RES-2840 XLIV-O-14.pdf).
[525] *Coloquio en la OEA sobre Derechos Humanos y Empresas,* (29 June 2015), (http://www.oas.org/es/cidh/desc/actividades/).

American Commission's reports, country monitoring, and public hearings.[526] The latter are the most relevant BHR-related activity at the Inter-American Commission, which has been conducting open hearings on the varied effects of business activity on human rights for a long time, with a particular focus on the effects of the extractive industries in the host countries.[527]

3.2.1.1 The IACtHR case-law

The IACtHR has investigated in its case-law the effects of non-State actors' exploration and exploitation[528] of traditional areas for oil,[529] mining,[530] logging,[531] and other resources. The case-law of the IACtHR makes explicit reference, and demonstrates the occurrence of, corporate practices jeopardizing the rights of indigenous and tribal peoples,[532] from the right to community property to the right to life.

However, the IACtHR often keeps the focus on State obligations rather than on the role and potential accountability of corporations.[533] Accordingly, even though the ordered remedies are significant and frequently include full land restitution,[534] the removal of explosives, and the reforestation of the affected

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[526] Memorandum of understanding between the General Secretariat of the Organization of American States through the Inter-American Commission of Human Rights and the Danish Institute for Human Rights (16 March 2015) (http://www.oas.org/es/cidh/mandato/docs/IACHR-DIHR-2015.pdf).
[527] Reguart-Segarra (n 506) 113.
[528] *Yakye Axa Indigenous Community v. Paraguay* IACtHR Series C No 125 (17 June 2005); *Sawhoyamaxa Indigenous Community v. Paraguay* IACtHR Series C No 146 (29 March 2006); *Xdkmok Kdsek Indigenous Community v. Paraguay* IACtHR Series C No 214 (8 March 2010).
[529] *Kichwa Indigenous People of Sarayaku v. Ecuador* (*Kichwa case*) IACtHR Series C No 245 (27 June 2012).
[530] *Mayagna (Sumo) Awas Tingi Community v. Nicaragua* (*Mayagna case*) IACtHR Series C No 79 (31 August 2001), para 104f.
[531] *Kaliña case* (n 511); *Saramaka People v. Suriname* (*Saramaka case*) IACtHR Series C No 172 (28 November 2007).
[532] *Mayagna case* (n 530); *Saramaka case* (n 531); *Kichwa case* (n 529); *Kaliña case* (n 511); T M Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2013) 35 University of Pennsylvania Journal of International Law 113; A Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors Through the Role of the State: A Comparison of Regional Approaches to the Obligation to Protect' (2009) 9 Human Rights Law Review 225, 226.
[533] Gonza (n 503) 361.
[534] T M Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2015) 25 Duke Journal of Comparative & International Law 1, 2014.

territories,[535] the IACtHR's decisions frequently lack a thorough analysis of the position of multinationals.[536] For instance, in the *Kichwa Indigenous People of Sarayaku v. Ecuador* case, the IACtHR merely mandated that the government set up a consultative mechanism for awarding future concessions,[537] but not the review and revocation of mining concessions as demanded by the petitioners.[538]

A relevant case in which the IACtHR referenced to the UNGPs, for the first time,[539] and to their implementation is the *Kaliña and Lokono Peoples v. Suriname* case, decided in 2015 and concerning the violation of indigenous rights by the State of Suriname.[540]

The case involved abuses of indigenous peoples' human rights brought on by the mining company BHP Billiton-Suralco's operations. Nevertheless, the parties of the case did not submit any evidence nor did they ask the IACtHR to further address BHR. Therefore, the IACtHR spontaneously addressed the UNGPs and their importance in this case and its acknowledgment highlights the necessity for civil society to urge more vehemently for a firmer commitment from the regional human rights authorities so that they can seek for all-encompassing solutions to situations involving corporate human rights breaches.[541]

Additionally, the IACtHR addressed the concept of HRDD[542] and stated that the UNGPs "establish that businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities",[543] thus acknowledging the relevant role of the UNGPs in fighting human rights violations by corporations, especially

[535] *Kichwa case* (n 529) para 295.
[536] *Kichwa case* (n 529) para 299.
[537] *Kaliña case* (n 511); *Saramaka case* (n 531) para 287.
[538] *Kichwa case* (n 529) para 299.
[539] Mondragón (n 509).
[540] L Lixinski, 'Case of the Kaliña and Lokono Peoples v. Suriname' (2017) 111 AM. J. INT'l L. 147, 147.
[541] Mondragón (n 509).
[542] F MacKay, 'The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence, and Mutual Reinforcement' (2018) 11 Erasmus L. REV. 31, 32.
[543] *Kaliña case* (n 511); *Saramaka case* (n 531) para 224.

since they provide express duties for corporations in relation to the respect of human rights.[544]

3.2.2 The European Court of Human Rights

The ECtHR is a regional human rights judicial body established by the Council of Europe in Strasbourg and adjudging on alleged violations of the European Convention on Human Rights (hereinafter "ECHR") by States parties.[545] Although potential violations of human rights committed by private actors because are outside of its scope, the case-law of the ECtHR can contribute to the worldwide debate on BHR by defining States' obligations to safeguard their citizens from human rights breaches committed by non-State actors and in particular corporations.[546]

3.2.2.1 Negative and positive obligations of States

Within the ECHR system a State will be held accountable for business-related human rights abuses whenever a corporate entity's actions or inactions directly result in a violation of a specific right protected by the ECHR. However, the corporation must have specific characteristics: it has to be deemed a "governmental organization" or the State must have given it the capacity to carry out public authority responsibilities.

On the one hand, this reflects the general international law rule whereby: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State",[547] and – with specific regard to attributability – the actions of the State's organs of government

[544] MacKay (n 542) 32.
[545] N Khedairi, 'The History and the Structure of European Court of Human Right' (2021) 4(3) International Journal of Social Science Research and Review 18, 18.
[546] L Verdonck, 'How the European Court of Human Rights evaded the Business and Human Rights Debate in *Özel v. Turkey*' (2016) 2(1) The Turkish Commercial Law Review 111, 111; R M Baratti, 'Business and Human Rights nella giurisprudenza della Corte Europea dei diritti umani in materia di ambiente: Limiti, sfide e prospettive' (2022) 1 I Diritti dell'Uomo 49, 53.
[547] DARS, Art. 2.

or those who have acted as its agents — that is, under their direction, instigation, or control — can be attributed to the State at the international level.[548]

On the other hand, while applying the ECHR in conformity with an evolutionary interpretation thereof, also keeping into consideration principles of international law,[549] the ECtHR has its own specific methodology in assessing whether a State can be held directly liable for the actions or omissions of a corporate organization.[550] In particular, it considers a number of factors such as the company's legal position, the nature of its business, the environment in which it operates, as well as its institutional and operational independence.[551]

In the event these conditions are fulfilled, if the corporations' actions result in the violation of human rights, the State will be in breach of its negative obligations under the ECHR, namely of its duty to refrain from engaging in conduct that violates human rights through its own or its agents' activities.[552]

The ECtHR has, to some extent, succeeded in establishing individual protection at the international level for human rights breaches resulting from commercial activities through the flexible interpretation of the ECHR and the elaboration of the idea of positive responsibilities.[553] The concept of positive obligations implies that specific actions are asked from the States in order to proactively protect human rights, as guarantors.[554]

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[548] I Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1st edn Clarendon Press, 1983) 132–166; D D Caron, 'The basis of responsibility: attribution and other trans-substantive rules' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1st edn Martinus Nijhoff, 1998) 109.
[549] V Zagrebelsky, R Chenal and L Tomasi, *Manuale dei diritti fondamentali in Europa* (2dn edn il Mulino, 2016) 43.
[550] W van den Muijsenbergh and S Rezai, 'Corporations and the European Convention on Human Rights' (2012) 25(1) Global Business & Development Law Journal 43, 52.
[551] B Topić, 'State's responsibility for business-related human rights violations in the light of the Strasbourg Court's case-law' (2019) 10(1) Pravni Zapisi 65, 100.
[552] Topić (n 551) 99.
[553] A R Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (1st edn Bloomsbury Publishing, 2004); P van Dijk, 'Positive Obligations' implied in the European Convention on Human Rights: are the states still the "Masters' of the Convention?" in Monique Castermans-Holleman et al (eds), *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy - Essays in Honour of Peter Baehr* (1st edn Brill Nijhoff, 1998) 17, 18.
[554] A I L Campbell, 'Positive obligations under the ECHR: deprivation of liberty by private actors' (2006) 10(3) Edin. L.R. 399, 399; C Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (1st edn Springer, 2003).

The ECtHR has never explicitly addressed the UNGPs, or the BHR standards in general, in its judgments. Yet, the positive obligations of States under the ECHR have common points with the UNGPs. Indeed, under the UNGPs the State will be liable for abuses on human rights deriving from business activities in three cases: firstly, if it does not regulate corporations' behaviors with the aim of preventing human rights violations connected to businesses' activities; secondly, if it fails to scrutinize these breaches; lastly, in case the State lacks to build appropriate remedies. Such circumstances would entail the violation of positive obligations by the State.[555]

3.2.2.2 The Özel v. Turkey case

Because of its potential role in the field of BHR, the ECtHR has been criticized in the *Özel v. Turkey* case,[556] as it decided to avoid the discussion on the actual impact of corporations on human rights.[557]

The case involved a natural disaster,[558] in particular an earthquake with a magnitude of 7.4 on the Richter scale that rocked the city of Izmit and the surrounding area in Turkey's Marmara Region in August 1999. Despite the fact that specific building standards were imposed due to the area's designation as a "high risk zone", several residential complexes collapsed. According to expert reports, the structures had severe construction flaws. Sand and sea gravel were used inappropriately, for example, and this circumstance had weakened the strength of the concrete and damaged the iron pillars. The buildings also had more floors than were permitted, and the foundations were not altered to accommodate for the extra levels.[559]

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[555] Topić (n 551) 99.
[556] *M. Özel and Others v. Turkey* Appl No 14350/05, 15245/05 and 16051/05 (*Özel case*) (ECtHR, 17 November 2017).
[557] Verdonck (n 546) 111.
[558] V Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights (2020) 33 Leiden Journal of International Law 601, 616.
[559] *Özel case* (n 556) para 23.

The applicants, i.e. the direct victims or their families, claimed an alleged violation of Article 2 of the ECHR, namely the right to life,[560] with regard to the positive obligations of States deriving from this right. Indeed, Turkey would have failed, through municipal authorities, to carry out the necessary inspections to verify whether the buildings complied with the applicable regulations or to stop their construction; the victims claimed that this behavior constituted gross negligence and had caused the deaths of their relatives.[561]

In its judgment, the ECtHR clarified that Article 2 of the ECHR applies to any acts, whether public or private, with the potential of creating risks to life, including natural disasters. The ECtHR found the claim concerning the State's direct obligation to protect the lives of its citizens to be inadmissible, based on the fact that, in the present case, the national authorities had qualified the region as at risk of earthquake and they had drafted a "spatial planning". Thus, prevention measures were put in place and the area was already subject to "special conditions".[562]

Nevertheless, the Court reminded States that they must adopt measures that strengthen their capacity to respond to lethal and unexpected natural disasters. Thus, it mainly focused, due to the limitations of its jurisdiction, on the first Pillar of the UNGPs, reminding the obligations of States on BHR.[563]

The ECtHR went on to rule that Turkey had breached the procedural limb of Article 2 of the ECHR,[564] which requires States to avoid any impression of tolerance for illegal conduct or collaboration in such activities. The ECtHR stated that, in order to comply with such provision, State authorities must determine the circumstances surrounding the disaster, investigate whether there were flaws in the regulatory framework or in its implementation, and identify all State actors who may have been involved in the sequence of events.[565]

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[560] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 2.
[561] *Özel case* (n 556) para 139.
[562] *Özel case* (n 556) para 174.
[563] *Özel case* (n 556) para 173.
[564] Stoyanova (n 558) 616.
[565] Verdonck (n 546) 114; *Özel case* (n 556).

From the standpoint of the international framework on BHR, the decision in *Özel v. Turkey* adheres to the prevalent 'duty to protect' approach articulated in the UNGPs. As mentioned above in this thesis, in order to comply with this duty, States are required to create and implement a regulatory framework that restricts business behavior, and remedies for noncompliance must be accessible.[566] At present, companies may have a moral responsibility to respect human rights, but their legal obligations can only be based on local laws and enforced by domestic courts.

Even without delving into the debated issue of whether corporations have legally binding and enforceable obligations under international law,[567] which is outside of its competence, the ECtHR could play a role in establishing corporate accountability for human rights at the domestic level.

