Chapter 2

The 'Hardening' and 'Broadening' of Norms on Business and Human Rights

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I. Introduction and Overview:

The field of business and human rights (BHR) law is rapidly evolving. Only fifteen years have passed since the United Nations Human Rights Council endorsed the business 'responsibility to respect' human rights in 2008.[1] Barely more than a decade has passed since the Council elaborated on the concept by adopting the *UN Guiding Principles on Business and Human Rights* (UNGPs) in 2011.[2]

The UNGPs explicitly created no new legal rights.[3] They were said to reflect only societal 'expectations' of business. They articulated broad, flexible norms for the business 'social license' to operate,[4] not binding conditions for a legal licence.

The UNGPs have won wide acceptance by governments,[5] international organisations,[6] business and industry associations,[7] Fortune 500 companies,[8] bar associations,[9] and human rights bodies.[10] They were swiftly incorporated into the OECD *Guidelines for Multinational*

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1 *See* Section II.B below.

2 *See* Section II.C below.

3 *Id*.

4 *Id*.

5 *See* examples worldwide in European Union Directorate-General for External Policies, 'Implementation of the UN Guiding Principles on business and Human Rights,' February 2017.

6 For example, Council of Europe, 'Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights,' 16 April 2015; Organization of American States (OAS) (2014), 'Promotion and Protection of Human Rights in Business,' AG/doc.5452/14.

7 For example, the International Chamber of Commerce affirms, "ICC believes that the UN Guiding Principles on Business and Human Rights (UNGPs) represent a transformational roadmap to a future where human beings and businesses alike can thrive and prosper." *ICC Engagement with UN on Business and Human Rights*, accessible at https://iccwbo.org/publication/icc-engagement-with-un-on-business-and-human-rights/.

8 *See*, for example, KPMG, "Addressing human rights in business: Executive perspectives", December 2016, accessible at https://assets.kpmg/content/dam/kpmg/xx/pdf/2016/11/addressing-human-rights-in-business.pdf.

9 For example, see Anna Triponel, "Respecting business and human rights: IBA's guidance on applying the UN Guiding Principles," *Thomson Reuters Practical Law*, July 11, 2016; American Bar Association House of Delegates Resolution 109, 6 February 2012

10 For example, Inter-American Court of Human Rights, *Miskito Divers v. Honduras*, Judgment of August 31, 2021, discussed in part III.C below.

Enterprises,[11] thus allowing communities and persons adversely affected by business activities to file 'specific instance' complaints for mediation by National Contact Points in over 50 OECD and other participating States.[12] The UNGPs were lauded by broad-based business organisations such as the International Chamber of Commerce[13] and the International Organisation of Employers.[14]

Business welcomed the UNGPs largely because they offer a flexible, soft law alternative to rigid, burdensome, legally risky, and potentially costly hard law.[15] Less than a decade before the adoption of the UNGPs, a UN human rights body had proposed vague and ambitious BHR norms, enforceable by suits for damages, exposing companies to considerable legal risk.[16] And only three years after the UNGPs were adopted, the UN Human Rights Council, on the initiative of Ecuador and South Africa and supported by a global coalition of civil society groups, launched a negotiation process designed to lead to a legally binding treaty on BHR (which is still ongoing).[17]

These and other international and transnational legal developments in BHR take place in a broader context of economic and social factors affecting business incentives. Increasingly, business respect for human rights, or for aspects of human rights, is encouraged by UN and OECD soft law initiatives,[18] equity investment funds,[19] private and multilateral lenders,[20] sovereign wealth funds,[21] asset managers,[22] ESG rating agencies,[23] insurance companies,[24]

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[11] Accessible at http://mneguidelines.oecd.org/. The Guidelines are currently being updated, with a new version expected in June 2023.

[12] *See* http://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm.

[13] Note 7 above.

[14] *See*, e.g., International Organisation of Employers, *UN Guiding Principles on Business and Human Rights: Employers Guide*, February 2012.

[15] *See* Sections II.B and II.C below.

[16] *See* Section II.A below.

[17] Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, ¶ 1 (June 26, 2014).

