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The Current and Developing State of Transnational Businesses' Responsibilities Under International Human Rights Law

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I) Introduction

It is widely accepted that the current international climate is much influenced by ever growing corporate entities that expand their operations in multiple states[1]. Although corporations are recognized to be big contributors on the production of human capital and social benefit, their purpose remains to produce capital for their own investors, therefore it is natural that a business interest can conflict with public interest. As it will be stated in this thesis, there have been subsequently many cases of human rights violations caused by corporate action[2]. The problem lies in the accountability of corporations, especially those being multinational in nature, that due to practical and legal reason, are often not found legally liable for their violations of internationally recognized human rights.

As it will be stated in the following chapters, multinational corporations, also known as transnational companies or multinational enterprises, while operating in the international setting has been often overlooked by international treaties providing much confusion over their duties and responsibilities, whilst enjoying many rights thanks to the numerous investment treaties. Transnational companies also usually operate in third world countries, where usually violations occur, which may not always ensure secure access to remedies for practical reasons such as the big financial burden that starting civil proceedings in a foreign country may incur, inefficient or corrupt judicial systems, or difficulties in the gathering of evidence. Another factor worth taking into account is the differentiability of accountability and remedial instruments: firstly, without a coherent set of rules that governs corporate accountability different national regimes may have different approaches and apply different laws; secondly, remedial instruments may be either practically inefficient or legally unviable; corporations therefore may exploit these situations as an attempt to escape legal liability. Furthermore, the complicated structure

[1] Diğer Haberler, 'The Significance and Influence of Multinational Corporations on the Global Economy', Blog, Rönesans Holding, 23 June 2023, https://ronesans.com/en/news/the-significance-and-influence-of-multinational-corporations-on-the-global-economy.

[2] Krishangee Bhattacharyya and Dr. Anita Sable, 'Human Rights Violation By Transnational Corporations: An Analysis On The Accountability Of Transnational Corporation Under The International Law', *Indian Journal of Integrated Research in Law* 2, no. 4 (5 January 2023): 314–28.

of transnational companies can make them liable for actions committed by a subsidiary which is domiciled in another country, raising issues of jurisdiction for home state's courts in cases of violations of human rights. These are only some of the many reasons why in the current international legal regime it is hard to make multinational enterprises accountable to human rights violations.

This thesis explores the current and evolving framework of responsibilities that transnational businesses hold under international human rights law, analysing both the issues, case law, enacted and proposed international instruments. It will be divided into three main chapters that will cover all the relevant aspects of the issue in a comprehensive way. The first chapter will focus on the current regime of Transnational responsibilities under human rights, with an analysis of the applicability of human rights in investment law; a debate over the question of personality of corporations under human rights which may entail obligations; an analysis of the very important UN Guiding Principles on Business and Human rights focusing on the "Protect, Respect, Remedy" framework that seem to be the common philosophy over the relationship between corporations, state, human rights and victims; and an analysis of the OECD Guidelines for Multinational Enterprises on Business Conduct.

The second chapter will delve into the proposed legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, with a focus on all of its proposed provisions, the differences and similarities with the instruments of soft law, while presenting the general scholar discussion over it.

The third chapter will finally look at some regional and national developments of corporate responsibility under human rights, such as focusing on the United States Alien Tort Statute, the Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill proposed in the United Kingdom, and the soon-to-be-enacted European Union's Sustainable Due Diligence Directive, discussing their provisions, original content, differences with the previously discussed instruments and the scholar debate around them.

II) The Current Legal Regime on The Responsibility of Businesses Over Human Rights

a) Introduction

Before diving deep into the working treaty, it is important to analyse the current state of the regime of businesses' responsibilities under human rights and, in general, international law. As globalization continues to reshape the economic landscape, questions regarding the accountability of corporations for their impacts on human rights have become increasingly prominent. The complex interplay between economic activities and human rights violations has spurred a growing recognition of the need for robust legal frameworks to govern the conduct of businesses on a global scale. Against this backdrop, this chapter aims to provide a comprehensive analysis of the current regime of international law concerning the responsibilities of businesses under human rights.

This chapter delves into two pivotal aspects that underscore the evolving landscape of corporate accountability: International investment law and its intersection with human rights, discussing the presence or lack of corporate duties and obligations under international law, the United Nations' Guiding Principles on Business and Human Rights, and the OECD Guidelines. This chapter will aim, by presenting the multilayered relationship between businesses and human rights, to address what are the problems of the old and current regime, how it evolved through the Guiding Principles and the Guidelines, and what are the current needs of the international community for legal instruments concerning it.

b) International Investment Law

i) A heterogeneous "Regime"

International Investment Law is the name attributed to the regime of international law regarding the protection of foreign investor's rights from the state they are investing in[3]. Calling it "regime" may be considered controversial though, since it implies that it is a coherent set of rules, either written or unwritten, analogous to the national dimension's field of investment laws, while the reality is much more complicated and nuanced. It is usually formed by many, separate treaties and agreements between sates which can vary in form, scope, applicability, and adjudication bodies established. This heterogeneity makes it so that inquiring about International Investment Law is not only complicated but can be misleading. The reality is that there is no general law governing investment treaties, but of course they often follow general principles of law and customary international law, while having some common characteristics.[4]

Generally, investment treaties may be either bilateral investment treaties (BITs) or part of free trade agreements (FTAs), their purpose is usually to incentivize foreign direct investment (FDI) in the host country by granting some level of protection to foreign investors as to guarantee the property rights of their assets. The level of protection may vary from country to country according to the specific terms of the investment treaty, but the most common protections afforded to foreign investors include protection from expropriation, Fair and Equitable Treatment (FET), National treatment, Most-favoured-nation treatment (MFN), Freedom to transfer funds, and Full protection and security.[5]

Since the scope of the treaties vary, it is directly consequential that the adjudication process may vary as well. Investment arbitration is the name commonly used to refer as the way in which disputes between foreign investors and the host state are solved in international investment law, this is also known as Investor-State dispute settlement (ISDS). This mechanism exists as to avoid national judicial bodies which may be biased

[3] Jason Odering, 'Library Guides: International Investment Law: Starting Your Research', accessed 8 May 2024, https://unimelb.libguides.com/c.php?g=929887&p=6719571.
[4] OECD, *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives* (OECD, 2008), https://doi.org/10.1787/9789264042032-en.
[5] United Nations Conference on Trade and Development, ed., *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (New York: United Nations, 2007), pt. C, E and F.

in favour of its own national government or persons instead of the foreign investors, therefore this is another way in which the foreigner's rights are protected. The precise process can vary significantly based on numerous factors and can be exceedingly complex. Consequently, it will not be addressed in this dissertation, as it warrants a dedicated thesis of its own.[6].

ii) The relationship between IIL and Human Rights

Investment treaties commonly do not explicitly mention other aspects of international law, such as human rights, with the closest acknowledgment being a vague nod toward social welfare in their preambles. This approach is notable considering investment disputes often involve or conflict with various human rights. Presently, it is increasingly challenging to discuss property rights protection without considering them. The question arises: why do investment treaties overlook this inevitable interaction? One explanation could be that such treaties do not feel the necessity to explicitly mention it. The absence of specific clauses about human rights in investment treaties does not automatically mean human rights are irrelevant. The potential relevance of human rights, as well as other aspects of international law, is implicitly acknowledged within these treaties. Since they are products of public international law, investment treaties must be understood within the broader framework of applicable international legal principles.[7]

The question on whether international human rights is just a symptom of the complicated issue regarding the applicability of general law within investment law, and in fact remains a hotly debated topic between lawyers and state-investors arbitrators. Generally, investment treaties can have specific provisions regarding the applicability of "external" law, as in not part of the investment treaty, which must be applied by the Arbitration

[6] 'Introduction to Investment Arbitration • Arbitration', International Arbitration, accessed 8 May 2024, https://www.international-arbitration-attorney.com/investment-arbitration/; 'Investment Treaty Arbitration | International Arbitration | Signature Litigation', 26 November 2021, https://www.signaturelitigation.com/investment-treaty-arbitration/.

[7] Luis Gonzalez Garcia, 'The Role of Human Rights in International Investment Law', *Investment Treaty Part 1*, 26 February 2013, 29–44.

Tribunal. Some of these provisions are narrowly framed, referring only to the treaty and to general international law. Other provisions are wider and cover also host state law.[8]

Not every treaty contains such provisions, therefore if the host state is part of ICSID, article 42(1) of the convention says: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable"[9]. Article 42 seems to be very vague on which rules of international law are applicable, which is echoed in the debate about the meaning of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which states that in the interpretation of a treaty should be taken of "any relevant rules of international law applicable in the relations between the parties"[10]. Article 42(1) of ICSID and Article 31(3)(c) of VCLT reflect the same idea, that in general international law is applicable in the interpretation of any treaty including investment treaties, but not every rule of international law is applicable, only relevant rules to the matter at hand. It would be reasonable to assume that human rights would follow the same logic as well.

iii) Grand River and the hesitation of applying human rights law.

Many tribunals have been rejecting this view based on lack of jurisdiction. In *Grand River Enterprises Six Nations v United States*[11]*,* the individuals bringing forth the claim belonged to a First Nations group and were involved in the production of two cigarette brands. They contended that a significant agreement reached between prominent tobacco companies and various US states had a detrimental impact on their business within Native American communities in the United States. According to their argument, this settlement was enforced upon them without any prior consultation. Additionally, they asserted that the United States violated the FET provision of NAFTA. A crucial point in the claimants'

[8] Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration', *Mc Gill Journal of Dispute Resolution* 1 (2014).
[9] 'ICSID Convention, Regulations And Rules' (2006), art. 42(1), https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.
[10] 'Vienna Convention on the Law of Treaties' (1969), art. 31(3)(c).
[11] Grand River Enterprises Six Nations, Ltd., Et Al. V. United States Of America (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 12 January 2011).

case was that the concept of "minimum standard of treatment" encompasses the rights of indigenous peoples as recognized in customary international law. However, the Tribunal rejected the claim. It concluded that the minimum standard of protection protected under the NAFTA treaty is not covered by other legal sources outside of the treaty, even though article 1131 and the aforementioned article 31(3)(c) of the VCLT require that the issues in dispute shall be decided not only in accordance with NAFTA but also with "applicable rules of international law"[12]. The Tribunal used the interpretation of article 1105(1) of NAFTA regarding FET by the Free Trade Commission which states that: "a determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)"[13], but it can be argued that firstly, the Commission probably meant that a breach of another rule of international law does not constitute *ipso facto* a breach of article 1105(1) and that does not mean that other rules of international law, including human rights, should not be taken into account when interpreting the treaty[14]; secondly, that the note explicitly mentions "other international agreements", which would exclude international human rights that, although codified in various treaties, can be considered part of customary international law.[15] The *Grand River* tribunal's approach is not surprising, considering that most international courts and tribunals are hesitant to rely on Article 31(3)(c). This reluctance can be understood from two main perspectives. Firstly, by incorporating other "relevant rules of international law," tribunals risk exceeding the bounds of their jurisdictional competence and deciding issues beyond their scope. In the *Oil Platforms* case, the International Court of Justice (ICJ) faced criticism for using Article 31(3)(c) of the VCLT to encompass the entire body of international law concerning the use of force. Judge Higgins pointed out that treaty interpretation cannot be used to replace applicable law.[16] Secondly, while it is acknowledged that referencing other rules of international law cannot supersede treaty provisions, as seen in the *Grand River* case, tribunals remain wary when parties invoke international human rights norms.

[12] 'North American Free Trade Agreement' (1994), art. 1131.
[13] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions', § 2.1 (2001).
[14] Garcia, 'The Role of Human Rights in International Investment Law', 36–37.
[15] William A. Schabas and William A. Schabas, *The Customary International Law of Human Rights* (Oxford, New York: Oxford University Press, 2021).
[16] Case Concerning Oil Platform: Islamic Republic of Iran v United States of America, No. 42 ILM 1387 (International Court of Justice 12 December 1996) (Opinion of Judge Higgins).

This scepticism arises because such invocation is often viewed as a pretext by respondent States to evade their responsibilities. Moreover, it is perceived to broadly litigate claims based on alleged violations of domestic and international law, thus bypassing the specific scope of clauses like the FET or expropriation provisions. These concerns are legitimate and cannot be disregarded by tribunals. However, despite the challenges it presents, arbitrators should not downplay the significance of other branches of international law.[17] It must be said though that not every tribunal has followed the same methodology as the Tribunal from *Grand River*, and there has case law in favour of applying human rights provisions within investment law decisions[18].

iv) Applying human rights: Urbaser

It is important to remember that international investment law is a "heterogeneous regime", and therefore whether the human rights are applicable depend, ultimately on the investment treaty, the magnitude of the violation and the matter at hand[19]. Therefore, there can be the possibility for an adjudication tribunal to apply it, one of the most recent instances was in the *Urbaser v. Argentina*[20] case. In 2006 Argentina decided to terminate the concession of the public distribution of water and sewage from the company Aguas Del Gran Buenos Aires S.A. (AGBA), since the 2001-2002 economic crisis caused economic loss to the company making its functions impossible and forcing Argentina to terminate the concession. Some of AGBA's investors decided to bring forth a claim of violating several provisions from the Spain-Argentina BIT, namely the prohibition against adopting unjustified or discriminatory measures, FET, and the obligation not to expropriate unlawfully[21]. Although the Tribunal would ultimately dismiss all claims exception made for the violation of the FET, which would not be granted damages for the breach on the basis that the concession agreement failed predominantly due to the claimants' failure to make the necessary investment, the Tribunal for the first time in the

[17] Garcia, 'The Role of Human Rights in International Investment Law', 37–38.
[18] Saluka B.V. v Czech Republic (UNCITRAL 17 March 2006); Toto Costruzioni Generali SpA v Lebanon, No. ORIL IIC 391 (ICSID 11 September 2009); Fireman's Fund v Mexico, No. ARB(AF)/02/01 (ICSID 17 July 2006); Técnicas Medioambientales, TECMED S.A.(Tecmed) v Mexico, No. ARB(AF)/00/2 (ICSID 29 May 2003).
[19] Garcia, 'The Role of Human Rights in International Investment Law', 43.
[20] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, No. ARB/07/26 (ICSID 8 December 2016).
[21] *Urbaser* paragraph 34.

history of investment adjudication would accept Argentina's counterclaim based on application of human rights. Argentina filed the counterclaim since the claimant violated their obligations under international law based on the human right to water[22], which the Tribunal accepted to hear but ultimately decided to reject it. The tribunal's analysis is divided into three parts: the applicable law, the BIT's relationship with international law and human rights, and the human right to water in AGBA's concession framework.