In this regard, in *Özel v. Turkey*, the Court may have addressed two issues: whether corporate activity can infringe human rights; and how corporate accountability can or should be enforced in domestic courts.[568]

As far as the first issue is concerned, the practice of referring to human rights abuses when the behavior of private actors, such as corporations, is dangerous, runs counter to the traditional notion that human rights provisions protect individuals from the potential violations by States. However, human rights bodies and courts, including the ECtHR, have regularly encountered cases in which the actual infringement was caused by the actions of a private actor. In these instances, the easy way out was that of ignoring the issue concerning the private actor's liability and holding the State accountable for failing to meet its commitment to protect human rights.[569] This option is perfectly legal and coherent under international law, because no international human rights authority has jurisdiction over corporations.[570] Although some institutions have gone a step

[566] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 1.
[567] Alvarez (n 510) 31.
[568] Verdonck (n 546) 114.
[569] Nolan (n 532) 225.
[570] UNHRCo, 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council" - 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: mapping international standards of responsibility and accountability for corporate acts' UN Doc A/HRC/4/35 (19 February 2007); Rome Statute of the International

further by warning businesses to comply with their human rights obligations,[571] in *Özel v. Turkey* the ECtHR refused to criticize or even acknowledge the private actor's involvement. Instead, the Court decided the entire issue with a focus on the State's position.[572]

It is true that no private actors can be adjudged before the ECtHR, [573] since, under the Rules of the Court only States can be brought before it.[574] Nonetheless, in this case there would have been no obstacle in clearly stating that both private actors and governmental authorities were at fault and that the State had an indirect responsibility.[575]

Another concern that the ECtHR should have addressed in the *Özel v. Turkey* case is the enforcement of business liability for human rights through judicial remedies, which is one of the most contentious issues in the BHR discussion. Such enforcement can take several forms, including that of judicial remedies.

In this respect, in the *Özel v. Turkey* case the ECtHR could have taken the opportunity both to address the lingering question of the interrelationship between State and private liability under domestic law for human rights violations committed by businesses,[576] and to provide guidance on the remedies for human rights abuses by corporations mentioned in the UNGPs.[577] This would have been essential since the international legal framework on BHR remains hazy mainly because few judicial authorities have ruled on the precise human rights duties that enterprises should bear within the domestic legal system.[578] Indeed, international

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Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) Article 1; V Ćorić and A Knežević Bojović, 'Indirect Approach to Accountability of Corporate Entities Through the Lens of the Case-Law of the European Court of Human Rights' (2018) Strani pravni život 25, 33.

[571] CESCR, 'General Comment No 12: The Right to Adequate Food (Art. 11 of the Covenant)' UN Doc E/C.12/1999/5 (12 May 1999).

[572] Verdonck (n 546) 114.

[573] Zagrebelsky, Chenal and Tomasi (n 549) 413-414.

[574] ECtHR, Rules of the Court (adopted 18 September 1959, last amended 3 June 2022).

[575] Verdonck (n 546) 114-115.

[576] Verdonck (n 546) 115.

[577] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 25, 26 and 27.

[578] B Toebes, 'Direct Corporate Human Rights Obligations under the Right to Health: From Mere "Respecting" Towards Protecting and Fulfilling', in Jernej Letnar Cernic and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (1st edn Oisterwijk: Wolf Legal Publisher, 2015), 267.

human rights authorities, including the ECtHR, are in a strong position to minimize gaps in national legislation by defining and developing basic BHR standards that create fair and equal chances for everyone by clarifying the duties of corporations in this area.[579]

Moreover, in *Özel v. Turkey* the ECtHR would have had a unique opportunity to analyze the link between criminal and civil culpability for human rights breaches committed by enterprises. Indeed, while corporations as legal organizations can normally face civil and administrative punishments, corporate criminal responsibility is a disputed notion,[580] also considering the divergence among the various domestic legal frameworks on the point. The biggest impediment is proving that a legal entity is guilty since this requires evidence of the subjective element (i.e. intention), while corporations can only act through natural beings.[581]

In this regard, the ECtHR remains quiet in *Özel v. Turkey* on the fact that only persons can be tried under Turkish criminal law. Conversely, it could have clarified (similarly to what it has previously done)[582] whether and under which circumstances a human rights infringement perpetrated by a corporation – rather than by an individual – may have led to the latter's criminal liability,[583] and whether this may have also stemmed from the liability of individual company managers, directors, or workers.

On this latter aspect, there are compelling arguments for both individual and corporate accountability. Individual culpability creates a significant disincentive and individual wrongdoing can be incited by a 'business culture'. In such a case, the corporation is likely to carry on as usual once the guilty worker is

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[579] S P Subedi, *The Effectiveness of the UN Human Rights System – Reform of the Judicialisation of Human Rights* (1st edn Routledge, 2017) 22; J H Knox, 'Horizontal Human Rights Law', American Journal of International Law 102 (2008) 1; Verdonck (n 546) 115.

[580] H van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 Chinese J. INT'l L. 43, 44.

[581] E Shkira, 'Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries' (2013) SSRN Electronic Journal; N Friedman, 'Corporations as Moral Agents: Trade-Offs in Criminal Liability and Human Rights for Corporations' (2020) 83(2) Modern Law Review 255, 258.

[582] *Oneryildiz v. Turkey* App No 48939/99 (ECtHR 30 November 2004), para. 92; *Siliadin v. France* App No 73316/01 (ECtHR 26 July 2005), paras 89 and 112; *Rantsev v. Cyprus and Russia* App No 25965/04 (ECtHR 7 January 2010), para. 284.

[583] Verdonck (n 546) 118.

punished and possibly replaced. Simultaneously, if only the corporation is deemed guilty and goes bankrupt, there is a serious chance that no compensation will be paid. Victims may also disagree on whether 'the firm' or 'the responsible individual' should be held accountable; for example, if they regard a company as an abstract organization, they may insist on naming an actual person as the perpetrator.[584]

In conclusion, differently from other bodies, the ECtHR did not utilize the opportunity to recognize and specify companies' human rights obligations.[585] This would have been a starting point for further developments of the international legal framework on BHR, especially in relation to its enforcement.

3.3 The contributions of other bodies

Among the relevant contributions from other bodies, that have discussed the issue of BHR and the application of UNGPs in the international practice, it is worth to mention the United Nations Committee on Economic, Social and Cultural Rights (hereinafter "CESCR" or "Committee") and the International Centre for Settlement of Investment Disputes (hereinafter "ICSID").

3.3.1 The United Nations Committee on Economic, Social and Cultural Rights (CESRC)

The CESCR is a permanent body of eighteen independent experts that oversees State parties' compliance of the International Covenant on Economic, Social, and Cultural Rights (hereinafter "ICESCR").[586]

In 2017, when it released its "General Comment No. 24 on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of Business Activities",[587] the CESCR took an

[584] T R Tyler and A Mentovich, 'Punishing Collective Entities' (2010) 19 J.L. & PoL'Y 203, 214; N Feigenson, *Legal Blame: How Jurors Think and Talk About Accidents* (1st edn Amer Psychological Assn, 2001) 212-213.
[585] T Sainati and D Attanasio, 'Urbaser v. Argentine Republic' (2017) 111 AM. J. INT'l L. 744, 745.
[586] CESCR (https://www.ohchr.org/en/treaty-bodies/cescr#:~:text=The%20Committee%20on%20Economic%2C%20Social,Rights%20by%20its%20State%20parties).
[587] CESCR, UN Doc E/C.12/GC/24 (n 314).

unprecedented step in the field of BHR.[588] The General Comment No. 24 does not address a particular right, in contrast to the majority of the previous CESCR General Comments. Instead, it codifies and expands the scope of the CESCR's previous decisions on the duties of governments in the area of BHR, making clear how the Committee views some of the most divisive problems in that area.[589] In particular, the purpose of this general comment is to clarify the responsibility of States parties to the ICESCR in situations where corporations can damage economic, social and cultural rights of people, with the goal of preventing and mitigating the negative effects of commercial operations on human rights.[590]

This General Comment analyzed the three Pillars of the UNGPs, namely the duties to protect and respect and the access to remedy. In addition, it took into consideration the three kinds of remedies listed in the UNGPs and concluded that States parties must make an ongoing effort to ensure that business activities are conducted in accordance with the Covenant's standards. To that end, the NAPs or the national strategies that States Parties are expected to implement in order to ensure the full realization of the CESCR rights should specifically address the role of business entities in the progressive realization of these rights.[591]

The General Comment No. 24 could have a significant impact on how legal standards for BHR are developed in the future, particularly how the UNGPs are put into practice.[592]

Moreover, although the International Court of Justice (hereinafter "ICJ") has made it clear that, in certain circumstances, some human rights duties apply extraterritorially,[593] it remains unclear whether a company's "home state" has extraterritorial obligations to control and remediate its effects on human rights at

[588] CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' UN Doc E/C.12/2000/4 (11 August 2000), paras 26 and 35.
[589] T Van Ho, 'Introductory Note to General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)' (2019) 58 Int'l Legal Materials 872, 872.
[590] CESCR, UN Doc E/C.12/GC/24 (n 314) para 1.
[591] CESCR, UN Doc E/C.12/GC/24 (n 314) para 58.
[592] CESCR, 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' UN Doc E/1992/23 (3 December 1991), para 14.
[593] N Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap* (1st edn Routledge, 2017) 263-65; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 198, paras 106-113; CESCR, UN Doc E/C.12/GC/24 (n 314).

the international level.[594] Such "accountability gap" is the main cause of the request for extraterritorial obligations in the area of BHR.[595]

Because of the corporate veil, which separates parent and subsidiary companies so that home States cannot exercise jurisdiction over the activities overseas, the State where a transnational business enterprise operates (the "host state") may not have the ability or willingness to hold the company accountable.[596] However, on the other hand, in Europe, as mentioned in the second chapter of this thesis, many States have already approved laws on mandatory HRDD to impose obligations on corporations to respect human rights during their activities.[597]

The CESCR has long acknowledged that corporations can have a detrimental effect on human rights.[598] Already in 2011, the Committee called on States to provide information on their regulation and mitigation of business impacts on human rights in their periodic reports in a brief statement on the duty of States parties in the domain of BHR.[599]

In conclusion, General Comment No. 24 is not the first example of the CESCR urging extraterritorial commitments in the domain of BHR or advising States to control and respond to threats by business. These expectations have, unfortunately, taken a while to materialize. The CESCR revitalizes and bolsters attempts to reduce the "accountability gap" over corporations by outlining the responsibilities of corporate home governments to respect, protect, and fulfill human rights extraterritorially.[600]

3.3.2 The International Centre for Settlement of Investment Disputes (ICSID)

[594] C Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' (2018) 3 BUS. & H.R. J. 47; De Schutter (n 184); N Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 J. BUS. ETHICS 493.
[595] Bernaz (n 593) 263-65.
[596] Van Ho (n 589) 872.
[597] Brabant, Hudson, Crockett and Savourey (n 389).
[598] CESCR, UN Doc E/C.12/1999/5 (n 571).
[599] CESCR, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' UN Doc E/C.12/2002/11 (20 January 2003).
[600] Van Ho (n 589) 872.

Among the NSBGMs, within the aim of implementing the third Pillar of the UNGPs and provide an efficient access to remedy for the victims of violations of human rights by corporations, the ICSID would prove to be a practical way to hold investors accountable for violations of human rights and to offer appropriate remedies to individuals whose rights are impacted by investment activity.

In the last years, ICSID has received more than eight hundred claims from investors based on investors-State legislative requirements. The statutory terms of investment treaties typically do not address human rights, which raises the question of the arbitral proceeding's jurisdictional scope and relevant law. As a result, the ICSID rarely deals with human rights complaints.[601]

Nevertheless, it is becoming increasingly evident that corporate interactions and related dispute resolution methods may have human rights consequences, whether directly or indirectly. In particular, there is growing agreement that IHRL, whether derived from international treaties, State constitutions, contractual obligations, or self-regulation tools, can have an impact on arbitration agreements, arbitral proceedings, and awards. Indeed, arbitration may become a favored mechanism for resolving human rights-related issues.[602]

This is more and more clear through some cases that have shown that the issue of human rights of third parties is becoming sensitive,[603] notably the ICSID case of *von Pezold v. Zimbabwe*. This case concerned the expansion of Zimbabwe's Land Reform Programme, a reversal of previous colonial land policy, in which the property rights of white-owned properties were bought, or otherwise rendered worthless, without compensation.[604]

The von Pezold family (the claimants) sued the State of Zimbabwe for expropriation and breach of fair and equitable treatment and full protection and security standards established in Bilateral Investment Treaties (hereinafter

[601] W S Mere, 'Recent Trend Toward a Balanced Business and Human Rights Responsibility in Investment Treaties and Arbitrations' (2020) 4 Homa Publica - Revista Internacional de Direitos Humanos e Empresas 1, 10.
[602] M V Benedettelli, 'Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience' (2015) 31 Arbitration International 631, 631.
[603] T Leary, 'Non-Disputing Parties and Human Rights in Investor-State Arbitration' (2017) 18 J. WORLD Investment & TRADE 1062, 1062.
[604] ICSID, *Bernhard von Pezold and others v. Republic of Zimbabwe*, 8 July 2010, ICSID Case No. ARB/10/15.