[18] For example, the UN expert Working Group on Business and Human Rights (*See* https://www.ohchr.org/en/special-procedures/wg-business) and the OECD National Contact Points (see note 12 above).

[19] *See*, for example, The Forum for Sustainable and Responsible Investment, at https://www.ussif.org/; Principles for Responsible Investment, at https://www.unpri.org/.

[20] For example, by means of the Equator Principles. *See* https://equator-principles.com/.

[21] For example, Shubham Kalia, "Norway sovereign wealth fund drops Thai, Israeli firms on rights concerns," *Reuters*, December 16, 2022.

[22] For example, BlackRock. *See* https://www.blackrock.com/us/financial-professionals/investment-strategies/sustainable.

[23] For example, the Corporate Human Rights Benchmark, at https://www.worldbenchmarkingalliance.org/corporate-human-rights-benchmark/. *See* more generally, Bran Tayan, "ESG Ratings: A Compass Without Direction?," August 24, 2022, *Harvard Law School Forum on Corporate Governance*, at https://corpgov.law.harvard.edu/2022/08/24/esg-ratings-a-compass-without-direction/. In the U.S. there has been a recent backlash in some quarters, resulting in legislative restrictions in many States on investing public funds under ESG criteria. *See generally* L. Malone et al., 'ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.', Harvard Law School Forum on Corporate Governance, March 11, 2023. A bill to prohibit ESG investing by pension fund managers recently passed the U.S. Congress but was vetoed by President Biden. David Morgan, 'U.S. Congress votes to block ESG investing, Biden veto expected', Reuters, March 1, 2023.

[24] For example, Steven Mufson, "What could finally stop new coal plants? Pulling the plug on their insurance," *Washington Post*, October 26, 2021; Letter from IFC Compliance Advisor Ombudsman, November 8, 2022 to Inclusive Development International, accessible at https://www.inclusivedevelopment.net/wp-content/uploads/2022/11/CAO-Letter-Britam-Complaint.pdf; Julius Barigaba, "Why Britam backed out of Uganda, Tanzania oil pipeline insurance deal," *The East*

accounting protocols,[25] stock exchanges,[26] and non-governmental organisations (NGOs) focusing on BHR.[27]

These practical incentives mutually reinforce the legal developments. Collectively they are probably even more important than legal reforms in encouraging business respect for human rights. Unlike the legal initiatives, however, they do not create legally enforceable remedies for victims.

This article acknowledges the practical importance of the non-legal incentives but does not examine them. The article addresses instead two trends in international and transnational BHR law: the 'hardening' and 'broadening' of norms.

The 'hardening' of BHR norms – their becoming obligatory and enforceable – responds, not only to the broader context noted above, but also to at least three phenomena. First, business enterprises, especially but not only transnational corporations, continue to have major impacts globally on human rights. Some impacts are positive, but others are negative. Second, more than a decade after the adoption of the UNGPs, many companies, even global companies, still do not meet minimum standards of the business responsibility to respect human rights.[28] And third, even among companies adopting human rights policies and carrying out human rights due diligence, few participate in assuring meaningful remedies for large scale violations.

The UNGPs do sensitize many companies to their BHR responsibilities, and in some cases play a significant role in preventing abuses. However, they are not uniformly taken seriously by business. Moreover, they have provided scant relief to persons and communities adversely affected by business. Many stakeholders believe that something more is needed. This conviction fuels the 'hardening' of BHR norms.

The 'broadening' of human rights norms affecting business can be explained differently. Unlike the hardening of BHR norms, the broadening of human rights is not meant specifically for business. States have the primary duty to protect and ensure human rights. Still, once new rights are recognised, business has a responsibility to respect them. Because of its importance for business, the main newly recognised right addressed in this article is the human right to a clean, healthy and sustainable environment.[29] The recognition of this right reflects growing awareness by governments and the public that the planet is rapidly approaching the limits of its capacity to withstand the adverse effects of human activity on the environment.

Recognising environmental human rights then triggers the responsibility of companies to exercise human rights due diligence to ensure that their industrial and commercial activities

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African, November 27, 2022, accessible at https://www.theeastafrican.co.ke/tea/business/britam-backs-out-as-eacop-insurer-4033706.