First, the tribunal determined that BITs cannot be viewed as solely protecting investors without imposing obligations and must be interpreted alongside other international law sources. This view was supported by the BIT's dispute settlement, applicable law, and MFN clauses, which reference "general principles of international law"[23]. Second, the tribunal addressed the BIT's interaction with international human rights law, rejecting the claim that corporations are not subjects of international law. It emphasized that recent international law developments mean corporations can be subject to international obligations[24]. It referred to international conventions like the UDHR and ICESCR to underscore the relevance of human rights in this context. However, the tribunal faced the challenge of construing a legal obligation for the investor but found none. It concluded that Argentina's argument conflated the concessionaire's service provision with the obligation to fulfil the human right to water, indicating that the source of this right was the concession contract, not the BIT or international law[25]. Third, the tribunal examined the human right to water within AGBA's concession. It agreed that the concession aimed to support the right to water but found no direct international law obligation on the investor. The responsibility lay with the state to ensure the concessionaire fulfilled this right[26].

Therefore, the applicability of human rights within investment law may depend on the matters at hand. But even when human rights are applicable in investment law, it is not given that they form obligations to corporations and individuals. This matter will be discussed in the next paragraph.

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[22] *Urbaser* paragraph 1165.
[23] Ibidem, para. 1189.
[24] Ibidem, paras. 1194-1195.
[25] Ibidem, paras. 1196-1197.
[26] Ibidem, paras. 1205-1212

c) Corporate responsibilities and duties in International Law

i) Corporations' personhood in International Law

According to the International Court of Justice, a "subject" of international law is an entity that is treated as a person, therefore that can affect international law and can be affected by it, from which therefore both obligations and rights can arise including the possibility of enforcing them by bringing claims to international courts[27]. Therefore, it would seem at a first glance that since corporations enjoy rights and are able to bring forth claims when these rights are violated, corporations are subjects of international law. Many scholars broadly support this view including Andrew Clapman, who wrote that corporations have "limited international legal personality", mostly by following the same reasoning as the ICJ in *Reparation*[28]. Steve R. Ratner is another supporter of this view, but his reasoning is not only based on *lege ferata* as in *Reparation*, but also on the basis that corporations *should* be considered subjects merely because they enjoy many rights given by investment treaties which should, accordingly, be accompanied to responsibilities and duties[29].

Some scholars argue that attributing personhood to corporations may be dangerous for the good global governance. For instance, Dame Rosalyn Higgins advocate for replacing the dichotomy of "subjects" and "objects" with the term "participants" including corporations, NGOs, and individuals in the international legal process. This perspective, according to Jose E. Alvarez, can help avoid that legal person are not conflated with natural persons or states, and therefore given rights and duties that should not be attributed to them since they practically differ from them in regards, for example, to their purpose, their ability to access remedies and the financial ability they have[30].

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[27] Reparation for injuries suffered in the service of the United Nations, Advisory Opinion (International Court of Justice 1949)179.
[28] Josè E. Alvarez, 'Are Corporations "Subjects" of International Law?', *Santa Clara Journal of International Law* 9, no. I (2011): 7.
[29] Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *The Yale Law Journal* 111, no. 3 (December 2001): chap. 2, https://doi.org/10.2307/797542.
[30] Josè E. Alvarez, 'Are Corporations "Subjects" of International Law?'

Whether companies possess legal personality in international law or not, there is widespread consensus on the notion that corporations *should* bear duties and responsibilities while also being held accountable whenever these obligations are not upheld. This perspective underscores the importance of corporate accountability in maintaining ethical standards and protecting stakeholders' rights, reinforcing the idea that corporations, given their significant impact on global economic and social landscapes, must operate within the bounds of established legal and moral frameworks. The imposition of duties and responsibilities on corporations ensures that they contribute positively to society and the environment, while also safeguarding against potential abuses of power.

ii) Violations of human rights by TNCs

Although many agree that corporations have some sort of legal personality, and arguably can commit violations of which the responsibility cannot be borne by either the host state or the home state, many times that are both practical and legal reason that make it very hard for companies to be liable for violations of national and international law[31], importantly often this is the case with human rights law which can often conflict with property rights of investors. Transnational corporations (TNCs) in particular, enjoy several property rights which host state cannot violate since they would risk to not respect the terms of the investment treaty, while adjudication tribunals are sceptic to apply international law and home states generally lack jurisdiction on acts committed abroad, human rights violations keep happening without repercussions[32].

Reminding that a company's business ethics may not always coincide with morality, there have been many cases of TNCs committing human rights violations[33] since the main purpose of a company is not to provide social benefit but to acquire capital gain, and whenever there is a possibility for a company to make a surplus by disregarding human rights without civil or criminal accountability, the company would probably choose to do

[31] Joel R. Pauò, 'Holding Multinational Corporations Responsible Under International Law', *Hastings International and Comparative Law Review* 24, no. 3 (Spring 2001): 285–91.
[32] Josè E. Alvarez, 'Are Corporations "Subjects" of International Law?', chap. II(B).
[33] Lucy Kronforst, 'Transnational Corporations And Human Rights Violations: Focus On Colombia', *Wisconsin International Law Journal* 23, no. 2 (2005): chap. IV.

so. Let us see an example: Fuller, a Minnesota-based glue company, operates manufacturing plants throughout Central and Latin America, including Colombia. One of their products, Resistor glue, contains toluene, a harmful and highly addictive toxin. This glue was inexpensive and widely available, leading to widespread abuse among street children in Colombia, who became known as "Resistoleros." Despite advocacy efforts by human rights and children's activists in the 1980s, Fuller refused to alter their product. The situation escalated in 1993 when a boy died from inhaling the glue, and his mother filed a wrongful death lawsuit against Fuller. Lawyers faced significant challenges in pursuing the case due to Fuller's complex corporate structure and U.S.-based parent company. It was not until 1999, after extensive media coverage and public outcry, that Fuller ceased selling the solvent-based glue and introduced safer alternatives. This is only an instance of the many violations of human rights and cases of company's negligence without legal liability that occur all around the world[34].

A survey by the Special Representative of the Secretary-General in 2006 focused on sixty-five reported abuses by corporations, acknowledging that these cases may represent extreme situations rather than a comprehensive overview. The extractive sector, including oil, gas, and mining, was prominently featured in reported abuses, followed by the food and beverages industry, apparel and footwear, and the information and communication technology sector. For instance, allegations against extractive industries ranged from complicity in crimes against humanity to violations of labour rights and abuses against local communities, particularly indigenous people[35].

iii) Inserting human rights values in BITs

In recent years, there has been a noticeable shift in some BITs towards recognizing the importance of balancing investment promotion and protection with human rights. This shift is evidenced by the inclusion of provisions in certain BITs that emphasize the need to prioritize values such as health, safety, environmental protection, and internationally

[34] Kronforst, 'Transnational Corporations And Human Rights Violations: Focus On Colombia', chap. III.
[35] Special Representative of the Secretary-General, 'Promotion And Protection Of Human Rights. Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', Interim Report (United Nations Economic and Social Council, 22 February 2006), paras 20–30, United Nations digital library.

recognized labour rights alongside investment interests. These provisions come in various forms, including general exceptions or affirmations of national governments' authority to enact measures safeguarding these values. Unlike traditional treaty exceptions, which allow for the disregard of treaty obligations under certain circumstances, the positive language within BITs reinforces the commitment of contracting parties to uphold societal values while honouring treaty obligations. One approach involves integrating statements within the preambles of BITs, serving as political affirmations of the importance of maintaining these values alongside investment interests. Another strategy entails commitments from contracting parties to refrain from lowering standards in specific policy areas to attract foreign investment, potentially elevating these commitments to binding obligations or "best efforts" commitments. For instance, the first investment agreement that imposes obligations to respect human, environmental, and labour rights is the Moroccan-Nigerian BIT signed in December 2016[36].

Although this is undoubtedly a positive development, it is too slow for the urgency of the matter. Furthermore, it would not solve the major underlying ambiguity of the nature of TNCs in international law, that could potentially leave gaps in the international legal system. In the recent decades therefore, a new theoretical framework started developing in relation to businesses responsibilities under human rights, which would culminate in many institutions, UN resolutions and proposed treaties[37], as will be presented below in the next paragraphs.

d) The United Nation's Guiding Principles on Businesses and Human rights

i) History of the Guiding Principles

In response to the inadequacy of a state-centric solution, the public outcry, and the inability of host countries to act on the behalf of their citizens, in the 1970s the United Nations would address the issue of TNCs and human rights through the establishment of

[36] Philippa Osim Inyang, 'The Morocco-Nigeria BIT: An Important Contribution to Ensuring the Accountability of TNCs for Their Human Rights Violations?', *European Scientific Journal, ESJ* 19, no. 2 (31 January 2023): 42, https://doi.org/10.19044/esj.2023.v19n2p40.

[37] Kristoffer Marslev, *Doing Well by Doing Right? Exploring the Potentials and Limitations of a Business Case for Human Rights* (Denmark's National Human Rights Institution: The Danish Institute for Human Right, 2020), chap. 2.1.

UN Commission on Transnational Corporations and the UN Centre for Transnational Corporations (UNCTC). The work of the Commission eventually led to a draft Code of Conduct on Transnational Corporations, that due to significant opposition to the Code, particularly by host states of transnational corporations based in the North, was abandoned in 1994, and the UNCTC was dismantled.[38]

After the failure of the Code, The Draft Norms were formulated within the framework of the former UN Sub-Commission on Human Rights, a subdivision of the Commission on Human Rights, consisting of twenty-six experts appointed by governments but acting in their individual capacities. Notably, the Draft Norms aimed to establish direct human rights obligations on corporations under international law, thereby subjecting them to uniform global standards. However, for the Draft Norms to attain legal validity, states would need to adopt them as a treaty or extensively integrate them into domestic legislation. Although human rights advocacy groups expressed strong support, the Draft Norms encountered minimal backing from governments and faced vehement opposition from international business associations.[39] Consequently, the Commission refrained from advancing the proposal[40]. Instead, in 2005, it authorized the appointment of a Special Representative of the Secretary-General to address human rights issues in transnational corporations and business enterprises.[41]

After many consultations, proposals and research, the Special Representative would finally propose in its final report to the Human Rights Council (UNHCR) the Guiding Principles on Business and Human Rights[42]. This proposal would then be accepted by the UNHCR a few months later [43] making it the strongest instrument of law regarding TNCs responsibilities of human rights in international law.

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[38] César Rodríguez-Garavito, 'Business and Human Rights: Beyond the End of the Beginning', in *Business and Human Rights*, ed. Cesar Rodriguez-Garavito, 1st ed. (Cambridge University Press, 2017), 17, https://doi.org/10.1017/9781316797990.002.

[39] John Gerard Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', in *Research Handbook on Human Rights and Business*, ed. Surya Deva and David Birchall (Edward Elgar Publishing, 2020), 70, https://doi.org/10.4337/9781786436405.00009.

[40] COMMISSION ON HUMAN RIGHTS, 'UN Human Rights Commission Resolution 2004/11' (UN Economic and Social Council, 16 April 2004).

[41] Special Representative of the Secretary-General, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (United Nations General Assembly, 21 March 2011), United Nations digital library.

[42] Special Representative of the Secretary-General, 'Final Report of the Special Representative'.

[43] 'Resolution Adopted by the Human Rights Council 17/4: Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/RES/17/4 § (2011).

ii) The "Protect, Respect and Remedy" Framework and the Scope of the Guiding Principles

The Guiding Principles rest upon three pillars of the "Protect, Respect and Remedy" framework: firstly, they remind that it is all States' responsibility to *protect* human rights and fundamental freedoms; secondly, they reaffirm that it is a responsibility of all businesses to *respect* human rights during their financial operations; finally, they call upon to match the rights and obligations to effective *remedies* for its victims. They apply to all States and to all business enterprises, both transnational and others[44]. It would therefore seem by how they are framed by the Special Representative, that the scope of these Guiding Principles is extremely broad, trying build upon the basis for the birth of a new international law regime and guiding states to impose new obligations upon all businesses, including TNCs.