"BITs") with Germany and Zimbabwe, and Switzerland and Zimbabwe. The ICSID rejected a request of intervention by third parties (the European Centre for Constitutional and Human Rights (ECCHR) and four indigenous communities) claiming indigenous rights under IHRL over the debated lands.[605] Indeed, the ICSID denied such request by using a rigorous interpretation of Rule 37(2)(b) of the ICSID Arbitration Rules.[606]

Under this Rule, the ICSID may permit a third party to intervene "regarding a matter within the scope of the dispute" when considering, among other things, how much this would "assist the Tribunal in the determination of a factual or legal issue related to the proceedings" and whether "the non-disputing party has a significant interest in the proceedings".[607]

However, the ICSID determined that because the BITs relevant for the present case did not integrate "the universe of international law" and the identification and treatment of indigenous people was not at issue, the submissions of the requesting third parties would not be helpful in resolving a factual or legal issue relating to the proceedings.[608]

As a result, this case offers crucial insights and raises crucial issues regarding the extent to which modern investor-State arbitration can meet IHRL.[609]

Furthermore, a recent case in which the ICSID addressed the issue of human rights is *Urbaser v. Argentine*.[610] Usually investments treaties do not include clauses concerning human rights and this limits the jurisdiction of the ICSID. Yet, in this dispute the ICSID tried to avoid this problem by enabling Argentine to file a counterclaim, claiming that Urbazer had infringed the right to water by failing to provide the concession established under the agreement.[611] Even though the counterclaim was rejected on the grounds that private actors like

[605] Leary (n 603) 1063.
[606] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 4 October 1966) 575 UNTS 159, Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules).
[607] ICSID Arbitration Rules, Rule 37(2)(b).
[608] ICSID, *Bernhard von Pezold and others v. Republic of Zimbabwe*, 8 July 2010, ICSID Case No. ARB/10/15, Procedural Order No 2, para 57.
[609] Leary (n 603) 1063.
[610] ICSID, *Urbaser S.A. and Consorcio De Aguas Bilbao Biskaia, Bilbao Biskala Ur Partzuergoa v. The Argentine Republic (Urbaser case)*, 8 December 2016, ICSID Case No. ARB/07/26.
[611] Mere (n 601) 10.

Urbazer are not subject to the same obligations as the State under the right to water,[612] the ICSID still made history by establishing jurisdiction for human rights claims in investment arbitration. In particular, the ICSID discussed whether or not investors are entities subject to international law and liable for such responsibilities. In answering this query, the ICSID reasoned that because the BIT granted investors rights under international law, it also acknowledged the possibility that an investor would be liable to obligations under international law. In particular, it stated that "[t]he situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake".[613]

In this context, the ICSID highlighted that "commitments to comply with human rights" are part of the rising standards of CSR. From this point, the ICSID came to the conclusion that "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law".[614] Thus, for the first time it made clear that both public and private organizations, including investors and multinational corporations, have a duty "not to engage in activity aiming at destroying" human rights.[615] As a result, the ICSID acknowledged that companies are subject to obligations under international law pertaining to human rights.[616]

Thus, at least according to this decision, the panel seems prepared to adopt a balanced approach by accepting human rights claims in investment arbitrations.[617]

Nevertheless, in order to give the ICSID the possibility to increasingly address human rights, States should overcome some challenges posed by the introduction of human rights in BITs. In particular, they should adopt a human rights approach when negotiating BITs; they should design BIT clauses with a focus on human rights issues; and they should establish grievance mechanisms within national and international systems when such safeguards fail. In order to

[612] ICSID, *Urbaser case* (n 610) paras 1210–1220.
[613] ICSID, *Urbaser case* (n 610) para 1210.
[614] Sainati and Attanasio (n 585) 745; ICSID, *Urbaser case* (n 610) para 1195.
[615] ICSID, *Urbaser case* (n 610) para 1199.
[616] Sainati and Attanasio (n 585) 746.
[617] Mere (n 601) 10.

fully implement a human rights approach to BITs and subsequently address all three areas of concern, States will be forced to resort to the UNGPs.[618]

In the past, investors who wanted to make investments overseas first agreed to abide by local rules in return for the protection offered by the host State. These days, engagements between States and investors call for an exchange of obligations in addition to protections. Through the prism of the UNGPs, it is possible to comprehend the obligations for both States and investors. As already mentioned, the PPR Framework, developed by John Ruggie, is a three-pillar strategy that is put into practice by the UNGPs.[619] The PPR Framework first outlines the responsibility of the State to uphold human rights, followed by the corporate obligation to do so, and finally, access to remedies.[620] All three elements should be addressed in the drafting of international investment agreements in order to guarantee the protection of human rights in a commercial or investment setting. Both the BITs and the investor-State dispute settlement (hereinafter "ISDS") systems, when it comes to foreign investment and human rights, require significant reforms in order to support the State's obligation to defend those rights and the corporate (often investor) obligation to uphold those same rights. The first step in carrying on with these duties is to negotiate BITs in a way that adequately addresses human rights issues.[621]

Along with the UNGPs, another relevant tool in the context of the ICSID and the BITs are the "United Nations Principles for Responsible Contract Drafting" which take into account human rights issues in contract discussions between States and investors,[622] emphasizing the importance of BIT negotiations supporting human rights effectively.[623] The principles highlight a higher need for better community engagement and transparency-stability provisions that are

[618] E George and E Thomas, 'Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes' (2018) 27 Transnat'l L. & Contemp. Probs. 403, 444.
[619] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[620] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[621] George and Thomas (n 618) 445.
[622] OHCHR, 'Principles for Responsible Contracts Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations Guidance for Negotiators' UN Doc HR/PUB/15/1 (31 March 2015).
[623] OHCHR, 'Principles for Responsible Contracts Integrating the Management of Human Rights into State-Investor Contract Negotiations-Guidance for Negotiators' (2015).

structured so as not to interfere with the State's right to regulate, and the development of grievance procedures for non-contractual harms to third parties.[624] The ISDS systems also emphasizes the necessity of a proactive strategy for safeguarding human rights. Additionally, scholars urge States and investors to conduct HRDD when negotiating BITs and within the ISDS system.[625] Identifying, preventing, mitigating, and accounting for how companies and States address their impacts on human rights is the goal of HRDD.[626]

Applying the HRDD procedure must start at the most fundamental level because that is where human rights are most at danger. Applying an HRDD approach to investment law calls for the procedure to start during BIT discussions in order to identify and mitigate threats to human rights as soon as possible. States and investors could consider, among other things, the use of social and environmental impact assessments, the publication of all significant disputes and contracts on a public forum, the use of domestic remedies prior to using the ISDS system, the inclusion of exception clauses that permit States to regulate in the public interest without investor interference, and the development of operational level grievance mechanisms during this HRDD procedure.[627]

These strategies would be in line with the UNGP's need for a procedure to detect and deal with dangers to human rights.[628] As stated in a 2011 report to the UNHRCo, "considering human rights early will help ensure that States maintain adequate policy space in the investment contract, including for the protection of human rights, while avoiding claims relative to the contract in binding international arbitration".[629]

The earliest stage at which human rights issues could and should be addressed in the context of foreign investment is BITs and a recent example of

[624] *ibid.*
[625] B Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 INT'L & COMP. L.Q. 573, 594.
[626] UNHRCo, UN Doc A/HRC/17/31 (n 25).
[627] George and Thomas (n 618) 446.
[628] Simma (n 625) 576.
[629] OHCHR, 'Principles for Responsible Contracts Integrating the Management of Human Rights into State-Investor Contract Negotiations – Guidance for Negotiators' (2015).

this phenomenon is the 2016 Morocco-Nigeria BIT.[630] BITs are now intended to help States and investors prevent conflicts and pricey litigation related to the ISDS system. However, the majority of BITs continue to give investors access to ISDS as a first resort for resolving a dispute and avoiding national courts.[631]

If BIT negotiations properly focused on implementing the three UNGP Pillars, there would be three main advantages: firstly, allowing States to properly regulate in the public interest would help them fulfill their responsibility to uphold human rights; secondly, requiring investors to publish the BITs they enter into with States and to solicit feedback from the local population will help investors and corporations uphold their responsibility to respect human rights; finally specifying domestic and international *fora* where victims of violations of human rights may seek redress, or, in the absence of such *fora*, establish them.

Ultimately, BITs can ensure stronger human rights safeguards if they contain provisions that encompass all three UNGP Pillars and encourage States and investors to adhere to the standards for responsible contract drafting.[632]

The third chapter has addressed the BHR standards' application in the case-law of regional human rights courts, ICSID and in the CESCR's reports. In particular, it has highlighted the developments of BHR in these different contexts and the aspects that still need advancement. The international overview will be followed in the last chapter of this thesis by a comparative analysis concerning the national implementation of the BHR standards in different countries, namely the US, France, the Netherlands, the UK and eventually it will focus on Italy.

[630] N Zugliani, 'Human rights in international investment law: the 2016 Morocco-Nigeria Bilateral Investment Treaty' (2019) 68(3) I.C.L.Q. 1, 2.
[631] M Bronckers, 'Is Investor-State Dispute Settlements (ISDS) Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements' (2015) 18 J. INT'l ECON. L. 655, 672.
[632] George and Thomas (n 618) 446.

4. COMPARATIVE ANALYSIS

The fourth chapter of this thesis will use a comparative approach to analyze how the BHR standards have been implemented in the domestic legislation and applied in the case-law of the US, France, the Netherlands, the UK and Italy, with a view to assessing the suitability of the Italian response to the developments in the area of BHR.

There is a growing international consensus regarding the actions that the home and host States should take to guarantee access to justice in situations where businesses are involved in severe human rights violations. While not all of these can yet be claimed to have the stature of international legal requirements, they do offer us a benchmark against which domestic development can be assessed, the fundamental components of which have already received widespread approval and endorsement. Domestic legal ideas and procedures make civil or criminal responsibility at least theoretically possible in many situations. The concept of a "growing web of liability" for corporations was investigated in light of the relevant domestic legal frameworks and concepts.[633]

As part of the SRSG's mandate, the topic of obstacles to obtaining legal remedies in human rights issues involving commercial enterprises was investigated as the subject of numerous studies and discussion papers.[634] These obstacles vary among jurisdictions, both in terms of type and degree, thus certain jurisdictions seem more attractive than other *fora* to pursue remedies for violations of human rights in a business environment. This should not come as a surprise, as such differences often reflect those in the historical legal systems, legal traditions, social and political stability, and economic progress of the various States.[635]

4.1 The United States

[633] Zerk (n 288) 63.
[634] Oxford Pro Bono Publico, 'Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse: A Comparative Submission Prepared for Professor John Ruggie' (3 November 2008) (http://www.reports-and-materials.org/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-08.pdf); M B Taylor, R C Thompson and A Ramasastry, 'Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses' (Fafo, 2010) (http://shiftproject.org/sites/default/files/20165.pdf).
[635] Zerk (n 288) 64.

One of the precursors in implementing the BHR framework and applying it in domestic case-law consists of the US.

In the US, violations of human rights by corporations are regulated by the ATCA, concerning the import of conflict minerals, as mentioned in the second chapter of this thesis.[636]

Today, it is considered the primary legal framework for US corporate human rights lawsuits.[637] According to the ATCA, any civil case where a non-US citizen sues for a tort "committed in violation of the law of nations or of a treaty of the United States" is, according to the ATCA, under the federal district courts' jurisdiction. In general, the ATCA acts as a legal framework for establishing global jurisdiction over transgressions of international law.[638] The ATCA's provision of a separate cause of action for "torts in breach of the law of nations" facilitates the possibility of bringing lawsuits. There has been substantial discussion regarding the scope and purposes of this statute, which is more than two hundred years old. However, it appears established law that it does give the right to bring action against private actors, including (albeit more contentiously) companies.[639]

Another important aspect of the ATCA is its geographic reach. Its potential as a tool for holding people accountable for human rights atrocities committed outside of the US was brought for the first time to light by the historic case of *Filártiga v. Peña-Irala*.[640] Since then, numerous lawsuits alleging corporate cooperation in State authorities' abuses of human rights have been filed against corporations.[641]

4.1.1 The restrictive effect of Kiobel v. Shell on the ATCA

[636] Cullen (n 384) 744; Alien Tort Claims Act (ATCA), 28 U.S.C.
[637] E Corcione, 'The Role of Soft-Law in Adjudicating Corporate Human Rights Abuses: Interpreting the Alien Tort Statute in the Light of the UN Guiding Principles on Business and Human Rights' (2021) 6(3) European Papers 1293, 1293; E A Young (n 386) 1023.
[638] Ćorić and Knežević Bojović (n 570) 26.
[639] D Everett, 'New concern for transnational corporations: potential liability for tortious acts committed by foreign partners' (1998) 35(4) San Diego Law Review 1123, 1124 and 1159.
[640] *Filártiga v. Peña-Irala* [1980] 630 F 2d 876 (2d Cir.).
[641] Everett (n 639) 1140.