[25] For example, GRI (Global Reporting Initiative), SASB (Sustainability Accounting Standards Board), TCFD (Task Force on Climate- related Financial Disclosures), IIRC (International Integrated Reporting Council), CDSB (Climate Disclosure Standards Board) and CDP (see https://www.cdp.net/en/info/about-us).

[26] The Sustainable Stock Exchanges Initiative lists 33 exchanges with mandatory ESG listing requirements: https://sseinitiative.org/.

[27] A regular reporting on NGO activities worldwide and company responses can be found at https://www.bhrrc.org/en/.

[28] *See generally* World Benchmarking Alliance, '2022 Corporate Human Right Benchmark', accessible at https://www.worldbenchmarkingalliance.org/corporate-human-rights-benchmark/; ESG Clarity, 'Companies engage on human rights but lack supply chain focus', April 13, 2023.

[29] *See* Section IV.A below.

do not render the air, water and soil of the communities where they operate – and the oceans, atmosphere and climate of the planet – unhealthy and unsustainable.

The analysis in this article of the hardening and broadening of BHR norms focuses on *international and transnational* norms. Predominantly national matters involving business and human rights, such as local laws and policies, disputes and judicial proceedings, are far too frequent and numerous to canvass here. This article focuses on trends in international norms, as well as in domestic norms with important transnational effects, such as recent UK Supreme Court judgments in transnational tort cases against multinational companies.[30]

I.A. 'Hardening' of International and Transnational BHR Norms

At regional levels and in national laws with transnational effect, mainly but not only in Europe, a clear trend in 'hardening' BHR norms is underway. Key elements of the business responsibility to respect human rights as set forth in the UNGPs – especially human rights due diligence,[31] and reparations for adverse impacts[32] – are increasingly mandated by legislation and judicial rulings.

Initially the post-UNGPs movement towards hardening BHR norms took the form of transparency and reporting regimes. They included, for example,[33] the 2014 EU Non-Financial Reporting Directive,[34] the 2015 UK Modern Slavery Act,[35] and the 2018 Australian Modern Slavery Act.[36] Although transparency is an important element in the UNGPs,[37] these disclosure laws have few or weak sanctions and have to date proved largely ineffective.[38]

A more meaningful hardening of BHR norms has come in the form of laws and judgments mandating companies, or at least large companies, (a) to carry out human rights due diligence, and (b) to face legal sanctions such as fines and monetary damages for failing to do so adequately, or for violating human rights.

The hardening takes at least seven different forms. However, they differ in the pace at which they proceed, and the extent of their impact on business and on communities affected by business.

First and broadest in impact is legislation mandating human rights due diligence, enforceable by sanctions. Examples include the 2017 French *Loi de Devoir de Vigilance*,[39] the 2022 Norwegian Transparency Act,[40] the 2023 German Supply Chain Due Diligence Act,[41] and the

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30 *See* Section III.B below.

31 *See* Section II.C.2 below

32 *See* Sections II.C.2 and II.C.3 below

33 There are other reporting laws, such as the California Transparency in Supply Chains Act, California Senate Bill 657, enacted September 30, 2010.

34 Directive 2014/95/EU, October 22, 2014, amending Directive 2013/34/EU, as recently amended by the EU Taxonomy Regulation ((EU) 2020/852, June 18, 2020, on the establishment of a framework to facilitate sustainable investment (Regulation (EU) 2020/852) and the entry into force on March 10, 2021, of the Sustainable Financial Disclosure Regulation (Regulation (EU) 2019/2088).

35 UK Public General Acts 2015 c. 30.

36 No. 153, 2018, C2018A00153.

37 UNGP 21.

38 *See*, for example, Business & Human Rights Resource Centre and Modern Slavery Registry, 'Modern Slavery Act: five years of reporting,' February 2021, accessible at https://media.business-humanrights.org/media/documents/Modern_Slavery_Act_2021.pdf.

39 *See* Section III.A.2 below.

40 *See* Section III.A.3 below.