One of the issues that were presented previously in this paper was the lack of a comprehensive way to define a proper list of human rights that TNCs are obligated to follow. The Guiding Principles take existing norms to solve this problem by declaring that businesses should follow at a minimum the International Bill of Human rights and the International Labour's Organization Declaration on Fundamental Principles and Rights at Work[45]. It is worth reminding that the International Bill of Human Rights includes the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and that these are only the minimum standards of protection businesses should be obligated to follow, therefore additional human rights not explicitly addressed can still be considered part of businesses' obligations. The number of human rights included in the Guiding Principles makes it ambitious, since let us remind ourselves that, while the UDHR is universally considered by all states[46], the two covenants are not. The ICCPR is notably not ratified by the People's Republic of China

[44] Special Representative of the Secretary-General, 'Final Report of the Special Representative', 6.
[45] 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 § (2011), art. 12.
[46] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' 25 (1995).

while the ICESCR is signed but not ratified by the United States[47], making it more difficult for them to also apply these Guiding Principles since they do not feel bounded by all human rights declared in it. Although this might be a problem for the future implementation of these Guiding Principles, it is a step in the right direction as far as the possibility of the enterprises' states to ratify or join the missing covenants is not remote at all. Additionally, the Guiding Principles state that these are the rights *businesses* have to respect, not *states*. This distinction is particularly important, because businesses this means that businesses are not seen as part of state action, but as in a polycentric governance framework, as different personalities within the international setting. Polycentric governance is the theoretical basis of the Guiding Principles, both in the way it was written[48] and in how it frames the specific balance between all stakeholders.

iii) State's responsibility to safeguard human rights.

The first part of the Guiding Principles focuses on the responsibility of states to safeguard human rights, in particular from violations by businesses[49]. It is important to note that according to them, states do not only have an obligation to make sure human rights are respected within their own territory, but that also businesses domiciled in their territory respect human rights throughout their operations, both domestic and foreign. This would have massive consequences for the very nature of international law, since it could mean that home states have a responsibility of ensuring that violations of human rights are not committed outside of their own territory, although only host states have a responsibility to provide judicial remedies to victims[50], that does not mean that home states should not punish businesses committing violations of human rights, indeed the Special Representative makes it clear through his commentary that home states should focus on monitoring their enterprises' actions abroad. The failure to uphold existing laws that directly or indirectly oversee business adherence to human rights standards often reveals

[47] Committee on Economic, Social and Cultural Rights, 'Ratification Status for CESCR - International Covenant on Economic, Social and Cultural Rights', n.d., United Nations Treaty Bodies, accessed 7 May 2024.
[48] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', 74–77.
[49] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, arts. 1–10.
[50] Id. Article 26

a significant legal void in State practices.[51] Thus, it is crucial for States to assess the effectiveness of law enforcement in these areas and identify reasons for any shortcomings, along with implementing reasonable measures to rectify them. Moreover, the Guiding Principles advice states to periodically review the adequacy of these laws in response to evolving circumstances and evaluate whether they, along with relevant policies, foster an environment conducive to businesses respecting human rights.

iv) Businesses' responsibilities to respect human rights.

The Guiding Principles, as their own name suggests, give useful guidance to businesses as to how to act to avoid committing human rights abuses through their own activities. Nevertheless, this was one of the main goals of the Guiding Principles from the start[52], the duty to uphold human rights is a universal benchmark for the conduct of all businesses, regardless of their location. This obligation remains intact regardless of the capacity or willingness of states to fulfil their own human rights commitments and does not diminish those obligations. Furthermore, it surpasses mere compliance with national laws and regulations aimed at safeguarding human rights[53]. The responsibility of businesses is not only limited to their own actions but also to the impacts indirectly linked to their own business operations[54], since businesses may be involved with adverse human rights impacts either through their own activities or because of their business relationships with other parties. In the commentary, the Special Representative clarifies that:

"[…] a business enterprise's 'activities' are understood to include both actions and omissions; and its 'business relationships' are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services"[55].

Therefore, it is a responsibility of businesses enterprises to both actively and passively avoid violations of human rights. Another original element within the Guiding Principles

[51] Belengar Francis Maïnkade, 'Corporate Human Rights Obligations of Investors in Recent Investment Agreements: The Progressive Hardening Process of CSR Clauses', *Heliyon* 9, no. 4 (April 2023): e15120, https://doi.org/10.1016/j.heliyon.2023.e15120.
[52] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', 74.
[53] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, art. 30.
[54] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 13.
[55] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, art. 13 Commentary.

is that giving effective remedies is not only a duty of the states, but also of businesses. Indeed, if an enterprise recognizes that a breach of human rights has occurred, they require to provide remedies either through their own means or by cooperating with state agencies[56]. Later in the paragraph it will be explained better how remedies for victims are framed within the Guiding Principles.

v) Human Rights Due Diligence

Another original notion introduced in the Guiding Principles was human rights due diligence (HRDD). They describe it as it follows:

> 17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking responses as well as communicating how impacts are addressed. Human rights due diligence:
>
> (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships
>
> (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations (c) Should be on-going, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.[57]

HRDD are therefore a process that starts before, continues during and after any business operation. After a company has made a firm commitment to uphold human rights, typically through the establishment of a company policy[58], the process of putting that commitment into practice encompasses three fundamental areas of activity. Firstly, HRDD involves the identification of both existing and potential adverse impacts on human rights[59]. This includes a comprehensive examination of the company's operations and supply chains to pinpoint any activities or practices that may pose risks to human rights. Secondly, HRDD necessitates taking decisive actions to halt, prevent, alleviate, or rectify any adverse impacts identified.[60] This proactive approach may involve implementing new policies, procedures, or initiatives aimed at addressing human rights

[56] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, art. 22.
[57] Ibidem. Art. 17
[58] Ibidem. Art. 16
[59] Ibidem. Art. 17-18
[60] Ibidem Art. 19 and 22

concerns within the company's sphere of influence. Lastly, HRDD entails the ongoing monitoring and reporting of the actions taken to address human rights issues.[61] This involves establishing mechanisms for tracking progress, documenting efforts, and providing transparent disclosure of the company's human rights performance.

Indeed, HRDD is a way for business to analyse their own activities' impact on society and assess actual or possible "human rights risks" that can occur during the business activities.[62] By pinpointing existing or potential negative consequences, the Guiding Principles aim to prompt companies to proactively consider and manage the impact of their operations and partnerships on individuals. This entails establishing mechanisms to identify societal risks, such as discrimination or vulnerability, and understanding how a company's activities and relationships may intersect with these factors. In essence, human rights due diligence involves companies identifying risks to individuals associated with their operations and relationships, and then taking suitable measures to prevent these risks from manifesting as adverse impacts on people's rights.[63] Therefore it is the business' responsibility to apply human rights due diligence, identifying potential or existing human rights violations and, according to article 19, mitigate or cease the risks. HRDD will be further discussed in the next chapter.

vi) Access to Remedy

Providing access to remedies was the third pillar in the "Protect, Respect and Remedy" framework set out by the Special Representative and occupies the third part of the Guiding Principles from article 25 to article 31. Clearly, part of the responsibility of states to protect human rights is also providing that provisions are enforced, abuses are punished, and victims are compensated, especially considering that they are an at-risk minority[64]. Remedies are understood to include "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or

[61] Ibidem. Art. 20-21
[62] Ibidem. Art.17 Commentary
[63] Taylor Mark B., 'Human Rights Due Diligence in Theory and Practice', in *Research Handbook on Human Rights and Business*, ed. Surya Deva and David Birchall (Edward Elgar Publishing, 2020), 88–107, https://doi.org/10.4337/9781786436405.
[64] David Kinley, ed., 'Human Rights and Corporations', *Boston College International & Comparative Law Review* 25, no. 253 (2002): 295, https://doi.org/10.4324/9781315252964.

administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition"[65]. Usually, human rights violations occur in developing countries that may have practical difficulties in dealing with powerful TNCs that commit them[66], and although the Special Representative seemed to be aware of this[67], the Guiding Principles still rely only on host countries' judicial systems to provide remedies for victims, as it states that "States must take appropriate steps to ensure, through […] appropriate means, that when such abuses occur *within their territory and/or jurisdiction* those affected have access to effective remedy"[68]. This might be a big issue in the applicability of state-based judicial remedies, and it was addressed partly by Guiding Principle 26 which expresses that states should ensure the effectiveness of grievance mechanisms and remove practical and legal barriers leading to denial of access to remedies[69]. The Guiding Principles, maybe partly because of this, also introduced three separate ways to give remedies to victims: state-based judicial remedies, state-based non-judicial remedies, and non-state-based remedies. State-based non-judicial grievance mechanisms are mechanisms that fall outside of the judicial branch, they may be administrative, legislative, or other state practices, they can be much more effective to adequately address specific and smaller abuses[70]. Meanwhile, non-state-based grievance mechanisms can be a way to facilitate access to remedies, have smaller costs and transnational reach[71], operational-level mechanisms are grievance mechanisms that can be directly accessed by individuals and administered by business enterprises. Operational-level mechanisms have two main functions: first, as part of their HRDD, they identify adverse human rights impacts by giving a channel for possible victims to report them; second, they make it possible for the grievance identified to be remediated directly by the enterprise.[72] It is important to not make the mistake to think that operational-level mechanisms can be enough for addressing human rights impacts. The commentary of the

[65] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, art. 25 Commentary.
[66] Kronforst, 'Transnational Corporations And Human Rights Violations: Focus On Colombia', 334.
[67] Special Representative of the Secretary-General, 'Promotion And Protection Of Human Rights. Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', paras 27 and 30.
[68] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, art. 25 emphasis added.
[69] Ibidem. Art.26
[70] Ibidem Art. 27 and Art. 27 Commentary
[71] Ibidem Art. 28 Commentary
[72] Ibidem Art. 29 Commentary

Special Representative makes it clear that the foundations of the system of remedy has to be built by the state and that non-state-based grievance mechanisms are only additional tools for early-stage resolution of the issue, other instruments such as international and human rights mechanisms should also be used to supplement the mechanism set in place[73]. Finally, non-judicial and non-state-based grievance mechanisms have effectiveness criteria set by Guiding Principle 31, as they should be:

I) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
II) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
III) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
IV) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
V) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
VI) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
VII) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

VIII) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances[74]

vii) Criticisms of the Guiding Principles

The Guiding Principles have never been thought of the final solution to the issue of TNCs and human rights, even from the Special Representative's point of view[75]. The Guiding Principle was successful in establishing a basis of how states and businesses should act in light of human rights, being endorsed by the OECD countries, the European Union and many TNCs[76]. Although it must be kept in mind that the Guiding Principles remain an instrument of soft law to understand corporate responsibility under human rights, and itself has received criticism.

[73] Ibidem Art. 25 Commentary
[74] Ibidem Art. 31
[75] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', 64.
[76] René Wolfsteller and Yingru Li, 'Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness', *Human Rights Review* 23, no. 1 (March 2022): 1–17, https://doi.org/10.1007/s12142-022-00656-2.

The first problem lies in the differentiation made by the Special Representative between states' duty of protecting human rights and businesses' responsibility to respect them. The precise nature of this differentiation is not clearly articulated by the Guiding Principles, leaving room for speculation about its purpose. One plausible interpretation is that a *duty* implies a moral or legal obligation, whereas a r*esponsibility* implies being held accountable for commendation or praise. This interpretation aligns with how the Special Representative delineates the division of responsibilities for safeguarding human rights. According to this perspective, states bear moral and legal obligations to protect human rights, while TNCs and other business entities may face criticism or reproach for failing to respect human rights, potentially resulting in adverse consequences for the TNC. According to Denis G. Arnold, this distinction is unsustainable because TNCs have a *moral* duty to follow basic human rights[77].

Secondly, human rights advocates, some of whom remained disillusioned by the unsuccessful outcome of the Draft Norms, expressed disappointment over the lack of substantial progress towards implementing binding standards for corporations. As a result, many outright rejected the Guiding Principles. Furthermore, widespread criticism from human rights organizations contended that the Guiding Principles marked a regression in human rights protection, as they failed to integrate established international human rights safeguards pertinent to corporate conduct. Additionally, recurring grievances surfaced regarding the perceived inadequate consideration of civil society perspectives by the Special Representative on these issues.[78]

Nevertheless, after endorsing the Guiding Principles, the Human Right Council would establish an intergovernmental working group to work on a possible binding treaty, the purpose of which would be to implement the Guiding Principles into a binding treaty[79] currently in work, which would be discussed in the next chapter.

[77] Denis G. Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights', *Business Ethics Quarterly* 20, no. 3 (2010): 371–99.
[78] Rodríguez-Garavito, 'Business and Human Rights'.
[79] Resolution adopted by the Human Rights Council 17/4: Human rights and transnational corporations and other business enterprises.

e) The OECD Guidelines

i) History, purpose of the Guidelines and their main concepts

Another instrument of soft law that governs corporate action was introduced through the Organization for Economic Cooperation and Development (OECD) with its OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. The OECD Guidelines were introduced in 1976 and have been periodically reviewed in 2011 and 2023 with the aim of providing recommendations to multinational businesses as to how to operate in respect to sustainable development and addressing potential human rights impacts[80]. They are part of the OECD Declaration on International Investment and Multinational Enterprises, of which all states signatories are obligated to adhere, with some non-OECD countries choosing to adhere as well[81]. They address all multinational enterprises (MNEs) in the territory of the state members, although the Guidelines do not give a formal definition of MNE only as they are understood to be corporations with an international nature in its structure[82].

The Guidelines are divided into two parts, the first containing the guidelines that should be followed by businesses, while the second is focused on the implementation procedures. The first part is further divided into eleven chapters focusing on different areas such as the main concepts and principles, the general policies, disclosure, human rights, employment and industrial relations, the environment, bribery a corruption, consumer interest, technological innovation, competition, and finally taxation. This paragraph will avoid delving too deep into the latter seven chapters and focus mainly on the main concepts of due diligence and human rights as to avoid going beyond the scope of this thesis.