However, it should be emphasized that the recent case of *Kiobel v. Shell* may considerably restrict claimants' future capacity to bring extraterritorial violations actions under the ATCA.[642] Shell was accused of participating in a number of human rights violations in the Niger Delta during the 1990s in this ATCA lawsuit. What first appeared to be one of many such lawsuits quickly developed into a landmark instance for human rights litigation in the US. The matter was first taken before a New York District Court in 2002, and in 2012 it was heard by the US Supreme Court. The Supreme Court requested a hearing on the matter with an emphasis on the legality of ATCA's extraterritoriality.[643] The Supreme Court issued its ruling in April 2013 after the parties' arguments in October 2012. Using the justification of a "presumption against extraterritoriality", the *Kiobel v. Shell* lawsuit was thrown out. The Court contended that as extraterritoriality is not addressed by the ATCA, foreign actions and events should not be included unless they "touch and concern" the US with "sufficient force". Because of this, the Court significantly restricted the ability to file a lawsuit, especially against foreign corporations, for human rights violations committed outside the territory of the US.[644]

The US Supreme Court's decision is regrettable in at least two aspects: first, the decision substantially curtails victims' ability to bring ATCA actions against corporations for human rights' violations, undermining not only the direct judicial and educational purposes of such litigation but also, and perhaps most significantly, its indirect regulatory implications. Indeed, the *Kiobel v. Shell* has already had some unfavorable impacts as some ATCA cases have been dismissed as a result of the ruling by the Supreme Court.[645] Future reductions in ATCA

[642] *Kiobel v Royal Dutch Petroleum Co.* [2013] 569 U.S. 108.
[643] Schrempf-Stirling and Wettstein (n 53) 559.
[644] E R George, 'Influencing the impact of business on human rights' in Lara Blecher, Nancy Kaymar Stafford and Gretchen C. Bellamy (eds), *Corporate Responsibility for human rights impacts. New expectations and paradigms* (1st edn ABA Book Publishing, 2014); D P Stewart and I Wuerth, 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute' (2013) 707(3) American Journal of International Law 601.
[645] L F Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' (2014) 10(1) Utrecht Law Review 44.

lawsuits will directly affect the businesses' approach to human rights policies. As a result, it can significantly impede the recent advancements in BHR.[646]

Second, taking into account the regulatory impact of human rights litigation, the implications of the decision can extend well beyond the specific area of action. Additionally, it might indirectly harm the efficacy of activities including soft laws in the area of human rights. Most importantly, it might diminish the consideration of UNGPs in the general opinion.[647]

4.1.2 The Nestlé USA, Inc. v. Doe et al. case

Moreover, another relevant and recent case is the *Nestlé USA, Inc. v Doe et al.*,[648] whose decision was released by the US Supreme Court in 2021.[649]

Six former child slaves from Mali filed the lawsuit in 2005, claiming they had been subjected to human rights violations at the Ivorian cocoa farms where the defendants obtained their raw materials. Due to damage occurring outside of US jurisdiction, which constitutes an "impermissible extraterritorial application of the ATCA", the plea to make the defendants liable for such abuses was ultimately denied, confirming the restrictive approach of the US Supreme Court towards the ATCA.[650]

The decision is consistent with the most recent trend in the US Supreme Court to continually narrow the scope of the ATCA in cases involving corporate human rights' violations, ruling out the possibility of holding chocolate giants Nestlé and Cargill accountable for alleged child labor in their cocoa supply chain.[651]

The possibility of considering the ATCA as an effective tool for remedies for human rights abuses in the context of business activities has been constantly at

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[646] Schrempf-Stirling and Wettstein (n 53) 559.
[647] *ibid*.
[648] *Nestlé USA, Inc. v Doe and others* [2021] 593 U.S.
[649] M M Coppa, 'Doe v. Nestle, S.A.: Chocolate and the Prohibition on Child Slavery' (2021) 33(2) Pace International Law Review 262; L E Wilkinson, 'Piercing the Chocolate Veil: Ninth Circuit Allows Child Cocoa Slaves to Sue under the Alien Tort Statute in Doe I v. Nestle USA' (2018) 63 Villanova Law Review 20.
[650] Corcione (n 637) 1294.
[651] B Stephens, 'The Rise and fall of the Alien Tort Statute' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (1st edn Elgar, 2020) 46-62.

risk ever since the US Supreme Court established a presumption against the extraterritorial application of the ATCA in the above mentioned *Kiobel v. Shell* case decision.[652]

The UNGPs, which clearly recognize a supply chain accountability based on the duty of the lead companies to exercise leverage over business partners to prevent and stop human rights abuses, wherever they occur, are disregarded and contradicted by the US Supreme Court's current interpretation of the ATCA, as developed in the *Nestlé* case. Such interpretation also fails to take into account the ways in which the UNGPs are regularly applied, translated into a growing body of local European laws and case-law, and reflected in the continuing discussions of an international treaty on BHR.[653] Accordingly, the US Supreme Court ought to have acknowledged the existence of a leverage-based liability for Nestlé for human rights violations occurring abroad, which would have superseded and surmounted the extraterritoriality hurdle.[654]

Indeed, the charge of the failure to act, i.e. Nestlé's negligent behavior in not using its financial influence to stop the abuses, should be viewed as overturning the presumption against extraterritorial applicability of the ATCA. In fact, the US Supreme Court acknowledges that the relevant behavior consists in an omission, on the basis that the UNGPs encourage lead companies to take action in case human rights abuses occur in their value chains, by employing their negotiating power with business partners to stop violations. Thus, if on the one hand the relevant conduct to proceed under the ATCA is supposed to be a domestic one, and on the other hand the UNGPs identify the failure to act as relevant conduct, the US Supreme Court's reasoning about the inadequacy of the domestic misconduct charge based only on corporate general activities cannot stand, since the relevant behavior is the fact that the company did not exercise

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[652] *Kiobel v. Royal Dutch Petroleum Co.* [2013] 569 U.S. 108; A Bonfanti, 'No Extra-territorial Jurisdiction Under the Alien Tort Statute: Which "Forum" for Disputes on Overseas Corporate Human Rights Violations After "Kiobel"?' (2013) Diritti Umani e Diritto Internazionale 379-400; M Fasciglione, 'Corporate Liability, Extraterritorial Jurisdiction and the Future of the Alien Tort Claims Act: Some Remarks After "Kiobel"?' (2013) Diritti Umani e Diritto Internazionale 401.

[653] OEIGWG, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises -Third Revised Draft (17 August 2021).

[654] Corcione (n 637) 1295.

sufficient power to stop human rights' abuses. As a matter of fact, an omissive conduct is pertinent *per se* in any situation where an actor has a duty to act but willfully or negligently chooses not to do so.[655] If there is a duty to act, even failing to act constitutes a relevant act that occurred on US soil because that is the place where decisions should have been made.

Accordingly, the presumption against extraterritoriality falls since the failure to use leverage is considered the main contested behavior. In this view, it would logically follow that the burden of proof falls on the corporation to show that it had no power over the business partner or that it had exercised it, doing everything it could. This would also remove the impediment to an effective remedy brought on by the existing interpretation of the ATCA by revealing the crucial corporate decision-making evidence, which is typically unavailable to claimants.[656]

Despite the ATCA serving as the foundation for a significant domestic body of case-law on corporate responsibility for human rights abuses, the US has yet to implement any practical remedies for human rights breaches perpetrated overseas by US companies.[657]

The *Nestlé* ruling adds another obstacle for lawsuits brought against multinational businesses when wrongdoing occurs elsewhere. The most recent reading of the ATCA also weakens the US political commitment to control company conduct,[658] together with undermining the UNGPs' goal of recognizing full corporate responsibility for human rights violations in supply chains.[659]

4.2 France

[655] F Latty, 'Actions and Omissions' in J Crawford, A Pellet, S Olleson and K Parlett (eds), *The Law of International Responsibility* (1st edn Oxford University Press, 2010) 355 ff.
[656] Corcione (n 637) 1305.
[657] I Pietropaoli, *Business, Human Rights and Transitional Justice* (1st edn Routledge, 2020).
[658] Campus for International Security and Defense (CISDE), 'No Steps Back: Catholic Organizations Denounce US Attempt to Derail the Negotiations for a UN Treaty on Transnational Corporations' (CISDE, 25 October 2021) (https://www.cidse.org/2021/10/25/catholic-organisations-denounce-us-attempt-to-derail-negotiations-for-a-un-treaty-on-transnational-corporations/).
[659] Bonfanti (n 652).

More recently, as mentioned before in this thesis, France has become a model in Europe for the implementation of the BHR framework in its national legislation with the 2017 Duty of Vigilance Law, establishing mandatory HRDD.[660] This law has been hailed as a victory for the global commerce and the human rights system. Indeed, it can help to increase corporate accountability for human rights violations by challenging the "separation principle" of transnational firms, between the controlling and the controlled companies, and compelling enterprises to report on their duty of vigilance.[661]

Significantly, it gives people or organizations the right to demand a company to address such claims.[662] Regardless of whether there has been damage, the Vigilance Law provides for a two-step enforcement procedure that includes firstly a written notice to comply and then a request to the appropriate court to issue an injunction with the possibility of periodic fine payment.[663]

In particular, people or organizations have the right to ask a company to respond to accusations that it failed to identify potential risks to human or environmental rights, such as the protection of factory workers, interference with the rights of indigenous populations, or environmental damage caused by the operations of a French enterprise. Even though the claimed violation took place outside of France, the complaint may file a lawsuit in a French court of law if the company's response is unsatisfactory.[664]

In particular, in January 2020 this law was used as legal basis by local authorities and NGOs, to bring before domestic courts Total E&P, the Bolivian subsidiary of the French multinational Total.[665] Indeed, since the French Duty of Vigilance Law applies not only to the parent company but also to the

[660] Cossart, Chaplier and Beau De Lomenie (n 392) 317.
[661] A Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?'(2021) 22 Human Rights Review 109, 109.
[662] M R Aczel, 'Public opposition to shale gas extraction in Algeria: Potential application of France's 'Duty of Care Act'' (2020) 7 The Extractive Industries and Society 1360, 1365.
[663] E Savourey and S Brabant 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' (2021) 6 Business and Human Rights Journal 141, 149.
[664] Aczel (n 662) 1365.
[665] A Chrisafis, 'French NGOs and local authorities take court action against Total' (Guardian, 27 January 2020) (https://www.theguardian.com/world/2020/jan/27/french-ngos-and-local-authorities-take-court-action-against-total?CMP=share_btn_tw).

subsidiaries,[666] the Bolivian subsidiary may be held liable in France for any human rights abuses or environmental harm it does in Bolivia.

Since its establishment in Bolivia in 1994, Total E&P has concentrated on gas production and exploration. The corporation takes part in areas like San Antonio, San Alberto, and Ita, which have a daily gas production capacity of up to 32 million cubic meters.[667] In addition, Total E&P is the primary operator in the Ipati and Aquio blocks and it uses the Incahuasi plant to procedure the hydrocarbons from its fields.[668]

Moreover, the Chaco region of Bolivia has been the site of the vast bulk of Total E&P's operations and gas extraction. The Chaco ecoregion has a high degree of climate variability and delicate ecosystems that are in danger due to declining water supplies.[669]

Indigenous groups and Bolivian NGOs have harshly condemned Total E&P's conduct and the company's socio-environmental effects in Guaran communities. The Assembly of Guaran Peoples, a representative Guaran group, accused Total E&P of forcing and paying off indigenous people during a prior consultation procedure over a massive seismic exploration project on the Ipati and Aquio blocks in 2007.[670]

Ultimately, this case demonstrates that, in the absence of government intervention, French civil society organizations have taken on the responsibility of monitoring the Duty of Vigilance Law's execution by evaluating the effectiveness of vigilance plans and gathering trustworthy data on the harmful externalities of transnational corporations abroad. The establishment of the French law has facilitated greater ties between French environmental and human rights NGOs as

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[666] C Clerc, 'The French 'Duty of Vigilance' Law: Lessons for an EU directive on due diligence in multinational supply chains' (2021) ETUI Policy Brief European Economic, Employment and Social Policy No. 1/2021.