2022 European Commission proposal for an EU Corporate Sustainability Due Diligence Directive.[42] Other nations are considering adoption of such laws.[43] Albeit in narrower fields of human rights, human rights due diligence is also mandated by the 2019 Dutch Child Labor Due Diligence Act,[44] and the 2022 "Swiss ordinance on conflict minerals and child labor due diligence".[45]

On the surface, these European laws might appear to be only national and regional. In fact, their impact extends far beyond Europe. Some apply to large foreign companies investing in Europe; even European companies will likely seek to cascade their human rights commitments down their supply chains to distant suppliers; and laws for the large and lucrative European market create incentives for transnational corporations to move toward a single set of policies and procedures with which they can operate globally.

A *second* form of hardening comes in national court judgments against companies, with transnational effect. These cases affect far fewer companies immediately than do human rights due diligence laws. But they can supply legal teeth to the commitments companies make (or fail to make) under those laws and may remind companies to take them seriously. For example, UK Supreme Court judgments in 2019 and 2021,[46] and a Canadian Supreme Court judgment in 2020,[47] authorised common law tort liability against parent companies for their own actions or omissions contributing to adverse human rights impacts of activities of their foreign subsidiaries. A Hague District Court judgment of 2021 interpreted the "*unwritten standard of care*" in Dutch general tort law to require a company to respect human rights guaranteed by the European Convention on Human Rights and to follow the UNGPs.[48]

A *third* form of hardening consists of court judgments interpreting regional human rights treaties to oblige states to regulate companies to respect human rights. These cases are against states and do not directly affect business. On the other hand, their indirect effect on business can be enormous, to the extent they in effect order governments to adopt regulations requiring companies to respect human rights, including environmental human rights. A 2019 Dutch Supreme Court judgment effectively required the Dutch government to regulate private companies to protect human rights and the environment by drastically curtailing greenhouse gas emissions.[49] A 2021 judgment of the Inter-American Court of Human Rights interpreted the American Convention on Human Rights to require states to regulate companies in accordance with the UNGPs.[50]

A *fourth* form of hardening consists of a limited but growing number of criminal prosecutions of companies and executives for complicity in war crimes and crimes against humanity.[51] While few in number, and generally arising only in situations of armed conflict or in extremely repressive regimes, they justifiably earn close attention in C suites and the offices of corporate counsel.

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41 *See* Section III.A.4 below.

42 *See* Section III.A.1 below.

43 *Id.*

44 Published in Dutch Government Gazette November 13, 2019.

45 221.433 Ordinance of 3 December 2021 on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (DDTrO).

46 *See* Section III.B.1 below

47 *See* Section III.B.2 below.

48 *See* Section IV.B below.

49 *Id*.

50 *Id*.

51 *See* Section III.D below.

A *fifth* form restricts the import of goods produced in violation of human rights, especially forced labour, in recently enacted and more aggressively enforced customs laws in the U.S. and Canada, and as proposed in the EU.[52] This form to date applies only in two major economies and in only one sector of that economy (imports). Yet the impact on business is not trivial. Forced labour is especially seen by the U.S. as an issue in China. In 2021, the U.S. imported more than USD 500 billion in goods from China – about 20% of all U.S. imports.[53] If the proposed EU import ban comes into force in a few years, the impact on business will be even greater.

A *sixth* form of hardening, but one that lags far behind the preceding forms, is in international investment law. Increased attention to human rights issues is paid in some newer bilateral and multilateral treaties,[54] by international arbitral tribunals interpreting older treaties,[55] and by national courts considering whether to enforce international arbitral awards in light of international and national public policy.[56] However, most of the new treaties with human rights clauses are not yet in force, and few arbitrations yet allow states to defend or counterclaim against companies on human rights grounds. Still, the groundwork is being laid for BHR to play a significant role in international investment arbitrations in the next decade or perhaps sooner.

Finally, pending negotiations to draft a UN treaty on business and human rights may signal a *seventh* form of hardening.[57] At present it would take a healthy degree of optimism to expect those negotiations to lead to an effective and widely ratified treaty. But the possibility cannot be ruled out. The likely adoption in 2023 or 2024 of a Corporate Sustainability Due Diligence Directive by the EU[58] could potentially breathe new life into the UN process. If the UN were to adopt a similar treaty, and if it were ratified by even a small number of major market states outside Europe, the effect on global business could be very significant.