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[80] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD, 2023), 3, https://doi.org/10.1787/81f92357-en.

[81] 'Responsible Business Conduct: The OECD Guidelines for Multinational Enterprises' (Business at OECD, January 2020), 3, https://25159535.fs1.hubspotusercontent-eu1.net/hubfs/25159535/website/documents/pdf/Investment%20and%20RBC/The%20OECD%20Guidelines%20for%20Multinational%20Enterprises%20-%20January%202020.pdf.

[82] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, pt. I(4).

ii) Human Rights and Due diligence

Enterprises should, according to the Guidelines, respect *internationally recognised* human rights of those affected by their activities[83]. The implication being that they are, at a minimum, the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the International Labour Organisation Declaration on Fundamental Principles and Rights at Work[84].

The fourth chapter of the Guidelines focuses on human rights, it goes as follows:

> States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:
>
> 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
> 2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
> 3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
> 4. Have a publicly available policy commitment to respect human rights.
> 5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
> 6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts[85]

The framework of the UN Guiding Principles is clearly visible in this chapter, as also stated in its commentary. States have a duty in safeguarding human rights, and SME have a duty to respect them[86]. Enterprises have to also actively prevent and mitigate human rights impacts with a policy commitment to respect them. Furthermore, there is a clear obligation for enterprises to carry out human rights due diligence.

Therefore, enterprises should carry out risk-based due diligence by integrating it into their risk management systems to identify, prevent, and mitigate both actual and potential

[83] Ibidem, pt. I(II)(A)(2)
[84] Ibidem, pt. I(IV) *Commentary* 44.
[85] Ibidem, pt. I(IV)
[86] Ibidem, pt. I(IV), *Commentary* 41 and 42

adverse impacts[87]. The scope and extent of due diligence should be tailored to the specific circumstances of each situation. Enterprises must avoid causing or contributing to adverse impacts through their activities and address such impacts when they occur, including cooperating in remediation efforts[88]. Furthermore, enterprises should seek to prevent or mitigate adverse impacts linked to their operations, products, or services through business relationships, without transferring the responsibility for these impacts to the entity that directly causes them[89]. It is noticeable the influence of the Special Representative's notion of human rights due diligence from the UN Guiding Principles, and in fact the Guidelines seem to base themselves upon the voluntary self-control of businesses as the polycentric governance philosophy at the basis of the Guiding Principles. The OECD also provides the OECD Due Diligence Guidance on Responsible Business Conduct which further gives guidelines to businesses on how to specifically carry out HDRR[90].

iii) Final considerations

In conclusion, the OECD Guidelines are immensely beneficial for MNEs by providing a clear and structured approach to responsible business conduct. They offer practical advice and foster a culture of good governance and ethical behaviour. Nonetheless, their voluntary nature means that they fall short of establishing a legal basis for corporate accountability in human rights matters. As such, while the guidelines are a significant tool for promoting good business practices, they should be complemented by stronger legal frameworks to ensure corporate responsibility and accountability in protecting human rights.

f) Conclusion

When analysing the current regime regarding corporate responsibility on human rights, we find more questions than answers. The heterogeneity of IIL and the absence legally binding instrument for corporations has led to a lack of clearness on what are their duties and, most importantly, a lack of instruments to make corporations liable whenever these

[87] Ibidem, pt. I(II)(A)(11)
[88] Ibidem, pt. I(II)(A)(12)
[89] Ibidem, pt. I(II)(A)(13)
[90] *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD, 2018).

duties or obligations are violated. Corporations have much more rights than duties in practical terms, and victims often lack the possibility to access remedies. Fortunately, the regime has been steadily progressing towards a clearer delineation of what are the duties of TNCs and the introduction of judicial and non-judicial grievances mechanisms. The adoption of the UN Guiding Principles has set the ground for big debates over this new forming regime and fostered the development of new instruments such as the OECD Guidelines and, as will be presented in the next chapter, of the proposed legally binding instrument on Business and Human Rights. Furthermore, states and regional institutions have been working on their own instruments, some of which will be presented in the fourth chapter of this thesis. Nevertheless, there is still need for much work to be done in this regard, as the current state is still very much confusing and inaccessible to the victims.

III) The Proposed Draft of the Binding Instrument on Business and Human Rights

a) Introduction

i) History of the Binding Instrument

Keeping in mind the success of the UN Guiding Principles, the Human Rights Council (UNHRC) established in 2014 an Open-ended Intergovernmental Working Group (OEIGWG) with the express purpose of drafting a legally binding instrument on transnational corporations and other business enterprises with respect to human rights[91]. The OEIGWG has had nine sessions at the time of the writing of this thesis[92], with a scheduled tenth session to be held in October 2024[93], and has submitted several drafts of

[91] 'Resolution Adopted by the Human Rights Council 26/9: Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', A/HRC/RES/26/9 § (2014), https://primarysources.brillonline.com/browse/human-rights-documents-online/promotion-and-protection-of-all-human-rights-civil-political-economic-social-and-cultural-rights-including-the-right-to-development;hrdhrd99702016149.

[92] Cristian Espinosa Cañizares, 'Report on the Ninth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (Human Rights Council, 5 April 2024), paras 1 and 2.

[93] Chair-Rapporteur of the OEIWG, 'Proposed Roadmap Towards The 10th Session Of The Open-Ended Intergovernmental Working Group On Transnational Corporations And Other Business Enterprises With

the legally binding instrument. To briefly summarize, the Zero draft was written during the fourth session[94], the First revised Draft was discussed during the fifth session[95], the Second revised Draft during the sixth[96], the seventh and eight sessions were dedicated to the Third revised Draft[97], and finally the ninth session was dedicated to the Updated Draft with the textual proposals submitted by states[98]. Building on the 'protect, respect and remedy' framework of the Guiding Principles, the draft of the LBI's statement of purpose confirms the purpose of the treaty as clarifying and ensuring respect for human rights and environmental norms and ensuring access to justice and remedies for victims of violations[99].

ii) A spiritual successor to the Guiding Principles, although more controversial

The formation of the OEIGWG was clearly inspired by the polycentric governance philosophy followed by the Special Representative when writing the Guiding Principles,

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Respect To Human Rights', March 2024, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session10/igwg-10th-proposed-roadmap.pdf.

[94] OEIGWG, 'Zero Draft Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises', 16 July 2018, https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

[95] Emilio Rafael Izquierdo Miño, 'Report on the Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 20 March 2020, https://primarysources.brillonline.com/browse/human-rights-documents-online/promotion-and-protection-of-all-human-rights-civil-political-economic-social-and-cultural-rights-including-the-right-to-development;hrdhrd99702016149.

[96] Emilio Rafael Izquierdo Miño, 'Report on the Sixth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', 19 March 2021.

[97] 'Text of the Third Revised Draft Legally Binding Instrument with Textual Proposals Submitted by States during the Seventh and the Eighth Sessions of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', October 2023, https://documents.un.org/doc/undoc/gen/g23/008/93/pdf/g2300893.pdf?token=FV28ZYUk32zM3uz2ck&fe=true.

[98] 'Text of the Updated Draft Legally Binding Instrument with the Textual Proposals Submitted by States during the Ninth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', July 2023, https://documents.un.org/doc/undoc/gen/g24/022/86/pdf/g2402286.pdf?token=aRiU4RX6Piuhj6oQ1V&fe=true; OEIGWG, 'Updated Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (OEIGWG, July 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf.

[99] 'Third Revised Draft of the LBIBHR', art. 2.1.

since it includes many, if not all, stakeholders of a possible binding treaty on businesses and human right, such as states representatives, civil society actors, non-governmental organizations, national and international human rights organizations, and many transnational businesses[100]. The various drafts sparked much debate in the discourse of businesses and human rights within international law, both over the substantial changes it would bring in the world and over what they signify in the context of international law. Indeed, its own drafting process has been notoriously tumultuous even before the publication of the Zero Draft[101], with Resolution 26/9 of the UNHRC barely passing its vote clearly showing the strong controversy over the drafting of the binding instrument[102]. In particular, the major division seemed to be between the western, industrial, countries, and the rest of the world, as also shown in the voting pattern of the resolution, who indeed seemed to be strongly opposed to a binding treaty, preferring a more voluntary instrument akin to the Guiding Principles and the Global Compact[103] as they barely participated in the first session of the OEIGWG[104]. To illustrate an example, the United States did not join the OEIGWG until the seventh session, and even then, its participation was described as: "a form of counter diplomacy geared towards delaying progress and watering down commitments"[105]. Nevertheless, despite the controversy and criticism, and despite the difficulties in reaching a consensus conundrum, the work has been going on steadily for years and right now the LBI enjoys broad support from many countries and institutions although there is still a lack of consensus on specific and fundamental issues[106].

This chapter will focus on the specific provisions of the Third revised draft and the Updated draft, the discussions around them, the new notions they would bring and the consequences they would have on the current regime. The structure of the chapter will

[100] Cristian Espinosa Cañizares, 'Report of the Ninth Session of the OEIGWG' Annex.
[101] Giorgia Papalia, 'Doing Business Right: The Case For A Business And Human Rights Treaty', *Perth International Law Journal* 3 (2018): 96–114.
[102] Resolution adopted by the Human Rights Council 26/9: Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 3.
[103] Caroline Lichuma, 'International Investment Law Reforms and the Draft Business and Human Rights Treaty: The More Things Change, the More They Remain the Same?', *The Journal of World Investment & Trade* 24, no. 4–5 (25 September 2023): 736, https://doi.org/10.1163/22119000-12340308.
[104] Carlos Lopez and Ben Shea, 'Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session', *Business and Human Rights Journal* 1, no. 1 (January 2016): chap. II, https://doi.org/10.1017/bhj.2015.15.
[105] Lichuma, 'International Investment Law Reforms and the Draft Business and Human Rights Treaty', 737.
[106] Cristian Espinosa Cañizares, 'Report of the Ninth Session of the OEIGWG', para. 28.

follow the structure of the Draft: the first paragraph will focus on the purpose of the LBI, its scope and the question of consistency with the rest of international law; the second paragraph will focus on the issue of the access to remedies for the victims; the third on the protection of victims and prevention instruments such as human rights due diligence; and the forth on the establishment of international collaboration institutions and instruments.

b) The purpose and scope of the legally binding instrument

i) The purpose of the LBI

The purpose of the LBI is set out in article 2 of the Draft. As it can be seen from the text of the Third Revision presented by the Chair-Rapporteur, the article was hotly debated in its specific contents by many state representatives in their text proposals[107]. For example, the USA and Brazil (with the support of the EU) have proposed that fulfilling human rights is a *responsibility* of TNCs instead of an *obligation* as originally set out in the previous draft, while Palestine wanted to keep the original version, the Updated Draft[108] shows that the OEIGWG chose to follow the "Protect, Respect and Remedy" framework of the UN Guiding Principles: States have an obligation of making sure human rights are respected while TNCs have a responsibility of respecting human rights[109]. As presented in the previous chapter, the framework and its philosophy has seen some controversy over the "responsibility" of TNCs, as it may be argued that TNCs should also have a moral duty of respecting and promoting human rights. Clearly though, the will of not putting direct obligations unto corporations is based on the, arguably outdated, view that states are the main subjects of international law and that corporations lack international capacity[110]. This thesis will refrain from presenting every objection and proposal since it is beyond the scope of this thesis, as it would extend the length beyond its intended parameters.

[107] 'Third Revised Draft of the LBIBHR', art. 2.
[108] OEIGWG, 'The Updated Draft of the LBIBHR', art. 2(b).
[109] Special Representative of the Secretary-General, 'Final Report of the Special Representative', para. 6.
[110] Lichuma, 'International Investment Law Reforms and the Draft Business and Human Rights Treaty', 740.

The purpose of the LBI according to the, most recent, Updated Draft is:

(a) To clarify and facilitate effective **implementation of the obligation of States** to respect, protect, fulfil and promote human rights in the context of business activities, particularly those of transnational character;
(b) To clarify and ensure respect and fulfilment of the human rights **responsibilities** of business enterprises
(c) To **prevent** the occurrence of human rights abuses in the context of business activities by effective mechanisms for monitoring, enforceability and accountability;
(d) **To ensure access to** gender-responsive, child-sensitive and victim-centred justice and effective, adequate and timely **remedy for victims** of human rights abuses in the context of business activities;
(e) To facilitate and strengthen **mutual legal assistance and international cooperation** to prevent and mitigate human rights abuses in the context of business activities, particularly those of transnational character, and provide access to justice and effective, adequate, and timely remedy for victims.[111]

The LBI seems to be clearly set out to implement the UN Guiding Principles by clarifying exactly how states should act in respect to businesses' responsibilities to respect human rights and ensuring access to remedies for the victims. It also adds, innovatively, the establishment of a sort of international cooperation to set out the objective of the LBI. The specific of what sort of "international cooperation" the LBI wants to set out will be discussed further down the chapter, but some questions of practicality surely immediately arise when reading this article is: what are the human rights states obliged to protect? Are they different from the human rights businesses have a responsibility to respect? What businesses are covered in these articles? Some of these questions about the scope of the LBI are covered in the subsequent articles.

ii) Personal and material scope

The scope of the LBI, as outlined in Article 3, is expansive in its personal jurisdiction yet constrained in its *ratione materiae*. Firstly, the LBI covers all business activities, from the small, family-based enterprise to the giant transnational company, no matter the size of its business operations[112], of course, its precise responsibility and risk of breach depend on the enterprise's size[113]. This seems to have changed in the Third revision, since before it used to only refer to TNCs.[114]

[111] 'The Updated Draft of the LBIBHR', art. 2 emphasis added.
[112] 'The Updated Draft of the LBIBHR', art. 3.1.
[113] Ibidem art. 3.2
[114] OEIGWG, 'Zero Draft LBIBHR', art. 3.1.