[667] TotalEnergies, 'Explore and Produce in Bolivia' (Explore and Produce in Bolivia | TotalEnergies in Bolivia).

[668] J Giné and F Villarroel, 'TOTAL E&P Bolivie y sus Impactos en los Derechos Humanos del Pueblo Guaraní de la Capitanía de Muyupampa' (2011) CEADESC - Centro de Estudios Aplicados a los Derechos Económicos, Sociales y Culturales.

[669] Schilling-Vacaflor (n 661) 118; M Aparicio-Effen, I Arana, J Aparicio et al., 'Climate change and health vulnerability in Bolivian Chaco Ecosystems. Climate Change and Health' in Walter Leal Filho, Ulisses M. Azeiteiro and Fátima Alves (eds), *Climate Change and Health Improving Resilience and Reducing Risks* (1st edn Springer, 2016).

[670] Giné and Villarroel (n 668).

well as between French and Global South civil society groups, due to the fact that this law allows NGOs to sue companies for violations of human rights.[671]

4.3 The Netherlands

In the Netherlands a relevant recent case concerned the use of the UNGPs as interpretative tool to apply domestic law on corporate liability: the case of *Milieudefensie and other associations v. Royal Dutch Shell Plc (RDS)*, where the claimants, in order to comply with the goals of the Paris Agreement, requested The Hague District Court to force RDS to cut its emissions.[672]

The case covers three allegations made by Nigerian farmers and backed by the non-governmental organization Milieudefensie alleging three distinct oil leaks from Shell-operated pipelines and wellheads in the communities of Oruma, Goi, and Ikot Ada Udo. The claimants named RDS and SPDC as co-defendants in their lawsuit, claiming that the spills were the result of irresponsible upkeep by the defendants and severely damaged their farms and fishing grounds. The defendants refuted the accusations, claiming that the spills were the result of sabotage and that, in any case, they had properly handled the situation by cutting off the pipelines, plugging the leaks, and cleaning up the contaminated soil.[673] Initially, the District Court had only supported the Ikot Ada Udo spill claim of farmer Friday Alfred Akpan, concluding that while sabotage was probably to blame for the spills, the defendants in this case had not taken adequate precautions to safeguard the infrastructure.[674]

The Dutch Court of Appeal overturned the District Court's decision, reached conclusions in the instances of Oruma and Goi, and issued a preliminary ruling in the case of Ikot Ada Udo. According to the ruling, SPDC was deemed strictly liable for the damage caused by the oil leaks in the first two cases under applicable Nigerian law. The Court of Appeal concluded that the defendants had not been able to establish, "beyond a reasonable doubt" that the spills were

[671] Schilling-Vacaflor (n 661) 118; Clerc (n 666).
[672] *Vereninging Milieudefensie v. Royal Dutch Shell Plc* [2021] The Hague District Court C/09/571932.
[673] L Roorda and D Leader, 'Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court' (2021) 6 Business and Human Rights Journal 368, 371.
[674] *Friday Alfred Akpan and others v. Shell and another* [2013] ECLI:NL:RBDHA:2013:BY9854.

brought on by criminal acts like sabotage, which was the sole defense that could be utilized.[675]

Additionally, the court ruled that SPDC's responses to the spills were negligent under common law standards and that the installation of a so-called "Lead Detection System" (LDS) would have allowed the defendants to switch off the pipelines and stop the leaks earlier. Finally, the court determined that RDS owed the claimants a duty of care to secure the installation of an LDS in the Oruma pipeline given its active participation with its subsidiary after 2011. It denied all additional allegations, including the one against RDS for negligence in causing the leak and the one for insufficient cleanup. Damages were held up for upcoming hearings.[676]

In 2021 the Hague District Court ruled that Shell Group policies were causing climate change and commanded the oil tycoon to cut its greenhouse gas emissions. The claimants' action was based on the supposition that RDS had a duty arising from the Dutch civil code's norm of care, the interpretation of which should be guided by soft law, such as the UNGPs, the UN Global Compact, and the OECD Guidelines.[677]

This case is relevant for two main aspects. Firstly, the Hague District Court, in accordance with Article 7 of the Rome II Regulation,[678] considered the definition of the "incident giving rise to the damage" in order to determine the legislation that applied to the situation. The Court came to the conclusion that the implementation of business policies may very well be a separate cause of the environmental harm associated with climate change affecting Dutch citizens.[679] The Court thus rejected RDS's argument that the mere adoption of a policy cannot be viewed as a harmful act *per se* and instead acknowledged that corporate policies – in this case, group policies – may be an act that causes the damage. The

[675] Roorda and Leader (n 673) 371.
[676] Roorda and Leader (n 673) 372.
[677] C Macchi and J van Zeben, 'Business and Human Rights Implications of Climate Change Litigation: *Milieudefensie et al. v Royal Dutch Shell*' (2021) RECIEL 1-7.
[678] European Parliament and Council of the European Union, Council Regulation (EC) Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199, Art. 7.
[679] *Vereninging Milieudefensie v. Royal Dutch Shell Plc* [2021] The Hague District Court C/09/571932, para. 4(3)(6).

ratio of this supposition prompts one to reevaluate the applicability of business policies in light of unfavorable outcomes that result from decision-making at the headquarters. Recognizing the relevance of corporate policies as acts that may result in damage *per se* entails acknowledging that the adoption of corporate policies (or, in the case at hand, the failure to adopt corporate policies capable of preventing the harmful conduct of third parties through the leverage that lead companies exercise on their business partners) is the relevant focus to identify domestic conducts that satisfy the "touch and concern" test and overcrowd the domestic market.[680]

Secondly, the Court considered the UNGPs when determining how to interpret the standard of care mandated by Dutch law. Indeed, the claimants made the case that RDS had a duty to act in conformity with goals for preventing climate change since there was an implied duty of care owed to them under domestic civil liability rules. The Court would have had to use not only internationally recognized human rights (such as the right to life and the right to respect for private and family life under the ECHR) but also international soft-law instruments (approved by RDS),[681] including the UNGPs, the OECD Guidelines for Multinational Enterprises, and the UN Global Compact, in order to interpret this standard of care and shape it into specific obligations.

In response to the claimants' petitions, the Dutch Court confirmed that the UNGPs should be used to interpret the implied duty of care that the business owed the claimants because of their widely accepted nature. Furthermore, the latter becomes meaningless whether or not the corporation made an explicit commitment to the UNGPs.[682] The Court went further in bringing up the accountability of the value chain, noting that businesses may contribute to the violation of human rights through actions that very well may involve omissions and that include the responsibility to prevent or mitigate violations that are directly related to interactions with business partners. In this regard, the Court

[680] Corcione (n 637) 1295.
[681] *Vereninging Milieudefensie v. Royal Dutch Shell Plc* [2021] The Hague District Court C/09/571932, para. 3(2).
[682] *Vereninging Milieudefensie v. Royal Dutch Shell Plc* [2021] The Hague District Court C/09/571932, para. 4(4)(11) ff.

found that RDS had policy-setting influence on group related enterprises and that its value chains also included the business relationships for the supply of raw materials.[683]

The *Milieudefensie* case is an example of how European courts are leading the charge in legal action against multinational corporations for violations of human rights.[684]

4.4 The United Kingdom

4.4.1 The Vedanta case and the duty of care

In the UK one of the most relevant cases in the BHR field and concerning the application and implementation at the domestic level of the UNGPs, is the *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors.* case, decided by the UK Supreme Court (hereinafter "UKSC") in 2019. This case raised crucial questions about jurisdiction and the possibility of imposing a parent corporation with a duty of care for harm produced by its subsidiary.[685]

In this case, the UKSC ruled that civil negligence lawsuits brought by Zambian claimants against Vedanta, an English parent company, and Konkola Copper Mines Ltd (KCM), a Zambian subsidiary, for losses incurred in Zambia, may be heard in English courts. Despite being presented as a domestic tort law case, the ruling has major implications for global initiatives aiming at holding corporations accountable for their "bad impacts" on human rights.[686]

The decision was largely based on the victims' right to receive fair justice. In a broader sense, the Court claimed that parent businesses that represent themselves in public disclosures as monitoring the social, environmental, labor, or human rights standards followed by their subsidiaries owe a duty of care to people

[683] C Bright, A Marx, N Pineau and J Wouters, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) Business and Politics 667.
[684] J Rooney, 'Extraterritorial Corporate Liability for Environmental Harm: Okpabi v Royal Dutch Shell' (2019) 70 N. IR. LEGAL Q. 157, 159.
[685] J Hughes-Jennett, 'Introductory Note to Vedanta Resources Plc and Another v. Lungowe and Others (UK SUP CT)' (2019) 58(5) International Legal Materials 1114, 1114.
[686] D Birchall, 'Any Act, Any Harm, to Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights' (2019) 1 U.OXFORD HUM. RTS. HUB J. 120.

who are damaged by the subsidiary.[687] Thus, despite the absence of an explicit mention to the UNGPs, the Court openly supported parent-subsidiary duty.[688] In particular, the UKSC made reference to a parent-subsidiary connection and acknowledged that the former was accountable for the latter's violations of human rights. The duty of care was based on the fact that the parent company exercises supervision and control over the subsidiary.[689] This decision has the power to alter present business strategies for responsibility and due diligence with regard to human rights.[690]

Vedanta v. Lungowe is, in many ways, a very conventional case about the challenging yet necessary inquiries a domestic court must undertake in international situations where the parties differ about which venue is more appropriate. Nevertheless, the UKSC's conclusions could have a significant effect on BHR.[691]

As mentioned in the previous chapters, the UNGPs acknowledge that States have an obligation to safeguard human rights by regulating business activity and to guarantee that people whose human rights have been violated by corporations have access to appropriate remedies.[692] Businesses, on the other hand, have a duty to uphold human rights by implementing practices and policies that recognize and curtail any dangers they may represent.[693] This implies, among other things, that parent firms should address the effects of their subsidiaries' activity.[694] Indeed, victims who suffered a human rights violation attributable to a subsidiary have to face a peculiar concern due to the legal principle whereby

[687] T Van Ho, 'Vedanta Resources Plc and Another v. Lungowe and Others' (2020) 114(1) American Journal of International Law 110, 113.
[688] Roorda and Leader (n 673) 370.
[689] *Vedanta Resources Plc and another v. Lungowe and others* [2019] UKSC 20; *Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3; R Meeran, 'Multinational Human Rights Litigation in the UK: A Retrospective' (2021) Business and Human Rights Journal 255-269.
[690] Van Ho (n 687) 110.
[691] Van Ho (n 687) 113.
[692] UNHRCo, UN Doc A/HRC/17/31 (n 25), Principle 1.
[693] UNHRCo, UN Doc A/HRC/17/31 (n 25), Principle 11.
[694] UNHRCo, UN Doc A/HRC/17/31 (n 25), Principle 14.

shareholders are not accountable for the activities of a corporation in which they invest.[695] This hinders even further victims' access to remedies.[696]

In the English case-law, showing a parent company's assumption of a duty of care has typically relied on the parent company's assertions that it controls or monitors the behavior of subsidiaries in particularly sensitive areas, such as economic and social governance.[697]

In particular, in the *Vedanta v. Lungowe* case, the Court took three cases into consideration:[698] *Caparo Industries Plc v. Dickman*,[699] *Chandler v. Cape* [700] and *Thompson v. Renwick Group Plc*.[701] The issue was not tried on its merits, but as part of the jurisdictional analysis, it was necessary to look into whether the parent company had a debatable duty of care. The UKSC clearly ruled that there can be a duty of care owed to third parties, such as local communities, in case the parent corporation intervenes sufficiently in the relevant operations of its subsidiary.