Secondly, the exact human rights covered by the LBI is not set in stone, but as article 3.3 states "This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms *binding on the State Parties of this (Legally Binding Instrument*)". This seems to be in line with the Guiding Principles, which did not even specify what human rights obligations were covered by them but only that states *had* an obligation to follow human rights[115], presumably, a *legal* obligation. This is in some way expected since not every human right set in the various treaties is recognized by every state, and if the LBI explicitly stated which human right treaties are binding through the ratification of it, it may have alienated some countries to sign it.

It is still not clear which human rights businesses are responsible for respecting, since unlike the Guiding Principles, there is no provision about them. The only mention is in the preamble, which underlines that "business enterprises […] have the responsibility to respect internationally recognized human rights"[116], whatever "internationally recognized" means is not clear. In international criminal law the same sentence "internationally recognized human rights" is used in article 21(3) of the Rome statute, so we could take inspiration from the court's interpretation of that article to understand what "internationally recognized" means, and the International Criminal Court seems to have regarded this article merely as a rule of interpretation to the Statute and not as a substantive provision[117]. This seems to be in line with the OEIGWG's fear of imposing obligations over businesses, and the state-centric philosophy of the LBI.

iii) Consistency with other rules of international law

Finally, article 14 lays down some rules regarding the LBI's consistency with international law. It makes it clear that states should fulfil their obligations under the LBI while respecting the principles of sovereign equality and territorial integrity of other states, the jurisdiction of other states (except in the cases underlined in art.9, which will be discussed further down in the chapter), the states own domestic law and existing

[115] Special Representative of the Secretary-General, 'Final Report of the Special Representative' Annex. Art. 1, commentary.
[116] 'The Updated Draft of the LBIBHR' (PP12).
[117] Rebecca Young, '"INTERNATIONALLY RECOGNIZED HUMAN RIGHTS" BEFORE THE INTERNATIONAL CRIMINAL COURT', *International and Comparative Law Quarterly* 60, no. 1 (January 2011): 189–208, https://doi.org/10.1017/S0020589310000710.

treaties, and the state immunity[118]. Although article 14.5 is the most important in this regard:

"All existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, **including trade and investment agreements**, shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments."[119]

This article is probably one of the most important and discussed one of the LBI, as it has been revised in all versions. The issue of making human rights "higher in hierarchy" than international investment law was raised early in the drafting process, but it was later discarded since, save for the specified *jus cogens*, there is no hierarchy within international law. Nevertheless, from the third revision, the issue of coinciding property rights of foreign investors in trade and investment agreements and human rights was finally addressed through this provision, making human rights important over the interpretation of past and future international investment law agreements[120].

c) Access to remedy for victims

i) Broad ratione loci

Access to remedy for the victims has always been a focal point of the discussion over the responsibility of businesses and human rights, even being the third pillar of the "Protect, Respect and Remedy" framework of the Special Representative. This is not surprising since this debate is not only normatively based, but also based on the practical and legal complications that make the usual victims of human rights abuses, workers from developing countries, by TNCs unable to even access any form of remedy for the injustice occurred[121].

One of the most prominent reasons why access for remedies was often denied is the lack of jurisdiction of courts, since it is often not clear whether, for example, the host state's court has jurisdiction over a company based in another country, or if it can override the

[118] 'The Updated Draft of the LBIBHR', art. 14.
[119] Ibidem art. 14.5
[120] Lichuma, 'International Investment Law Reforms and the Draft Business and Human Rights Treaty', para. 3.3.
[121] See first chapter

property rights given by investment agreements for human rights. Article 9 fortunately tackles this legal void. Jurisdiction can be conferred to national courts depending on where the human right abuse or harm *took place*; where the *offender* is domiciled, in the case of a legal person, or has the citizenship of, in case of a natural person; where the *victim* is a national of or has residence in[122]. Therefore, if the worker, national of country A, of a TNC, domiciled in country B, wants to open proceedings against their company for an abuse that took place in country C, they can do so from three different courts for each country A, B or C. It must be noted that extra-territorial jurisdiction has been possible for a while now, especially on the issue of human rights law, although many countries avoid enacting domestic laws for political reasons[123], but adding this possibility in a treaty can be a way of showing the political will of the international community and pressure the remaining countries. Obviously, the broad possibilities of conferring jurisdiction can lead to different courts starting proceedings for the same issue, instead of choosing a higher court, article 9.4 clarifies that the two or more court should "consult one another with a view to coordinating their actions"[124]. The OEIGWG still shows its state-centric view of the LBI with the way access to remedies for the victims is tackled, since it still heavily relies on national courts to deliver remedies, ignoring the calls for an established international court which would have probably ensured effective remedies[125]. The establishment of an international court would have probably helped to solve those previously mentioned situations in which judicial means are either practically inefficient, corrupt or biased[126], though it would have been a far reach to ask to state parties to give up their jurisdiction so broadly, furthermore the freedom of choice for the forum where to initiate proceedings would probably already counterbalanced the issue.

[122] 'The Updated Draft of the LBIBHR', art. 9.1.
[123] Doug Cassel, 'State Jurisdiction over Transnational Business Activity Affecting Human Rights', in *Research Handbook on Human Rights and Business*, ed. Surya Deva and David Birchall (Edward Elgar Publishing, 2020), https://doi.org/10.4337/9781786436405.00017.
[124] 'The Updated Draft of the LBIBHR', art. 9.4.
[125] Lichuma, 'International Investment Law Reforms and the Draft Business and Human Rights Treaty', para. 4.3.
[126] David Bilchitz, 'The Moral and Legal Necessity for a Business and Human Rights Treaty', n.d., 11.

ii) The characteristics of the access to remedies

Access to remedies itself is regulated in article 7 of the LBI. According to article 7.1:

> 7.1. States Parties shall provide their relevant State agencies, with the necessary competence in accordance with this (Legally Binding Instrument) to enable victims' access to **adequate, timely and effective** remedy and access to justice, and to overcome the specific obstacles which women and groups in **vulnerable or marginalized** situations face in accessing such mechanisms and remedies.[127]

The rest of article 7 specifies mechanisms through which adequate, timely and effective access to justice and remedy can be provided to the victims, notable is article 7.4(d) that considers the removal of the burden of proof[128] so to ensure easier access to justice under certain circumstances. In legal terms, the reversal of the burden of proof shifts the obligation to prove a claim from the plaintiff to the defendant. The provision was probably inspired by existing environmental treaties, such as the Escazu Agreement, because it may be harder for the defendants to provide evidence of misbehaviour[129]. Also notable is article 7.4(b) which addresses the possible financial burden that victims may have due to proceedings, and that states should remove if necessary[130]. For the same reason, article 15.7 even institutes an International Fund for Victims, due to the consideration given to the distinct challenges encountered by various demographic groups. This approach acknowledges and addresses the diverse barriers that these groups may encounter in their pursuit of remedies within the legal framework, aiming to ensure inclusive support mechanisms tailored to their specific needs and circumstances[131].

iii) The removal of the statute of limitations and other facilitators in accessing remedies

To further aid the victim's access to remedy, article 10 permits the elimination of the statute of limitations for human rights abuses caused by business activities. Originally, the removal of the statute of limitations was going to be given to all human rights abuses[132] but the Updated Draft unfortunately limited it only to "human rights abuses

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[127] 'The Updated Draft of the LBIBHR', art. 7.1 emphasis added.
[128] Ibidem art. 7.4(d)
[129] Zgjim Mikullovci, 'Overview of the Proposed Binding Treaty on Business and Human Rights', accessed 15 May 2024, https://www.law.georgetown.edu/ctbl/blog/an-overview-of-the-proposed-legally-binding-instrument-to-regulate-in-international-human-rights-law-the-activities-of-transnational-corporations-and-other-business-enterprises/.
[130] 'The Updated Draft of the LBIBHR', art. 7.4(b).
[131] Ibidem art. 15.7
[132] 'Third Revised Draft of the LBIBHR', art. 10.1.

which constitute the most serious crimes of concern to the international community as a whole, including war crimes, crimes against humanity or crimes of genocide"[133], although the following article specifies that even when the abuse does not fall under the scope of article 10.1, the limitation period should be appropriate with the severity of the breach and not restrictive according to the context of the circumstances[134].

The Updated Draft has removed the possibility provided in the Third Draft to remove the doctrine of *forum non conveniens*[135], which was seen controversial since it is a central doctrine within common law countries. *Forum non conveniens* is the doctrine that allows for a court to reject a case because it considers that another court is better suited to hear it[136]. It is unfortunate that this provision was removed in the latest draft, since victims may not have the resources to access foreign courts in the case their own state's court rejects the case brought upon them, nevertheless, the other provisions may compensate for this practical gap and its removal was probably essential to ensure the support of the LBI.

iv) Judicial proceedings against a state?

Although the LBI imposes a direct, binding, obligation unto states to protect human rights from corporate action, it seems that there is no form of remediation for victims when states party might fail to fulfil this duty. In the European tradition, there is the notion of Drittwirkung, which governs the horizontal direct application of constitutional norms, and whether the States might be brought to civil proceedings by a private actor when it fails to protect him by another private actor[137]. It might be interesting to see whether this LBI, when ratified, could give the opportunity to victims to sue their state on the ground of failing to protect him from human rights violations. Although unlikely, it is worth considering this possibility.

Regardless, it is remarkable how much the LBI would help ensuring easier access to justice for the victims of corporate malpractice. The UN Guiding Principles did not

[133] 'The Updated Draft of the LBIBHR', art. 10.1.
[134] Ibidem, art. 10.2
[135] 'Third Revised Draft of the LBIBHR', art. 7.3(d).
[136] Marco Pistis, 'Forum Non Conveniens', 17 May 2016, https://www.ipglexandtax.it/file_upload/p1aivarf5485sv851fgr5p5637.pdf.
[137] Eric Engle, 'Third Party Effect of Fundamental Rights (Drittwirkung)', *Hanse Law Review*, European Law / Europarecht, 5, no. 2 (2009): 165–73.

introduce practical measures for ensuring that access to remedy for the victims would be available, therefore the LBI could give big benefits for victims of the state parties.

d) Protection of victims and prevention mechanisms

i) Protection of victims

Articles 4 and 5 regulate the rights and protection mechanisms of victims. Victims are defined as "any person or group of persons who suffered a human rights abuse in the context of business activities", the immediate family members or dependents of the direct victim may be included as "victims", and the status of victim does not depend on their nationality, residency or whether the perpetrator of the abuse was identified but by the abuse itself[138]. According to the LBI, victims enjoy all international recognized human rights and fundamental freedoms as a minimum[139], although it is still not clear what "internationally recognized" may mean in this context as it was in the case of businesses' responsibility[140], nevertheless the following paragraph specifies some rights *inter alia* that victims enjoy. Included are several fundamental freedoms, positive and negative rights, social, civil and participation rights[141], and the right of asking for precautionary measures during proceedings[142]. A crucial issue lies in the limited access to information pertinent to human rights. In reality, significant power differentials and information imbalances pose substantial challenges for individuals and communities affected by adverse corporate actions on human rights who seek redress. The absence of data regarding corporate operations and their impacts complicates the pursuit of strong legal recourse for victims. Often, this crucial information is either unavailable or controlled by the corporate entity in question. Furthermore, the absence of clarity regarding intricate and opaque legal and operational frameworks can impede victims of corporate human rights violations from initiating legal actions against multinational corporations[143]. To this

[138] 'The Updated Draft of the LBIBHR', art. 1.1.
[139] Ibidem, art. 4.1
[140] See paragraph b of this dissertation.
[141] 'The Updated Draft of the LBIBHR', art. 4.2.
[142] Ibidem, art. 4.4
[143] Nicola Jägers, 'Access to Effective Remedy: The Role of Information', in *Research Handbook on Human Rights and Business*, ed. Surya Deva and David Birchall (Edward Elgar Publishing, 2020), 404, https://doi.org/10.4337/9781786436405.00029.

matter, the LBI would guarantee access to information for victims in all languages[144] and oblige state parties to monitor the businesses' remedies in cases of human rights abuses[145] while taking into account the imbalances of power between victims and businesses[146] Finally, state parties have an obligation in protecting victims, their representatives, families, and witnesses against any illegal infringement, encompassing instances occurring before, during, and after the initiation of legal proceedings[147], actively investigate possible human rights abuses[148], and create a safe environment for victims[149].

ii) Human rights due diligence as a prevention mechanism

As previously mentioned, the OEIGWG chose not to impose direct obligations over businesses and kept the "Protect, Respect, Remedy" framework of the Guiding Principles. However, the LBI rarely mentions the "Respect" side of the framework or even businesses altogether since it mainly focuses on States and imposes obligations over them. In fact, article 6 merely focuses on mechanisms of prevention of the occurrence of human rights abuses by corporations, entrusting state parties to enact laws on the matter[150]. Whilst the Guiding Principles did set guidelines for corporations to respect human rights[151], the LBI does not give practical instructions to businesses in any way, exception made for obliging states to enact laws that "ensure the practice of human rights due diligence"[152]. Human rights due diligence (HRDD) is defined as following:

> […] the processes by which business enterprises identify, prevent, mitigate and account for how they address their adverse human rights impacts. [..] these processes will in every case comprise the following elements:
>
> (a) **identifying** and assessing any adverse human rights impacts with which the business enterprise may be involved through its own activities or as a result of its business relationships;
>
> (b) taking appropriate measures to **prevent and mitigate** such adverse human rights impacts;
>
> (c) **monitoring the effectiveness** of its measures to address such adverse human rights impacts; and
>
> (d) **communicating** how the relevant business enterprise addresses such adverse human rights impacts regularly and in an accessible manner to stakeholders, particularly to affected and potentially affected persons.[153]

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[144] 'The Updated Draft of the LBIBHR', art. 4.2(f),4.2(g) and 7.3(b).
[145] Ibidem art. 7.5(c)
[146] Ibidem art. 7.3(c)
[147] Ibidem art. 5.1
[148] Ibidem art. 5.3
[149] Ibidem art. 5.2
[150] Ibidem, art. 6.1,6.2,6.3
[151] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, arts. 16–21.
[152] 'The Updated Draft of the LBIBHR', art. 6.2(c).
[153] Ibidem, art. 1.8

Again, these are only broad concepts of what HRDD is, unfortunately there is no provision that specifies *how* businesses should introduce HRDD[154]. There is more specification within the Guiding Principles than the LBI, which means that state parties could put different rules and requirements over businesses' practice of HRDD. Therefore, if the biggest perpetrators of human rights abuses committed in developing countries are TNCs with their company domiciliated in western countries, that, as outlined earlier, are more opposed to the drafting of the LBI, their HRDD would probably be regulated from the western countries' laws, which could be more relaxed. If this would be the case, the effectiveness of preventing human rights abuses may be compromised or even non-existent. Even non-state grievances are not mentioned within the latest draft of the LBI as opposed to the Guiding Principles which considered them a major step stone for the immediate and effective access to remedy[155].

e) Committee and International Cooperation

i) An international dimension

Given the transnational nature of many corporations and the complex webs of supply chains spanning multiple jurisdictions, effective regulation necessitates collaborative efforts among nations. International cooperation is essential to ensure the implementation and enforcement of standards that hold corporations accountable for their human rights impacts globally. Furthermore, coordination among states facilitates the sharing of best practices, resources, and expertise, enabling more comprehensive approaches to addressing corporate abuses. Additionally, victims may have practical barriers due to financial constraints and poor infrastructure to reach on the domiciled territory of the TNC committing the abuse. Therefore, the LBI has dedicated article 12 to Mutual Legal Assistance mechanisms, article 13 to international cooperation and some of article 14 to the establishment of international institutions.

[154] Exception made for article 6.4, which only obliges states to make sure HRDD takes into consideration minorities and in general groups with a heightened risk of receiving human rights abuses.
[155] Special Representative of the Secretary-General, 'Final Report of the Special Representative'.

ii) Mutual Legal Assistance

Specifically, Mutual Legal Assistance emphasizes the necessity for collaboration to expedite criminal, civil, and administrative proceedings, including facilitating the transmission and service of documents and evidence collection in civil cases[156]. States parties are required to adhere to existing treaties or arrangements on Mutual Legal Assistance and enhance cooperation to bolster enforcement efforts. This involves establishing communication channels between relevant state agencies to exchange information swiftly and securely, enabling early breach identification and sharing insights for preventing business involvement in human rights abuses[157]. Additionally, states must ensure their agencies have the requisite support and resources for effective utilization of mutual legal assistance mechanisms and contemplate bilateral or multilateral agreements to streamline requests and information exchange between relevant authorities[158]. Mutual Legal Assistance, and in general the provisions of the LBI, should also be enhanced through international collaboration on all levels[159].

iii) The three institutions

The LBI also introduces three institutions for the correct implementation of the provisions. They are the Committee, the Conference of State Parties, and the International Fund for Victims. As the Fund has been already presented, this last part will be shortly dedicated to the first two. In particular, the Committee is a non-political institution composed by twelve members (later extended to 18) voted by the state parties, these members will not represent the states but act in their personal capacity and should be elected according to their recognized competences in the field[160]. The Committee would not have discretionary power but have monitoring functions over the states, through the submission of recommendations and reports, help states in the implementation of the LBI, and provide useful information to them[161]. The Conference purpose is instead to discuss matters pertinent to the implementation of the LBI, and to address any further developments necessary for achieving its objectives. These gatherings serve as forums

[156] 'The Updated Draft of the LBIBHR', art. 12.1.
[157] Ibidem, art. 12.3
[158] Ibidem art. 12.4
[159] Ibidem, art.13
[160] Ibidem, art. 15.1
[161] Ibidem, art 15.4

for reviewing progress, addressing challenges, and strategizing for the continued effectiveness and relevance of the LBI[162].

f) Conclusion

Despite the criticisms levelled against the LBI, as discussed in this chapter, its potential benefits remain considerable. By offering practical guidance for states to translate the often-abstract Guiding Principles into concrete measures within their domestic legal frameworks, the LBI holds promise for enhancing human rights protections in the context of business activities. Moreover, the work of the OEIGWG has spurred significant normative discourse regarding the intersection of business practices and human rights within international law. While the final iteration of the LBI may not fully satisfy all proponents' expectations, it has the potential to inaugurate an innovative realm of corporate accountability, compelling businesses to reckon with their impact on human rights and fostering a more responsible approach to their conduct. As such, despite its imperfections, the LBI represents a pivotal step forward in the ongoing quest to reconcile corporate activities with human rights imperatives on a global scale.

IV) National and Regional developments on corporate responsibility over human rights

a) Introduction

The previous chapters merely focused on international instruments that focused on corporate responsibility over human rights abuses, although the current position of the international community is that states must safeguard human rights from the actions of businesses. It is therefore necessary to analyse whether and how states have been safeguarding these principles. The multinational nature of TNCs make it hard for host countries to make them responsible of human rights violations, since they enjoy special protection given by their investment treaties and because host countries' courts may lack

[162] Lichuma, 'International Investment Law Reforms and the Draft Business and Human Rights Treaty', 721.

jurisdiction over the acts committed by a company domiciliated outside of the nations' territory. Therefore, the burden of making TNCs accountable for their actions is often associated with their countries of origin[163].

The Guiding Principles have been big influencing factors in this regard, as their "Protect, Respect, Remedy" framework has been used relatively recently as a source for state responsibility of neglecting their duties in safeguarding human rights from businesses, such as in *LIDHO and Others v. Republic of Côte d'Ivoire*[164]. The *Ligue Ivoirienne Des Droits De L'homme* (LIDHO) brought Côte d'Ivoire to the African Court on Human and People's Rights to civil proceedings on behalf of the victims of the toxic wastes dumped by the cargo ship M.V. Probo Koala owned by TRAFIGURA Limited. The toxic waste caused the death of seventeen people while hundreds of thousands of people suffered poor health symptoms such as nausea, headaches, vomiting, rashes and nosebleeds. TRAFIGURA Limited paid 95 billion CAF Francs in exchange for a waiver by the state which then established a compensation program, although it did not cover all victims who then brought several proceedings to their own domestic courts claiming that a miscarriage of justice had occurred. The domestic courts all acquitted government officials of any wrongdoings effectively failing to ensure access to remedy[165]. The African Court found that Côte d'Ivoire had violated, *inter alia*, partially the right to effective remedy[166]. It must be mentioned though, that the court did not assert that this right arose from the Guiding Principles, as they are an instrument of soft law, but when asserting responsibility. In the words of the Court:

> the Court notes that even though the responsibility, inter alia, to respect the obligations of international law is incumbent primarily on States, it is also true that this responsibility is incumbent on companies, notably, multinational companies. In this regard, the Court refers to the United Nations Guiding Principles on Business and Human Rights to recall that "The responsibility of enterprises in the respect for human rights is independent of the capacity or the determination of states to protect human rights". [..]

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[163] Nicola M. C. P. Jagers and Marie-Jose van der Heijden, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands Symposium: Corporate Liability for Grave Breaches of International Law', *Brooklyn Journal of International Law* 33, no. 3 (2008 2007): 835–36; Robert McCorquodale, 'Corporate Social Responsibility and International Human Rights Law', *Journal of Business Ethics* 87, no. S2 (August 2009): 387, https://doi.org/10.1007/s10551-009-0296-5.
[164] LIDHO and Others v Republic of Cote d'Ivoire, No. 041/2016 (African Court on Human and Peoples Rights 5 September 2023) para. 143.
[165] Florence Shako, 'The Scope of State Responsibility for Business-Related Human Rights Abuses: The Toxic Journey of Trafigura', *Opinio Juris* (blog), 28 February 2024, http://opiniojuris.org/2024/02/28/the-scope-of-state-responsibility-for-business-related-human-rights-abuses-the-toxic-journey-of-trafigura/.
[166] *LIDHO v. Cote d'Ivoire* para. 163.

Be that as it may, the Court notes that in the instant case, even though the multinational company, TRAFIGURA Limited, which hired the MV Probo Koala was at the origin of the impugned violations, **the main responsibility for human rights violations** resulting from the dumping of the toxic waste in Abidjan **is, ultimately, borne by the Respondent state**.[167]

The view of the Court confirms the main theoretical framework set up by the Guiding Principles, that the state had an obligation to safeguard human rights against business practices and provide access to remedy.

This is merely an example provided to understand why national and regional instruments are required in the current understanding of setting TNCs accountable for human rights abuses, furthermore whether such instruments are set up in place is crucial in establishing state practice for the further development of international law.

This following chapter will delve into only some of the developed and developing instruments national and regional institutions have been setting up to regulate TNCs practices against human rights abuses. In particular, the Alien Tort Claims Act of the United States, the United Kingdom's Human Rights and Environment Act and the European Union's Directive on Corporate Sustainability Due to Diligence will be the focus of the chapter, the first being a general source of access to remedy for non-nationals from abuses committed by US companies, the latter two being a recent development of specific legislation targeted to businesses. Although many more states provide some type of instrument[168], the focus will be on these three specific examples as they are the most relevant in the western legal framework and as to maintain conciseness and manageability within the scope of this discussion. Additionally, the choice is based upon the idea that host countries are most often legally and practically unable to safeguard human rights, and that western, developed countries such as the United States, the United Kingdom and the Member States of the European Union are the biggest game changers regarding proper regulation of TNCs.

[167] *LIDHO v. Cote d'Ivoire* para. 143 and 144, emphasis added.
[168] Claire Methven O'Brien and Giulia Botta, 'The Corporate Responsibility to Respect Human Rights: An Updated Status Review (2022)', *SSRN Electronic Journal*, 2022, para. 3.3, https://doi.org/10.2139/ssrn.4179257.

b) The United States Alien Tort Claims Act

i) The history behind the statute

The Alien Tort Claims Act (ATCA) also known as the Alien Tort Statute (ATS) is one of the oldest surviving pieces of legislation that grants jurisdiction for acts that occurred outside of the territory of a state. It was introduced as part of the Judiciary Act of 1789[169], it reads as follows:

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"[170]

The exact context and purpose behind the statute is unclear, and its scope remain debated within scholars. This is because the rule had not been used for almost two hundred years except for only two reported decisions[171] but was later revived in a landmark judgement during the *Filártiga v. Peña-Irala* case by the US Court of Appeals Second Circuit in 1980. Later the US Supreme Court would again use the ATS in *Sosa v. Alvarez-Machain*, these two cases would kickstart the development of a complex case law regarding corporate liability for torts committed outside of the US by private actors[172].

ii) Analysis of the case law: what is the scope of the statute?

In both judgments the ATS was considered not as a substantive rule but only having jurisdictional value[173], which therefore means that no substantive rule can originate from it, but it only indicates that *when* a tort has been committed to an alien violating the "law of the nations", then a civil action can be brought in front of a US court for a US national. Therefore, the statute covers only civil actions, no criminal proceedings, although instruments for corporate liability under international criminal law already exist outside of the scope of the ATCA[174]. But the main questions that may arise from analysing this

[169] Stephen P. Mulligan, 'The Rise and Decline of the Alien Tort Statute', Congressional Research Service, 6 June 2018, https://sgp.fas.org/crs/misc/LSB10147.pdf.
[170] 'Alien Tort Claims Act', Pub. L. No. June 25, 1948, chaps 646, 62 Stat. 934, §1350 Judicial Act (1948).
[171] Stephen P. Mulligan, 'The Rise and Decline of the Alien Tort Statute'.
[172] Alison Kanne, 'Corporate Liability Abroad Under the Alien Tort Statute', *The Journal of Corporation Law* 41, no. 3 (March 2016).
[173] Filartiga v. Pena-Irala, No. 630 F.2d 876 (US Court of Appeals for the Second Circuit 30 June 1980) part II; Sosa v. Alvarez-Machain, No. 542 U.S. 692 (Supreme Court of the United States 29 June 2004) part III.
[174] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda', *American Journal of International Law* 101, no. 4 (October 2007): 17, https://doi.org/10.1017/S0002930000037738.

statute are the meaning of the term “law of the nations” and in general what how much the tort needs to be linked to the US to fall under the scope of the statute. The former question is less ambiguously addressed by the case law than the latter, as in *Filártiga* the Court took the already long established definition provided by the Supreme Court which found that the law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law’ and therefore that it depended on established customary international law[175], the Supreme Court would confirm this view in *Sosa*[176]. Therefore, human rights violations will probably always fall within the scope of the ATS, as it was both in *Filártiga* and in *Sosa*, but the case law is ambiguous on how much the perpetrator and the incident itself have to be linked to the US for the ATCA to be called upon. For example, in *Al Shimari v. CACI Premier Technology, Inc.,* in which the claim of ATS was accepted, and in *Kiobel v. Royal Dutch Petroleum¸* in which the connection to US territory was deemed too weak, the Court reached different conclusions on the matter of applicability. In the *Kiobel* case, Nigerian nationals living in the United States filed a lawsuit in federal court against Dutch, British, and Nigerian corporations under the ATS. The petitioners accused these corporations of "aiding and abetting" the Nigerian government in violating international law during the early 1990s. They alleged that Nigerian military and police forces attacked their villages, committing acts of violence such as beating, raping, killing, and arresting residents, as well as destroying or looting property. After these events, the petitioners relocated to the United States, where they were granted political asylum and now reside as legal residents. The Court had found that the company was not strictly linked to the US but only as part of the New York exchange which was not seen as enough of a connection[177]. In *Al Shimari,* four Iraqi citizens filed a lawsuit against CACI Premier Technology, Inc., an American corporation, and military contractor, under the ATS. They claimed that they were subjected to abuse and torture while detained at Abu Ghraib prison in Iraq, where they were held as suspected enemy combatants. The Court held that the claim of ATS was valid since the company in this case was American, stationed in America and the violations were committed by

[175] *Filartiga* part. II.
[176] *Sosa* part IV.
[177] Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (Supreme Court of The United States 17 April 2013).