This ruling includes a number of groundbreaking conclusions that are very significant for instances to come.[702] First, it was shown that claims of tort liability do not require the allegation of a "novel and contentious new" class of instances.[703] Although English negligence law does not have a particular doctrine for parent company liability, the equity between the two companies may allow a parent company to take managerial control of its subsidiary's operations without being required to do so.[704]

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[695] G Skinner, 'Rethinking the Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72WASH. & LEE L. REV. 1769.
[696] L McGregor, 'Activating the Third Pillar of the UNGPs on Access to an Effective Remedy' (EJIL:TALK!, 23 November 2018) (https://www.ejiltalk.org/activating-the-third-pillar-of-the-ungps-on-access-to-an-effectiveremedy).
[697] *Chandler v. Cape Plc* [2012] EWCA Civ 525; *AAA&Others v. Unilever Plc and Unilever Tea Kenya Ltd.* [2018] EWCA Civ 1532; *Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* [2018] EWCA Civ 191.
[698] E Blanco, 'Reflections on Vedanta's Supreme Court Decision on Jurisdiction' (2019) 16 Manchester J. INT'l ECON. L. 110, 111.
[699] *Caparo Industries Plc v Dickman* [1990] UKHL 2
[700] *Chandler v. Cape Plc* [2012] EWCA Civ 525.
[701] *Thompson v. Renwick Group Plc* [2014] EWCA Civ 635.
[702] E Aristova, 'The Future of Tort Litigation against Transnational Corporations in the English Courts: Is Forum [Non] Conveniens Back?' (2021) 6 Business and Human Rights Journal 399, 405.
[703] *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 para 60.
[704] *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 para 49.

Second, the UKSC declined to categorize all parent company liability cases into a single category due to the fact that corporate groups' organizational and management structures differ significantly, leading to a variety of corporate governance models and, as a result, the degree to which the parent company will intervene in the operations of its subsidiary.[705] More significantly, the Supreme Court held that the four considerations outlined in the *Chandler v. Cape* case[706] imposed an "unnecessary straightjacket" on the claimants and the courts, opening the door for examination of other situations in which a parent firm may be said to have a duty of care. A duty of care may result from the parent company issuing group-wide policies and guidelines on a variety of subjects (such as reducing health and safety or environmental risks) if the parent company also actively works to implement these at the subsidiary level through oversight, training, and enforcement.[707]

Last but not least, the UKSC affirmed that failing to monitor a subsidiary's operations where those operations conflict with statements made public by the parent corporation may also constitute a breach of the duty of care.[708]

The UKSC's decision to reject the factors established in the *Chandler* case is likely to expand the instances in which a parent company may be held accountable for the actions of its subsidiaries, which could increase the number of tort liability claims that are brought before English courts and give rise to new types of litigation, such as supply-chain responsibility litigation.[709]

Parent corporations frequently impose strict group-wide standards on these matters. Up until this point, it was not obvious how much significance a trial court should place on such public pronouncements. Companies frequently assert that the people the policies are designed to protect are not assumed to be responsible because of these claims. According to the UKSC's ruling, what parent businesses may have considered to be "exaggerated" presupposed responsibility resulting in a

[705] D Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4 Business and Human Rights Journal 265, 272.
[706] *Chandler v Cape* [2012] EWCA Civ 525.
[707] M Croser, M Day, M Van Huijstee and C Samkalden, 'Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' (2020) 5 Business and Human Rights Journal 130, 133.
[708] Aristova (n 702) 405.
[709] Van Ho (n 687) 115.

duty of care.[710] Although it is not currently required by English law, businesses can nonetheless be held accountable for upholding the rules they decide to include in their internal policies, including those linked to environmental stewardship and human rights.[711]

Furthermore, the Court's admission that issues of "substantial fairness" exist when claimants are unable to retain competent legal representation for complicated claims may be crucial in subsequent commercial and human rights disputes. These claims frequently take attorneys a lot of time and call for specialized knowledge in science or another field. Frequently, victims are unable to cover these expenses.[712] A victim may have little alternative but to seek counsel elsewhere if a forum does not offer legal assistance, contingency fees, or some other way of acquiring considerable legal assistance.[713]

According to the UKSC's ruling, this is an important consideration for choosing the right forum and it might even prevail over competing concerns with international comity. Victims may find it simpler to sue international corporations in English courts as a result.[714]

4.4.2 The Okpabi case

Another relevant case of the UKSC in relation to BHR and UNGPs' implementation is the case of *Okpabi and others v. Royal Dutch Shell*, which was firstly decided by the UK Court of Appeal in 2018 and then, with a radical change in the decision, by the UKSC in 2021.[715]

Two similar sets of procedures were launched in the *Okpabi* case, one by 2,335 members of the Bille village in Rivers State and the other by almost 40,000 residents of the Ogale community in Nigeria's Rivers State.[716] The claimants hold both RDS and its Nigerian subsidiary SPDC accountable for environmental harm brought on by oil spills from SPDC-operated pipelines and infrastructure, which

[710] *Vedanta Resources Plc v Lungowe* [2019] UKSC 20.
[711] Van Ho (n 687) 114.
[712] Croser, Day, Van Huijstee and Samkalden (n 707) 130.
[713] Van Ho (n 687) 114.
[714] Van Ho (n 687) 114.
[715] Corcione (n 637) 1303.
[716] *Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* [2018] EWCA Civ 191.

they claim are the result of the operating company's careless pipeline maintenance and oil spill response. They further contend that RDS owed them a duty of care under common law because it exerts significant control and direction over its subsidiary, including by establishing, overseeing, and upholding group-wide policies and standards for health, safety, and the environment.[717]

The 2018 *Okpabi* case before the Court of Appeal demonstrated how tort law was unable to ensure that parent corporations with English domiciles follow the OECD Guidelines for MNEs and the UNGPs,[718] taking the necessary precautions to protect the health, safety, and environment of the people impacted by their subsidiaries' extraterritorial operations.[719]

Furthermore, the more heinous an act the subsidiary commits, the least probabilities are available to a claimant before a tort law system such as the English one. Indeed, for a duty of care to exist in tort, a defendant must cause losses "of a kind in respect of which damages are recoverable".[720] In particular, the claimants who owned lands close to the pipeline that was harmed by the oil leak were not a sufficiently defined group of people impacted to warrant the imposition of a duty of care. According to the UK Court of Appeal, it was critical to distinguish between "abstract concepts of moral responsibility", such as the obligation to fight global warming and safeguard the environment, and the "duty owed to a particular person or class of persons".[721]

Furthermore, due to the "fair, just, and reasonable" requirement that the damage be recovered, a parent business is more likely to be held accountable in tort if only one of its subsidiaries causes specific concern rather than all of them or a sizable number of them. The likelihood that a court will have jurisdiction to hear a lawsuit decreases when harm to people's health and the environment becomes more pervasive and systemic. In effect, this implies that those who have

[717] Roorda and Leader (n 673) 370; S Varvastian and F Kalunga, 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe' (2020) 9(2) Transnational Environmental Law 323, 334.
[718] UNHRCo, UN Doc A/HRC/17/31 (n 25) 17-24; OECD Guidelines (n 80) 23-24.
[719] Rooney (n 684) 159.
[720] *Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* [2018] EWCA Civ 191, para 134.
[721] *Okpabi and Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* [2018] EWCA Civ 191, para 88.

been harmed by a subsidiary's damaging acts cannot access justice since the subsidiary lacks jurisdiction in the parent company's home State.[722]

In the State hosting the subsidiary corporation and where the damaging conduct occurs, structural issues such as "a weak rule of law, corruption, lack of independence of the courts and corporate capture" mean that victims cannot get justice. As a result, corporate immunity is essentially created by the duty of care test used in 2018 in *Okpabi*.[723]

However, in 2021 the case was challenged by the claimants and brought before the UKSC which, relying on the *Vedanta* decision, mentioned in the previous section, rejected the 2018 Court of Appeal's decision, stating that there is an arguable case that RDS owes the claimants a duty of care.[724] Therefore, the UKSC should not have granted the defendants' requests for strike-out and the setting aside of serving of the claim form against SPDC as a "necessary or proper party".[725] This ruling confirms that companies can be sued for negligent conduct in relation to environmental and human rights violations committed by their foreign subsidiaries.[726]

The ruling offers recommendations regarding the situations in which a parent business may have a duty of care to those who are harmed by the deeds or inactions of its overseas subsidiary. Additionally, the judgement rejects a rigid approach to corporate separation between the parent company and its subsidiaries and makes it apparent that businesses cannot rely solely on their legal structure to

[722] Rooney (n 684) 160.
[723] Amnesty International, 'Okpabi and others vs Royal Dutch Shell plc and another UKSC 2018/0068 Rule 15 submission to Supreme Court of the United Kingdom by Amnesty International' (26 April 2018) (https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4483212018ENGLISH.pdf).
[724] L Roorda, 'Lowering the bar (in a good way): the Supreme Court decision in Okpabi v Shell' (Rights as Usual Blog, 17 February 2021) (Lowering the bar (in a good way): the UK Supreme Court Decision in Okpabi v. Shell | Rights as Usual).
[725] Dentons, 'Okpabi v. Shell: UK Supreme Court reaffirms broad potential for environmental damage claims against parent companies' (Dentons, 25 February 2021) (https://www.dentons.com/en/insights/articles/2021/february/25/okpabi-v-shell).
[726] UKSC Blog, 'Case Comment: Okpabi and others v Royal Dutch Shell Plc and another [2021] UKSC 3' (UKSC Blog, 10 August 2021) (http://ukscblog.com/case-comment-okpabi-and-others-v-royal-dutch-shell-plc-and-another-2021-uksc-3/).

reduce risks related to the activities of corporate affiliates. The UKSC reaffirmed that there is no unique standard that applies to a parent company's tort liability.[727]

This judgment fits into a larger legal trend where judges are more willing to hold parent businesses accountable for the actions of their foreign subsidiaries.[728]

Indeed, the topic of parent liability acknowledges the enormous influence and power that parent corporations have on the workforce and host communities of subsidiaries and supply chains, both inside and outside of their home jurisdictions. For this reason, the studied on BHR have focused heavily on the potential for such authority to have adverse effects on various interests. In particular, the importance to ensure that victims of corporate human rights violations receive compensation, as well as the need to establish businesses' liability, has been highlighted.[729]

This breakthrough is important for businesses in sectors with high levels of social, environmental, and corporate governance risk.[730] The 2021 *Okpabi* judgment before the UKSC did not concern the validity of the claim; it was simply a finding of the threshold for jurisdiction. However, the reasoning of the UKSC emphasizes the growing significance of more active corporate governance, due diligence, and internal controls for effectively managing important corporate risks related to human rights and the environment. Thus, it is a fundamental contribution to the BHR field.[731]

4.5 Italy

The last section of this chapter will focus on Italy and it will analyze how the BHR framework has been implemented nationally. In particular, it will focus

[727] White&Case, 'Okpabi v Royal Dutch Shell Plc: UK Supreme Court allows Nigerian citizens' environmental damage claim to proceed against UK parent company' (White&Case, 13February 2021) (https://www.whitecase.com/insight-alert/okpabi-v-royal-dutch-shell-plc-uk-supreme-court-allows-nigerian-citizens).
[728] UKSC Blog (n 726).
[729] S Hopkins, C O'Kelly, C Hackett and C Patton, 'Okpabi and Others v Royal Dutch Shell plc and Another [2021] UKSC 3' (2021) 72(1) Northern Ireland Legal Quarterly 148, 148.
[730] UKSC Blog (n 726).
[731] White&Case (n 727).

on the Legislative Decree No. 231/2001 (hereinafter "L.D. No. 231/2001" or "Decree") and its gaps.

Moreover, in this section the application of the BHR framework in practice will be discussed, in particular the case of ILVA S.p.A., which is particularly relevant because it is the only case in which an Italian court, namely the Constitutional Court, expressly mentioned the UNGPs as applicable standards.

4.5.1 BHR in Italy

When the first studies on CSR in Italy started to be published in the late 1980s, the scholars' approach was focused on corporations. In particular, the primary concern was to emphasize that businesses should fulfill both individual and collective needs rather than simply aiming to maximize profit. However, the majority of the doctrine was studying the developing of CSR from the companies' perspective.[732]

Instead, in the last years, Italy is gradually shifting toward an approach based on human rights corporate responsibility, and thus giving more importance to individuals' rights, as evidenced by a number of recent initiatives demonstrating its willingness to implement the legal framework established by the UNGPs.[733]

For instance, the Human Rights Interministerial Committee (CIDU) of Italy adopted the NAP on BHR 2016-2021, which identifies the promotion of HRDD procedures as one of its main areas of interest along with combating discrimination and *caporalato* (i.e., treatment practices, primarily involving agricultural workers, that disregard core labor standards), the promotion of labor rights within the global supply chain, and fighting sexism.[734] The NAP, in relation to the HRDD, states that it is planned to "Conduct a comprehensive review of the existing commercial and civil law to assess and evaluate legislative reform

[732] S Aureli, M G Baldarelli, M Del Baldo, 'Corporate Social Responsibility in Italy' in Samuel O Idowu and René Schmidpeter (eds), *Current Global Practices of Corporate Social Responsibility – In the Era of Sustainable Development Goals* (1st edn Springer, 2021) 214.
[733] A Bonfanti, 'Strengths, Weaknesses and Developments of Business and Human Rights in Italy' (Nova Centre on Business, Human Rights and the Environment Blog, 16 December 2020) (https://novabhre.novalaw.unl.pt/bhr-italy-strengths-weaknesses-developments/).
[734] *ibid.*

introducing provisions such as the 'duty of care' or due diligence for companies".[735]

Moreover, in relation to the protection of human rights in the business world, Italy has implemented the EU Directive No. 2014/95 on the disclosure of non-financial and diversity information by large enterprises and groups and introduced the option to form benefit corporations (Legislative Decree No. 1882/2015 and Legislative Decree No. 254/2016).[736]

Nevertheless, despite its declared will to implement the BHR standards within the national legal framework, Italy does not yet have a clear, comprehensive legislative framework for corporate human rights' protection.