American citizens[178]. Therefore, it would seem that for the ATS to have validity the tort has to be committed by an American or an American legal person, domiciled in America is not enough for the applicability to be possible but there has to be a reasonable connection to the US[179]. The scope of the ATS would be even more circumscribed with *Jesner Et Al. V. Arab Bank, Plc* in which the Court would clarify that no foreign company may be held liable under the ATCA, and therefore only US corporations fall under the scope of the statute under the parameters set in *Kiobel* and *Sosa*[180].

iii) An ineffective instrument

This means that the ATS and its subsequent case law is rather ineffective for holding corporations, especially TNCs, liable under human rights violations, and ultimately the need for a more modern and comprehensible instrument is critical for the sake of the victims of corporate abuse. Even more recently in *John Doe I, et al. v. Nestle* the court rejected the claim of ATS even though the company had "major operational decisions" and "financial decisions" in US soil, since it held that mere corporate presence is not enough to be liable under the ATS and that operational decisions are common to all levels of the corporate ladder[181], and in both *Jesner* and *Nestle* the Court seem to think that a court "'must' not create a private right of action if it can identify even one sound reason to think Congress might doubt the efficacy or necessity of [the new] remedy'"[182] because of the importance of the separation of powers in the US Constitution. It would seem that even the US Supreme Court does not want to create even more controversy by using the ATS as liberally as first thought and sees this statute as more of a political move than a legal one, which therefore would need Congress to introduce new legislation on this matter.

[178] Al Shimari v. Caci Premier Tech., Inc., No. Nos. 13–1937 13–2162 (4th Circuit 30 June 2014).
[179] Kanne, 'Corporate Liability Abroad Under the Alien Tort Statute', para. 6.
[180] Stephen P. Mulligan, 'The Rise and Decline of the Alien Tort Statute', 3.
[181] Nestle USA, Inc. v. Doe, No. 19-416 (Supreme Court of Justice of the United States 17 June 2021) at 7.
[182] *Nestle* at 8.

c) The Human Rights and Environment Act of the United Kingdom

i) History of the bill

These next two paragraphs will briefly focus on new recent developments undergone by the United Kingdom (UK) and the European Union (EU). The UK has been introducing regulatory legislation for companies ever since the Companies Act of 2006 such as reporting a "non-financial and sustainability information statement"[183] , and more recently under the Modern Slavery Act of 2005 to ensure that large businesses do not partake in slavery and human trafficking[184]. Afterwards there has been a growing public call in the UK for the introduction of robust legislation to address the intersection of business practices and human rights. Many organizations composed of elements coming from the financial sector, companies, human rights organizations, and the UK's own Joint Committee on human rights have been calling for legislation giving companies the tools and regulations for correctly respecting human rights and for the parliament to implement the UN Guiding Principles[185] according to the implementation action plan of the government[186]. As a result of these concerns, Baroness Young of Hornsey would propose a bill in the House of Lords called the "Commercial Organisations and Public Authorities Duty Bill" also known as the "Human Rights Environment Bill"[187]. This bill aims to "to ensure that the UK keeps pace with other countries in implementing human rights and environmental due diligence standards in line with the UNGP"[188] by introducing both civil and criminal liability to businesses' misconduct, regulatory measures, and corporate due diligence.

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[183] 'Companies Act 2006', 2006 c. 46 § (2006), art. 414C, https://www.legislation.gov.uk/ukpga/2006/46.
[184] 'Modern Slavery Act 2015', 2015 c. 30 § (2015), art. 54, https://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted.
[185] Emily Haves, 'Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill Briefing' (House of Lords, 29 April 2024), para. 3, Library Briefing, https://researchbriefings.files.parliament.uk/documents/LLN-2024-0021/LLN-2024-0021.pdf.
[186] Secretary of State for Foreign and Commonwealth Affairs, 'Good Business Implementing the UN Guiding Principles on Business and Human Rights' (Government of the UK, May 2016), https://assets.publishing.service.gov.uk/media/5a815b46e5274a2e8ab538d6/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf.
[187] Emily Haves, 'Human Rights and Environment Bill Briefing', 1.
[188] Baroness Young of Hornsey, 'Explanatory Notes of the Human Rights and Environment Bill', 28 November 2023, 2, https://bills.parliament.uk/publications/54745/documents/4591.

ii) The scope

The Bill imposes a duty to all commercial organizations and public authorities to prevent human rights harms as well as the obligation to conduct human rights due diligence.[189] All commercial organizations and many human rights, those recognised in the International Bill of Human Rights and in the ILO's Declaration on Fundamental Principles and Rights at Work[190], are explicitly included, similarly to the example given by the Guiding Principles[191], making the scope of the Bill very large. The definition of commercial organizations is taken from the Bribery Act of 2010 which is:

> (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
>
> (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
>
> (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
>
> (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.[192]

Therefore, the Bill will include both local and transnational enterprises, as long as part of the commercial activity is under the law or territory of the UK. Furthermore, clause 8 sub-section 4 gives jurisdiction to the national courts for human rights harms occurred inside or even outside of the state insofar as they are initiated through civil proceedings[193], making it very similar to the ATS of the US, although as mentioned earlier The Bill contains a provision addressing criminal offenses related to human rights violations, stipulating that the geographic location of the criminal act is irrelevant. What is significant is the direct connection between the act committed by the natural person and the commercial organization[194].

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[189] 'Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill' (2023), sec. 2.
[190] Ibidem, sec. 1
[191] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, art. 12.
[192] 'Bribery Act of 2010', 2010 c.23 § (2010), sec. 7(5).
[193] Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill, sec. 8(4).
[194] Ibidem, sec 11(1)

iii) Human rights due diligence: implementation of the Guiding Principles?

The Bill also introduces human rights due diligence as an obligation for all commercial organizations to follow[195] and sets out that it must include, at a minimum:

(a) Integrating human rights and environmental due diligence into **policies and management systems**;
(b) identifying, assessing and addressing actual or potential human rights and environmental harms, through **prevention, mitigation and remediation**;
(c) establishing or participating in and maintaining effective **grievance mechanisms**;
(d) tracking, verifying, **monitoring** and assessing the effectiveness of measures taken and their outcomes;
(e) **communicating** with stakeholders and reporting publicly on findings[196].

The section is clearly inspired by the Guiding Principles since it includes every characteristic that human rights due diligence should have according to them, such as integrating it to policy and management systems[197], non-state grievance mechanisms[198], tracking and monitoring[199], and communication with stakeholders[200]. Of course, human rights due diligence must be reasonably assessed according to, *inter alia*, the size of the commercial organisation and the severity of the harm[201]. Regarding due diligence, there are two innovative provisions in this Bill which can have significant positive results: firstly, there is the possibility for a duty bearer to terminate a business relationship so to comply with human rights, this is called "responsible disengagement" in the Bill, and has to be taken in a timely manner, gradually if the harm is not severe and rapid if it is, taking into account the possible human rights harms it may cause and the Bill clarifies that the action must be taken only as a last resort[202]; secondly, commercial organizations based on specified financial thresholds have to annually publish and submit reports detailing their due diligence procedures and effectiveness assessments, with civil penalties if there is

[195] Ibidem, sec. 2(2)
[196] Ibidem, sec 3(1)
[197] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, art. 19.
[198] Ibidem, art. 22
[199] Ibidem, art. 20
[200] Ibidem, art. 21
[201] Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill, sec. 3(3).
[202] Ibidem, sec. 4

failure to comply with these obligations, and additionally, the clause establishes the right to request information on prevention measures from relevant organizations[203].

iv) State management, enforcement authority and final comments.

Furthermore, the legislation imposes obligations on public authorities regarding the procurement process and subsequent contract management with suppliers, such as: prohibition from engaging in procurement from suppliers that fail to conduct human rights due diligence; they have to establish due diligence requirements for suppliers during the tender stage; lastly, public authorities are required to provide an annual list of current suppliers and any excluded, debarred, or terminated suppliers to the relevant regulatory authority[204].

Finally, the Bill mandates the appointment of a competent regulatory authority responsible for overseeing compliance with its provisions. This designated authority should possess expertise in business regulation and international human rights law to effectively discharge its responsibilities. The duties of the regulatory authority include providing guidance on due diligence methodologies and best practices, establishing reporting standards, maintaining a publicly accessible registry website containing reports from organizations, and in general, enforcing compliance with the Bill[205].

The Bill has just recently passed its second reading at the House of Lords, and its committee stage, where the proposal will be analysed line by line, is yet to be scheduled as at the time of the writing of this thesis[206]. The passage of the Bill would probably be a positive development, as it would confer significant benefits by addressing the critical issues on the matter and giving very positive outcomes not only within the territory of the UK but in the prospect of international law and human rights as well.

[203] Ibidem, sec. 5
[204] Ibidem, sec. 6
[205] Ibidem, sec. 7
[206] 'Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill [HL] - Parliamentary Bills - UK Parliament', accessed 26 May 2024, https://bills.parliament.uk/bills/3527/news.

d) The European Union's Corporate Sustainability Due Diligence Directive

i) History of the Directive

On the 23rd of February 2022 the European Commission, after being called upon by the European Parliament in a resolution adopted in on the 10th of March 2021[207], advanced a proposal for a new directive named the Corporate Sustainability Due Diligence Directive, also known as CSDDD or CS3D, with the aim of establishing a common regulatory framework across the Union for business in achieving, among others, the UN Development Goals[208]. The Council of the European Union would adopt a contrary position initially[209], and after a tumultuous legislation process and a triad consultation between the European Parliament, the Commission and the Council, an agreement would be finally reached in December of 2023[210], with the Parliament voting on the final text on the 25th of April[211] and the Council adopting the proposal on the 24th of May closing the drafting procedure of the directive. At the time of the writing of this thesis, the CS3D only needs the final signature of the presidents of the two European bodies, and twelve later will become law[212]. The directive would be of upmost importance for the Union, as it would give an obligation for all member states to implement its provisions and establish due diligence as they would have 2 years to transpose it[213], although France and Germany

[207] 'European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability', Pub. L. No. P9_TA(2021)0073, (2020/2129(INL)) (2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021IP0073.

[208] 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence' (2022), https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[209] Mundo M Les Amis de la Terre France 47 avenue Pasteur, 93100 Montreuil (France), 'European Directive on Corporate Sustainability Due Diligence and Legal Actions in France: Lessons Learned and Recommendations' (France, 2023).

[210] Michelle Adcock Crowe Radhika Bains,Thomas, 'Progress on the EU Corporate Sustainability Due Diligence Directive - KPMG Global', KPMG, 19 February 2024, https://kpmg.com/xx/en/home/insights/2024/02/progress-on-the-eu-corporate-sustainability.html.

[211] 'European Parliament Legislative Resolution of 24 April 2024 on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive' (2024), https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html.

[212] 'Corporate sustainability due diligence: Council gives its final approval', Council of the European Union press release, 24 May 2024, https://www.consilium.europa.eu/it/press/press-releases/2024/05/24/corporate-sustainability-due-diligence-council-gives-its-final-approval/.

[213] 'Position of the European Parliament Adopted at First Reading on 24 April 2024 with a View to the Adoption of Directive (EU) 2024/… of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive' (2024), art. 37(1),

already have some form of due diligence and regulatory frameworks for business and human rights[214] which will not be covered in this dissertation.

ii) A somewhat limited scope

Contrary to the earlier examples provided in the chapter and of the proposed LBI on BHR, the CS3D has seen its scope *ratione personae* limited by the efforts made by the Council[215] to include only large companies that employ more than 1000 employees with at least 450 million of euros in turnover[216] or a third state's company operating in the Union which generated 450 million euros in turnover[217], this inclusion seems to be motivated to avoid an unbalanced competitive environment between EU undertakings and extra-communitarian companies[218]. The directive also applies to the subsidiaries of the aforementioned companies and to those who they have a "established business relationship" out along the value-chain. This includes all upstream and downstream economic operators associated with the production of goods or provision of services by the company, while a "lasting business relationship" is. It is important to note that although small and medium-sized enterprises (SMEs) compose around 99 per cent of businesses in the EU[219], they are not included within the scope of the CS3D. But they might be indirectly impacted by its provisions as contractors or suppliers of the larger companies[220] and therefore the Commission and partner companies themselves should provide them proportionate support[221]. This choice has been somewhat criticised since it falls short of both the UN Guiding Principles and of the OECD Guidelines[222], which as

https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html This is the latest publicly available version of the draft as of the writing of this thesis, therefore it will be cited as the 'latest draft of the CS3D'.

[214] Emily Haves, 'Human Rights and Environment Bill Briefing', 1.

[215] Lois Elshof, 'Corporate Sustainability Due Diligence and EU Competition Law', *Journal of European Competition Law & Practice*, 30 April 2024, 2, https://doi.org/10.1093/jeclap/lpae025.

[216] latest draft of the CS3D, art. 2(1)(a).

[217] Ibidem, art. 2(2)(a)

[218] Roberta Greco, 'Corporate Human Rights Due Diligence and Civil Liability: Steps Forward Towards Effective Protection?', *Diritti Umani e Diritto Internazionale*, no. 1 (2023): 13, https://doi.org/10.12829/107093.

[219] Elshof, 'Corporate Sustainability Due Diligence and EU Competition Law', 2.

[220] latest draft of the CS3D, n. 69.

[221] latest draft of the CS3D, art. 10(2)(e).

[222] ECCJ, 'European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence A Comprehensive Analysis' (Legal Brief, April 2022), https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf.

stated in the previous chapters include all business entities, without regards of their size or turnover.

About the material scope of the directive, the CS3D defines adverse human rights impacts those actions in violations of a precise list of human rights in Section 1 of Part 1 of the Annex to the directive as enshrined by international instruments listed in the following section[223] which include, *inter alia*, articles from the ICCPR, the ICESCR and the ILO's core conventions[224], a violation can be committed outside of the listed rights if they are part of the international instruments cited with some requirements[225]. Therefore, conversely to all of the previous instruments that have been analysed, the human rights are defined in a precise way. This has been somewhat controversial since it leaves out other human and environmental rights instruments and could leave new ones in the future[226], while it has been praised by others as it helps to clearly define the rights and obligations without creating ambiguity in the discourse[227]. Member States are therefore obliged to make sure that companies carry out human rights due diligence, in line with the provisions of the directive[228]. In short, the CS3D requires a risk-based approach to supply chain due diligence, meaning companies must map and prioritize their due diligence efforts based on the likelihood and severity of potential adverse impacts. When a potential or actual impact is identified, companies are obligated to take measures to prevent, mitigate, or end the impact as specified in the CS3D[229].

As mentioned, companies are also required to make sure that adverse impacts are not caused by their subsidiaries all along the value-chain, that is, they need to put forth contractual obligations to all other companies with whom they have an established business relationship which guarantees the respect of human rights in their operations[230]. This means that the directive is meant to have extraterritoriality in its applicability, which is arguably one of the most important and original notions of the directive. There has been

[223] latest draft of the CS3D, art. 3(1)(c)(i).
[224] latest draft of the CS3D, Annex, Part I, Section 2.
[225] Ibidem, Annex, Part I Section 2
[226] Marco Fasciglione, 'Luci ed ombre della proposta di direttiva europea sull'obbligo di due diligence d'impresa in materia di diritti umani e ambiente', *SIDIBlog* (blog), 26 May 2022, pt. 4, http://www.sidiblog.org/2022/05/26/luci-ed-ombre-della-proposta-di-direttiva-europea-sullobbligo-di-due-diligence-dimpresa-in-materia-di-diritti-umani-e-ambiente/.
[227] Roberta Greco, 'Corporate Human Rights Due Diligence and Civil Liability', 16.
[228] latest draft of the CS3D, art 4.
[229] Elshof, 'Corporate Sustainability Due Diligence and EU Competition Law', 3.
[230] latest draft of the CS3D, art. 8

some criticism raised by some scholars regarding this provision since "established business relationships" leaves out many types of informal and shorter relationships businesses may have, as well as the possibility of businesses to prefer shorter and unstable relationships as a loophole to this obligation[231]. It is arguable though, that it would not be fair to make companies liable for the actions of every company they have short and sporadic relationships with[232].

iii) The administrative level

The enforcement mechanisms for corporate sustainability due diligence rules are mainly divided at the administrative level and through civil liability. At the national level, member states will have to establish one *or more* supervisory authorities to supervise all of the companies registered in their territory (or, in the case of third state companies, the relevant branch) in their compliance with the provisions of the directive[233], the possibility to establish more than one authority gives the possibility to member states to have more specialized authorities. These authorities will possess the power to investigate on potential adverse impacts and issue injunctive orders and impose penalties, including fines, which are effective, proportionate, and dissuasive[234]. It is worth noting that, for the effective enforcement of the directive, the supervisory authorities should be completely impartial in their judgement and be free from external influence, especially of the relevant companies[235].

Any legal or natural person would also be able to submit *substantiated concerns* to the relevant supervisory authority in the case they objectively suspect that a company is violating any duty regarding the directive[236], this element makes it possible for NGOs that focus on human rights report to directly assist member states in the enforcement of human rights due diligence and, exclusively, for persons who are directly involved in the matter to have access to remedy through administrative judicial means.

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[231] ECCJ, 'European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence A Comprehensive Analysis'.
[232] Roberta Greco, 'Corporate Human Rights Due Diligence and Civil Liability', 16.
[233] latest draft of the CS3D, art. 24.
[234] Ibidem, art. 25
[235] Ibidem, art. 25(9)
[236] Ibidem, art. 26

Additionally, the European Commission will establish a European Network of Supervisory Authorities[237], facilitating coordinated efforts among national bodies to oversee compliance across Member States.

iv) A new civil liability regime

The directive does not extensively tackle the issue of access to remedy, instead it merely forms a new civil liability regime to ensure that victims of adverse human rights impacts can be compensated. Member States will be responsible for ensuring that victims of such negligence or intentional non-compliance receive compensation for damages incurred[238]. Nonetheless, a company cannot be held liable for the damages caused only by its business partner in the chain of activities[239], exception made for when the adverse impact is caused jointly by the company and the subsidiary.

The latest draft has added, probably after scholarly concern[240], provisions ensuring easier access to compensation. The directive obliges member states to ensure fair and accessible procedures for claimants seeking damages for infringements under the Directive. It mandates that national rules on limitation periods for bringing actions for damages should not unduly hinder claimants and must be at least as lenient as those for general civil liability regimes. Specifically, the limitation period must be at least five years and should not commence until the claimant knows of the infringement, the harm caused, and the identity of the infringer. Additionally, the cost of legal proceedings must not be prohibitively expensive, claimants should be able to seek injunctive measures, including through summary proceedings, to stop infringements. These measures can be either provisional or definitive[241].

v) The issue of jurisdiction

The directive, as opposed to the LBI on BHR, does not have any provision regarding the forum on which civil proceedings may be issued in, therefore there are reasons to believe that this may negatively affect the possibility of access to remedy. Member states of the

[237] Ibidem, art. 28
[238] Ibidem, art. 29
[239] Ibidem, art. 29(1)
[240] ECCJ, 'European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence A Comprehensive Analysis', 20–21.
[241] latest draft of the CS3D, art 29(3)

EU already have some international instruments in regard to general cross-border cases, in particular the Brussels I-bis Regulation. If a company is domiciled in a Member State, it is generally to be sued in the courts of that state, except in specific cases. Under Article 7.2 of Brussels I-bis, for tort-related matters, the company can also be sued where the harmful event occurred. In environmental cases, victims can choose to sue either where the damage occurred or where the harmful activities were carried out, providing more flexibility. If the defendant company is not domiciled in a Member State, jurisdiction is determined by national private international law or applicable international instruments[242]. This fragmented legal framework has been heavily criticized as it leads to confusion and different approaches over the extension of jurisdiction[243].

When jurisdiction falls to a third-country court, victims may struggle to access effective remedies due to issues like corruption, judicial independence, evidence difficulties, lack of legal aid, and standing for public interest organizations in the forum where the harm occurred[244]. A victim of human rights impact from a third world country may, therefore, prefer to access member state's courts to bring the company into proceedings, but in the current state the directive does not give this privilege.

vi) Final remarks

Although the directive has been somewhat criticised for some of its provisions[245], the CS3D is widely regarded as a significant advancement in establishing a unified human rights due diligence policy within the European Union. This directive aims to safeguard human rights both within the Union's territory and in external operations, reflecting the EU's commitment to responsible business conduct globally. By mandating comprehensive due diligence processes, the CS3D seeks to ensure that companies

[242] 'Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I) | EUR-Lex', accessed 3 June 2024, https://eur-lex.europa.eu/EN/legal-content/summary/jurisdiction-recognition-and-enforcement-of-judgments-in-civil-and-commercial-matters-brussels-i.html.
[243] European Union Agency for Fundamental Rights., 'Business and Human Rights: Access to Remedy.' (LU: Publications Office, 2020), 70, https://data.europa.eu/doi/10.2811/54662.
[244] For more, see: European Law Institute, 'Business and Human Rights: Access to Justice and Effective Remedies' (European Law Institute Secretariat, 2022), chap. 3.
[245] Anne Lafarre, 'The Proposed Corporate Sustainability Due Diligence Directive: Corporate Liability Design for Social Harms', *European Business Law Review* 34, no. 2 (1 April 2023), https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EULR\EULR2023017.pdf; Elshof, 'Corporate Sustainability Due Diligence and EU Competition Law'.

operating in or from the EU proactively address and mitigate human rights abuses and environmental harms throughout their supply chains.

e) Conclusion

This chapter presented three examples of state's instruments in making corporations accountable to human rights violations. Of course, as mentioned, there are more instruments all around the world, and the examples above show that a new paradigm is slowly forming. If national laws are systematically adopted on these issues in many countries as the trends suggest, international custom may form as a consequence, and have great repercussions onto the international landscape. Not only this, but it also might increase the possibility of western countries to support the LBI on BHR or could even lead to new forms of international cooperation.

Even if all the states in the world introduced strict and effective laws to make companies responsible to human rights violations, the international nature of TNCs make it so that even then they might be ineffective against them in particular. It is just too easy, in the current international order, for TNCs to avoid liability for human rights violations, and therefore it would be clear that an international instrument is fundamental. Despite this, national and regional laws can be particularly important as to develop international law, if we were to believe on the New Haven school of International Law where international rules come from the bottom-up and not from a top-down development model[246]. Although it might be argued that national laws in this case are *inspired* by the Guiding Principles, a normative *top-down* instrument, this discussion could be an intriguing subject for future research. Finally, as mentioned in the introduction, states might be in the future held liable if they do not properly safeguard human rights from third persons and therefore positive steps towards the introduction of mechanisms are required.

V) Conclusion

The relationship between TNCs, states, and human rights is a complex one that is hard to tackle and even confusing at times. This thesis has tried to shed light on this intricate

[246] Janet K Levit, 'Bottom-up International Lawmaking: Reflections on the New Haven School of International Law', *International Law Commons* 393, no. 32 (2007).

dynamic by exploring the current legal frameworks and emerging trends aimed at holding transnational corporations accountable for human rights violations. Through an in-depth analysis of international treaties, national regulations, and voluntary guidelines, this study has highlighted both the progress made and the significant gaps that remain in ensuring effective corporate accountability.

The in-depth research has highlighted the complexity of international investment law and its applicability of human rights, showing how even though corporations enjoy both rights and duties under international law, its accountability when these duties are violated is often hard to reach. The UN Guiding Principles have been in this regard an important stepstone in establishing the current legal framework. States have a moral duty to protect human rights violation from private actors, while corporations have a legal duty to respect them as private actors themselves. They addressed the need of victims, including their often lack of access to remedy. Finally, they established human rights due diligence, a prevention mechanism useful for companies to avoid adverse human rights impacts and mitigate them, who will be inspiration for all subsequent instruments of international law including the OECD Guidelines.

Furthermore, it has shown the positive impact that a ratification of the proposed LBI on BHR may have on global governance. Imposing an obligation on states to safeguard human rights corporate action, including introducing human rights due diligence, and establishes international cooperation to achieve this goal and ensure access to remedies for victims. The LBI, though, lacks any direct obligation for corporations to respect human rights, addressing only the states, and does not establish an international court for victims, which has been extensively criticised.

Finally, national and regional laws have been developing in respect to the UN Guiding Principles, and, although not without their own controversies, it will lead to the establishment of obligations for corporations to follow human rights due diligence to prevent adverse impacts and ensure access to remedies even outside of their own territory.

In conclusion, while there have been noteworthy advancements in the development of a regime for transnational business responsibilities under human rights, much work remains to be done. Strengthening legal mechanisms, enhancing international cooperation, and fostering a culture of corporate responsibility are essential steps forward. The LBI will

probably not get "stronger" within the next few work sessions, but that does not mean that the international regime will not. Instead, the LBI should be only the start of many new legally binding instruments regulating corporate action at the international stage and furthering sustainable development, including safeguarding the environment, social rights and cultural rights. As the late John Gerard Ruggie, the former Special Representative who wrote the UN Guiding Principles, would say in his keynote address at the United Nations Forum On Business & Human Rights in Geneva on the 14th of November 2016: "my proposition to business—and to you all—is that far from being at the 'immature' end of a transformative trajectory of business models, respect for human rights, respect for the dignity of every person, is at the very core of the people part of sustainable development. And as if that alone were not enough, it is also the key to ensuring a socially sustainable globalization, from which business stands to be a major beneficiary."[247]

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