Yet, at the same time, Italy has been one of the first countries to introduce a form of corporate criminal responsibility through the L.D. No. 231/2001, which will be the focus of section 4.1.5.2 below. Indeed, the Decree establishes a peculiar kind of business liability, which constitutes a hybrid between administrative and criminal liability, stemming from the commission of any of the numerous offences included in the Decree's lengthy list.[737] As it will be more extensively discussed below, among such offences, there are crimes involving money laundering, terrorism, subversion of the democratic order, computer crimes, crimes involving corruption and misappropriation of public funds. Relevantly, this Decree has been updated during the years and it now also includes crimes concerning human rights, such as crimes against people, slavery, mutilation of female genitalia, and violations of workplace safety regulations.[738] Through the adoption of management and control models suitable to deter managers, executives, and employees from breaking the law and suitable to identify the procedures to avoid their occurrence during the development of corporate activities, businesses may be exonerated from such liability. So far, the

[735] 2016 - 2021 Italian National Action Plan on Business and Human Rights (https://globalnaps.org/wp-content/uploads/2017/11/italy_revised-nap_2016-2021.pdf) 17.
[736] Bonfanti (n 733).
[737] Legislative Decree 8 June 2001, no. 231 (L.D. No. 231/2001), "*Regulation on administrative responsibility of legal entities, companies and associations, including those not having legal personality, according to art. 11, Law 29 September 2000, no. 300*.
[738] Human Rights International Corner ETS (n 383) 17.

Decree has primarily established liability in cases of corruption, environmental crimes, and labor rights breaches.[739]

More recently, Italy has enacted significant legislation, namely Law No. 31/2019, that gives victims of corporate human rights violations the power to bring class actions for torts liability against companies.[740] The law, which entered into force in May 2021, will hopefully represent a vital weapon for the establishment of corporate liability for BHR.[741]

Despite isolated attempts to be in compliance with EU and international BHR standards, Italy has not yet incorporated them within the national legal framework in a coherent and structured way.[742] This is clear from the recent judgment against Italy in *Cordella v. Italy* by the ECtHR, which will be discussed below, for its infringement of Articles 8 and 13 of the ECHR in relation to actions taken by the steel corporation ILVA that caused harm to human health.[743]

4.5.2 The Italian Legislative Decree No. 231/2001

Italian legislation, differently from many other European States mentioned above, does not have a law on mandatory HRDD. The only piece of legislation dealing with the (quasi-criminal) responsibility of corporations is the L.D. No. 231/2001, which introduced for the first time in Italy a form of corporate liability with an inherent criminal nature,[744] for crimes committed in the benefit of or in the interest of a corporation.

The L.D. No. 231/2001 was published and it entered into force in 2001 with the aim of implementing the delegation under Article 11 of Law No. 300 of 29 September 2000 and to align Italian legislation both with EU Law and

[739] Bonfanti (n 733).
[740] Italian Law No. 31: Provisions Concerning Class Actions (drafted 12 April 2019, entered into force 19 April 2020).
[741] G d'Andria, 'Class/collective actions in Italy: overview' (2019) Thomson Reuters Practical Law.
[742] Bonfanti (n 733).
[743] *Cordella and others v. Italy* App No 54414/13 and 54264/15 (ECtHR, 24 January 2019).
[744] D Badodi, 'D. Lgs. 231/2001: Evoluzione Normativa e Prospettive di Applicazione' (2011) Università degli Studi Di Parma Dottorato di ricerca in Diritto Penale Ciclo XXIII, 6; M H Schettino and F Lucariello, *La difesa degli enti e dagli enti nel d.lgs. 231/2001: Dal modello organizzativo al procedimento penale* (1st edn Giuffrè, 2019) 6.

international conventions.[745] In particular, the 1995 Brussels Convention on the protection of the European Communities' financial interests, the 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, and the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[746]

The Decree, as stated at the beginning of the official document, regulates the "administrative liability of legal persons, companies and associations, including those without legal personality".[747] In particular, the Decree introduced into the Italian legal framework the so called "administrative responsibility of legal entities for crimes committed in their interest or to their advantage".[748] Thus, it was the first binding regulation in Italy which allowed to hold entities, and not only people, criminally responsible, under the so called "administrative corporate responsibility".[749] The above mentioned "administrative liability" would infer that it refers to provisions contained in the administrative code and under the jurisdiction of an administrative judge. However, the responsibility regulated in the Decree is inherently criminal and thus falls under the Italian criminal law.[750]

Although the Decree was not originally intended to protect human rights, its reach has grown over time and now it also covers serious environmental crimes as well as specific human rights violations. In particular, under Art. 25-quinquies, the Decree protects the individual personality referring to Art. 600-604 of the Italian Criminal Code. This provision includes slavery, human trafficking, forced labor, juvenile prostitution and pornography. Moreover, Art. 25-quarter covers the crime concerning practices of mutilation of female genitals referring to Art. 583-

[745] L.D. No. 231/2001 (n 737).
[746] M De Nigris, A Strippoli Lanternini, A Arrotino, 'The Legislative Decree no. 231/01 the test of the international law' (Il Diritto Penale della Globalizzazione, 2016) (https://www.dirittopenaleglobalizzazione.it/the-legislative-decree-no-23101-the-test-of-the-international-law/).
[747] L.D. No. 231/2001 (n 737).
[748] L.D. No. 231/2001 (n 737) Art. 5.
[749] Human Rights International Corner ETS (n 383) 5.
[750] Human Rights International Corner ETS (n 383) 6; *Thyssenkrupp case* [2014] Cassazione Penale, Sez. Unite, n. 38343.

bis of the Italian Criminal Code. Eventually, under Art. 25-undecies the Decree also includes environmental crimes.[751]

The Decree establishes different kinds of penalties, such as fines or the ban from exercising the business activity, for companies whose managers, executives, and employees commit one of the listed crimes in the interest of the company. Nevertheless, companies can avoid liability by showing that they have successfully adopted and implemented compliance programs with the objective of recognizing, preventing, and minimizing the risk of crime commission in relation to commercial activities. Yet, these programs do contain any indication on which are the possible risks of violations of human rights encountered by a corporation and how to identify them. Indeed, differently from other European counties mentioned before, no HRDD is included in this piece of legislation.[752]

Despite the evolution of the Decree during the years, which has led to the inclusion of relevant human rights crimes within its list, it does not provide binding BHR standards nor a mandatory HRDD regime. The Decree only indicates when the company is liable, who are the physical subjects that can be brought to court and under which conditions they can be held responsible. However, none of the provisions of the Decree reflect the BHR standards such as UNGPs or the OECD Guidelines and Guidance.[753]

Thus, the Decree, which is the only piece of Italian legislation which allows to bring companies before Italian courts, and which could be a useful tool to sue companies for the violation of human rights, does not adhere to the scheme introduced by the UNGPs. Indeed, as mentioned in the previous chapters, the UNGPs state that corporations have a specific responsibility to exercise HRDD in order to respect human rights.[754] In particular, under Principle 15 of the UNGPs, it is stated that "In order to meet their responsibility to respect human rights, business enterprises should have in place policies and procedures appropriate to their size and circumstances, including: (a) a policy commitment to meet their

[751] L.D. No. 231/2001 (n 737).
[752] I Pietropaoli, 'Concluding Remarks on Business and Human Rights Developments in Italy' (Nova Centre on Business, Human Rights and the Environment Blog, 22nd January 2021) (https://novabhre.novalaw.unl.pt/concluding-remarks-bhr-italy/).
[753] L.D. No. 231/2001 (n 737) Art. 5 and 6.
[754] UNGA, UN Doc A/73/163 (n 344) 3.

responsibility to respect human rights; (b) a human rights due diligence procedure to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) procedures to enable the remediation of any adverse human rights impacts they cause or to which they contribute."[755]

None of these procedures are included in the L.D. No. 231/2001 and this confirms that Italy still lacks a comprehensive legal system on BHR which today is mainly discussed in non-binding instruments and which therefore have limited, if none, legal value.[756]

4.5.3 The ILVA case

A relevant Italian case in relation to the BHR field and the implementation of the UNGPs is the ILVA case, which was decided both in Italy, by the Taranto Tribunal and the Italian Constitutional Court, and at the supranational level by the ECtHR.[757]

ILVA S.p.A., an Italian iron and steel mill founded in 1905, opened the ILVA steel facility in Taranto in the Italian region of Apulia in 1965. Being the first factory to use integrated cycle technology in production, the development of the Taranto steel plant gained international recognition.[758]

The Taranto ILVA steel factory is renowned for more than only its influence on the local economy and society. Indeed, since the 1990s, municipal, national, and European authorities have been worried about its environmental pollution. While numerous procedures were put in place by the Italian government to compel ILVA to follow environmental laws and ensure that harm is repaired,

[755] UNHRCo, UN Doc A/HRC/17/31 (n 25) Principle 15.
[756] Bonfanti (n 733).
[757] European Parliament, 'Fact Finding Mission to Taranto Report' (July 2017), (http://www.europarl.europa.eu/cmsdata/123280/Background%20Document%20PE571.403EN.pdf). FIDH, Unione Forense per i Diritti Umani, Peacelink and HRIC, 'The environmental disaster and human rights violations of the ILVA steel plant in Italy' (April 2018), (https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/the-environmental-disaster-of-the-ilva-steel-plant-hasalso-violated).
[758] A Lai, S Panfilo and R Stacchezzini, 'The governmentality of corporate (un)sustainability: the case of the ILVA steel plant in Taranto (Italy)' (2019) 23 Journal of Management and Governance 67, 70.

the firm has persistently disregarded environmental norms, creating major environmental and public health issues in the Taranto region.[759]

The ILVA case shows that, contrary to popular belief in the field of BHR, harmful economic activities do not only occur in underdeveloped countries with ineffective governments and weak legal systems. Conversely, they even occur in States with highly developed legal and judicial systems, especially when important economic interests are at stake.[760] This is the case of Italy, whose 2016 NAP for implementing the UNGPs stated that: "Italy is committed to the promotion and implementation of key actions aimed at giving human rights priority status so as to avoid and minimize potentially negative impacts from business activity in this area" and that "in the field of environment protection, the promotion of high environmental standards by enterprises beyond National and EU legislation is an essential contribution to the respect, promotion and fulfilment of human rights".[761]

The "judicial history" of ILVA began in 2015 when its facility experienced a deadly accident which was not the first one and one employee perished as a result. Following the tragic incident, the Prosecutor of the Court of Taranto initiates legal action against a number of the company's managers and technicians for failing to take the necessary precautions to stop the series of events that resulted in the fatal accident and for failing to adopt the proper instrumentation to ensure the safety of the workers. During the initial stages of the investigation, the Public Prosecutor of Taranto gave the factory orders to seize the factory. This seizure is contested by the ILVA company and this led the Court of Taranto to refer to the Italian Constitution on the constitutionality of the provision providing the release of the factory.[762]

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[759] European Commission, 'State aid: Commission concludes in-depth investigation on support to Italy's largest steelmaker ILVA S.p.A. in A.S. and orders recovery on two measures that involved illegal State aid' (2017) (https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5401).

[760] M Neglia, 'Striking the Right(s) Balance: Conflicts between Human Rights and Freedom to Conduct a Business in the ILVA Case in Italy' (2020) 5 Business and Human Rights Journal 143, 143 and 144.

[761] Comitato Interministeriale per i Diritti Umani (CIDU), Italian National Action Plan (1 December 2016) (https://cidu.esteri.it/resource/2016/12/49117_f_NAPBHRENGFINALEDEC152017.pdf) 5 and 17.

[762] S Laforgia, 'Se Taranto è l'Italia: il caso Ilva' (2022) 1 Lavoro e Diritto 29, 41-42.

Thus, in 2015 the Italian Constitutional Court was asked to decide on the matter and it eventually released its judgment in 2018. The 2018 ruling provides a thoughtful analysis of this matter. The Court's reasoning demonstrates how constitutional law can provide helpful clarifications in the challenging procedure of striking a balance between several constitutional rights, such as the freedom to employment and the right to health, thus representing a powerful, yet often disregarded, tool in the BHR field.[763]

More specifically, this case serves as an example of the conflicts that exist between economic activity and a number of fundamental rights, including the rights to life, health, a clean environment, work, and the freedom to operate a business, that are guaranteed by national constitutions and international law.

In particular, in the ILVA decision the Italian Constitutional Court ruled that the balance between conducting economic activities and fundamental human rights must be struck in accordance with the principles of fairness and reasonableness and cannot result in one right taking precedence over the others.[764] In this instance, the Italian Constitutional Court claimed that the government prioritized the goal of production and "totally disregarded the protection of fundamental rights such as the right to health and life as well as the right to work in a safe environment".[765]

In addition, the Constitutional Court stated that the interdependence of all fundamental rights is a feature of the pluralist nature of the Italian Constitution and that "the dignity of the individual is the result of this complex and interrelated system of rights and liberties".[766] The Constitutional Court then emphasized that there is no hierarchy among fundamental rights but did so while also pointing out that the right to health and the right to live in a healthy environment could be regarded as "primary" rights in that their sacrifice always requires a strict

[763] Italian Constitutional Court, Decision no. 58/2018 (23 March 2018).
[764] M Cartabia, 'I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana', Conferenza trilaterale delle Corte costituzionali italiana, portoghese e spagnola (Rome 2013) (https://www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf); A Barak, *Proportionality* (1st edn Cambridge University Press, 2012) 175-210.
[765] Italian Constitutional Court, Decision no. 58/2018 (23 March 2018), 5 para 3.3.
[766] Italian Constitutional Court, Decision no. 85/2013 (9 May 2013), 9.

justification and careful consideration of the balance between various rights.[767] As a result, the Court also examined the infringement of Article 41 of the Italian Constitution, in relation to the restrictions on economic activity.[768] It further highlighted that it shall be interpreted in light of the protection of basic rights and that, as a result, economic activity is subject to restrictions that must take into account the rights to life, health, and a wholesome environment.[769]

Despite the fact that the Italian Constitutional Court asserted the unconstitutionality of the provision on the release of the factory, in practice the activity kept being active. For this reason, after the exhaustion of the domestic remedies, namely the Constitutional Court, the case of ILVA was brought to the ECtHR by up to 182 citizens who demanded that the Italian government be held accountable for failing to take the necessary steps to protect the environment and ensure the health and safety of its citizens and employees, as well as for issuing public decisions that instead permitted the production activity to continue.[770] In 2019 the ECtHR released its judgment and established two violations by Italy: firstly, Article 8 ECHR since Italy failed to strike a "fair balance" between the applicants' desire to prevent substantial environmental harm that would have a negative impact on their "well-being" and "private life" and the interest of society at large.[771] Secondly, the violation of Article 13 ECHR was established for the absence of appropriate and effective remedies in the Italian judicial system that may address the claimants' complaints concerning the lack of steps taken to ensure the restoration of the affected region.[772]

Yet, the Strasbourg judges rejected the applicants' request to use the "pilot judgment" procedure,[773] and to specify to the national authorities the precise steps

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[767] Italian Constitutional Court, Decision no. 85/2013 (9 May 2013), 9.
[768] Italian Constitution, (adopted 22 December 1947, entered into force 1 January 1948), Article 41.
[769] Neglia (n 760) 148.
[770] *Cordella and others v. Italy* App No 54414/13 and 54264/15 (ECtHR, 24 January 2019).
[771] *Cordella and others v. Italy* App No 54414/13 and 54264/15 (ECtHR, 24 January 2019), para 174.
[772] M Odoni, 'Il caso Ilva davanti alla Corte europea dei diritti umani: tutela par ricochet dell'ambiente o tutela par double ricochet della salute pubblica?' (2021) 15(1) Diritti umani e diritto internazionale 171, 171.
[773] D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (1st edn Martinus Nijhoff, 2013); M. Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot

to be taken to deal with the situation by choosing instead not to comment on the potential violation of the applicants' Article 2 ECHR right to life.[774]

In addition, the ECtHR determined that the finding of violations of Article 8 and 13 ECHR by Italy was sufficient to repair the moral harm suffered by the claimants, hence the victims' demand for monetary compensation for the non-pecuniary loss was rejected as well.[775]

The request for the referral was then filed by the appellants themselves, who cited several reasons for doing so, including the refusal to consider the complaints under Article 2 ECHR, to accept the "pilot judgment", and to make remedies for moral harm.[776]

The Grand Chamber's five-judge panel rejected the appellants' request for referral on June 24, 2019, and as a result, the judgment from January 24, 2019 became conclusive in accordance with Article 44(2)(c) ECHR.

Actually, the inability to frame the ILVA issue within Article 2 ECHR is not surprising, considering that the Strasbourg Court had already demonstrated a certain reluctance to apply this article in the Court's earlier decisions involving environmental circumstances or harmful activities.[777] However, the Court seems to encounter difficulties in "adapting" the well-established "general principles" created in its own environmental jurisprudence, which has relied on the broad reading of Article 8 ECHR, to the particular facts of the case at hand.

The severity and pervasiveness of the situation posing a threat to the public health appears to have been what most seriously damaged the conventional "environmentalist" approach under Article 8 ECHR. On the one hand, they used

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Judgment Procedure of the European Court of Human Rights' (2011) 12 *German Law Journal* 1231.

[774] Odoni (n 772) 171.

[775] *Cordella and others v. Italy* App No 54414/13 and 54264/15 (ECtHR, 24 January 2019), para 187; V B Castellaneta, 'Ex Ilva, Strasburgo condanna l'Italia "Non ha tutelato la gente di Taranto"' (*Corriere della sera*/*Corriere del mezzogiorno,* 24 gennaio 2019) (https://corrieredelmezzogiorno.corriere.it/bari/economia/19_gennaio_24/corte-strasburgo-sull-ex-ilva-misure-sull-ambiente-urgenti-6bae6b1a-1fc4-11e9-b1af-37a17d6ba10d.shtml?refresh_ce-cp).

[776] La Gazzetta del Mezzogiorno. 'Ex Ilva, le vittime chiedono un nuovo giudizio alla Corte di Strasburgo' (La Gazzetta del Mezzogiorno, 18 giugno 2019) (https://www.lagazzettadelmezzogiorno.it/news/taranto/1153585/ex-ilva-corte-di-strasburgo-boccia-richiesta-di-un-nuovo-giudizio.html)

[777] A Sironi, 'La tutela della persona in conseguenza di danni all'ambiente nella giurisprudenza della Corte europea dei diritti umani, Tra diritto al rispetto della vita privata e diritto alla vita' (2011) 1 Diritti umani e diritto internazionale 5, 5 and 9.

leverage to support their adverse verdict for the Italian government by basing it on precisely this risk. On the other hand, they chose not to assign the most obvious and suitable cause – the infringement of Article 2 of the ECHR's right to life – to that major public health issue.[778]

The ILVA case both at the domestic level, in the Constitutional Court judgment, and at the ECtHR level shows how important it would be to establish hard-law BHR standards within the Italian legal framework. In fact, at present, the Italian legal framework includes no binding principles providing obligations for States to protect human rights from corporate activities and for corporations to conduct their activities while respecting human rights. If the international standards and principles on BHR were enforceable, both national and supranational courts would finally be able to hold corporations liable for their human rights abuses.

In conclusion, as it emerges from the legislative framework and the case-law, namely the discussed case of ILVA, Italy still has developments to put in place in the BHR field. At present, the BHR standards have been implemented partly in single, and not interconnected, national laws and partly through soft law. Thus, this country does not have a comprehensive and structured framework on BHR. In addition, the soft-law character of many BHR instruments in Italy means that they are not binding nor enforceable and this creates difficulties also in the judiciary system. Indeed, national courts have the duty to apply laws or, more in general, binding instruments. Although they can take into consideration recommendations and other soft-law principles, Italian courts cannot base their judgments on such instruments. Therefore, in comparison with countries such as France and the Netherlands, which have introduced binding instruments in particular on HRDD, Italy is still behind in the process of implementing and developing a BHR system at the national level.

The last chapter of this thesis has analyzed five different countries in order to understand the extent to which BHR standards are implemented in the national

[778] Odoni (n 772) 173.

legislation and in order to address the relevant case-law within these countries concerning BHR and in which BHR standards have been applied in practice. As far as legislation is concerned, it is evident that, only with the exception of France which has enacted a law on mandatory HRDD, there is a general trend of maintaining the non-binding nature of international BHR standards also at the national level. Consequently, national courts cannot rely entirely on these principles since they consist of soft law and, for this reason, the implementation and application of BHR in practice encounter obstacles and thus proceed slow.

CONCLUSION

The present thesis has tried to analyze the evolution of the BHR movement from the initial historical phase to the current status. In particular, the BHR movement, the CSR and the ESG described in the first chapter show how the world of corporations is increasingly encountering and engaging the issues concerning human rights. In particular, these developments have led to debates on whether corporations should be subject to human rights-related obligations. This debate can be framed within the more general discussion on the subjects of international law, which however would imply a further and deeper analysis on this topic which is not the focus of this thesis. Rather the focal point has been to analyze the BHR standards in order to establish their fundamental value, despite their non-binding value.

Due to the fact that the BHR standards consist of soft law, it has been relevant to address the last developments of the BHR movements and the attempts to draft an international treaty to legally bind both States to protect human rights within the business world, and the corporations to respect human rights during the exercise of their activities, in compliance with the UNGPs.

However, it has also been highlighted that it emerges how the political will to sign such treaty is not spread everywhere and on the contrary not many States are willing to become bound. For this reason the developments of the BHR movements proceed slowly or at least they keep encountering difficulties. Indeed, this is evident from the case-law of international, regional and national courts, as analyzed in the third and fourth chapters of this thesis.

In fact, the two regional human rights courts that have been analyzed in the third chapter are the ECtHR and the IACtHR, from which it appears once again that the non-binding nature of the BHR standards limits the possibility of these bodies to apply these principles, due to the lack of any enforceability.

Moreover, it has been considered significant to study also the reports of the CESCR and the case-law of the ICSID. The former is one of the few UN bodies to have expressly stated the fundamental value of the UNGPS and their role in encouraging the respect of human rights by States and corporations. The

latter has attributed in its case-law such a relevance to the BHR standards to create a connection between international human rights law and international investment law. Indeed, although the ICSID usually does not deal with human rights because the ICSID's jurisdiction depends on BITs, which rarely address human rights, the ICSID's approach to human rights is increasing their importance in investment law.

Eventually, the last chapter has employed a comparative approach to discuss the current evolution and approach on BHR of five different countries, namely the US, France, the Netherlands, the UK and Italy. These examples have shown that the non-binding value of the international BHR standards creates obstacles also at the national level. In fact, this feature of the BHR standards leads to the fact that nationally it is not common to have laws implementing these principles in a mandatory way. In the range of the analyzed States, only France and the Netherlands have such laws, establishing mandatory HRDD. Yet, these laws are recent and thus the national case-law is still in the process of developing in this direction.

On the other hand, the general trend which emerged in the other countries taken in consideration, is to follow the current international path which only provides soft law in the BHR context. However, this trend is not helpful for national tribunals since they can only try to mention and analyze them attributing more value to these standards, yet cannot apply these principles in concrete since courts when deciding their cases are obliged to apply binding provisions.

Therefore, the case-law on BHR is sporadic and does not offer several examples to try to build a legal framework from the final decisions of these cases.

The example of Italy is emblematic: the Italian legal framework has tried to implement the BHR standards but it has done it with no continuity and not in a complete way: Italy has drafted laws to comply with EU law and international law instruments but these laws seem to be disconnected and do not constitute an organized system. The result is that the Italian BHR framework is mainly made of many soft-law instruments which are not included in a bigger overview.

This clearly emerges also in the case-law which is rare when searching for courts that explicitly mention BHR standards and almost absent when trying to find tribunals that attempt to apply these instruments.

In conclusion, starting from the history of the BHR movement and eventually coming to the analysis of the case-law of different bodies, this thesis has tried to show how the lacks of binding instrument has slowed down the developments in this field. Thus, it is desirable that in the future an international binding treaty will be drafted and signed by as many States, and hopefully corporations, as possible and that it will establish obligations for both of them in respect of human rights, in order to facilitate courts to hold them accountable when such violations occur.

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