Despite all these parallel trends, the hardening of BHR norms should not be overstated. Business groups are lobbying to soften the impact of the proposed EU Directive and will likely lobby in most EU countries to soften the implementing legislation. No Latin American State has yet enacted legislation to implement the 2021 Inter-American Court judgment. Broad-based, mandatory human rights due diligence is not likely to be adopted soon in such leading global economies as the U.S., China, India or Indonesia.

Even so, what may matter most about these trends – both legal and non-legal -- is that they are all pushing in the same direction, albeit at varying paces and with varying impacts. They mutually reinforce one another. No one of them, in isolation, would be a game changer. However, they are properly viewed in the broader context of the full gamut of parallel trends. In that context, companies are well-advised to establish or review their human rights policies and procedures in order to enhance reputational capital and minimise financial and legal risks. As advised by the UN Framework on BHR, and in the words of its author John Ruggie,

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[52] *See also* "Britain to tighten laws on imports linked to alleged Chinese human rights abuses: Telegraph," *Reuters*, January 11, 2021; KPMG, 'Canada and UK announce trade restrictions, response to forced labor in China's Xinjiang region,' January 13, 2021, accessible at https://home.kpmg/us/en/home/insights/2021/01/tnf-canada-and-uk-announce-trade-restrictions-response-to-forced-labor-in-china-xinjiang-region.html. Cite new Canada law

[53] Trading Economics, 'United States Imports by Country,' accessible at https://tradingeconomics.com/united-states/imports-by-country.

[54] *See* Section III.F.2 below.

[55] *See* Section III.F.1 below.

[56] *Id.*

[57] *See* Section III.G below.

[58] *See* Section III.A below.

companies should respect human rights in order to preserve and strengthen their "social license" to operate.[59]

I.B. 'Broadening' of International and Transnational BHR Norms

International and transnational BHR norms are also 'broadening' – recognising additional human rights which business is also responsible to respect. The UNGPs opened the door. They defined human rights to include the broad spectrum of rights set forth in the Universal Declaration of Human Rights;[60] the International Covenants on Civil and Political Rights,[61] and on Economic, Social and Cultural Rights;[62] the International Labour Organization's Declaration on Fundamental Principles and Rights at Work;[63] and additional rights where relevant to a company's operations, such as rights of indigenous peoples, rights of women, or rights under international humanitarian law during armed conflict.[64]

The most recent broadening likely to affect business significantly is the recognition, by an overwhelming vote of the UN General Assembly in 2022, of the human right to a clean, healthy and sustainable environment.[65] The Resolution noted that at least 155 nations already recognise a fundamental right to a decent environment, whether by treaty, Constitution, law or regulation.[66] The right has previously been recognised by human rights treaties in Africa,[67] the Americas,[68] Europe[69] and the Islamic world.[70]

The responsibility to respect the human right to a decent environment has significant ramifications for most global companies. They include, for example, companies in the extractive, energy, food and agriculture, chemical, pharmaceutical, auto, steel, construction, and information technology industries. The relevance to business of the right to a clean environment is so clear that the acronym for mandatory human rights due diligence, previously 'mHRDD', is now sometimes expressed as 'mHREDD', for mandatory human rights and environmental due diligence.[71]

I.C. Following Sections

Section II of this article summarises the background and key provisions of the UNGPs. Section III discusses (A) the hardening of BHR norms through regional and national transnational legislation, (B) regional and domestic transnational court judgments against

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[59] Special Representative of the Secretary-General, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), at 16-17, ¶ 54.

[60] Adopted by UN General Assembly Resolution 217 A(III) of 10 December 1948.

[61] 999 U.N.T.S. 171, adopted 16 December 1966, in force 23 March 1976.

[62] 993 U.N.T.S. 3, adopted 16 December 1966, in force 3 January 1976.

[63] Adopted in 1998, amended in 2022, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf.

[64] UNGP 12 and Commentary.

[65] See Section IV.A below.

[66] *Id*.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id*.

[71] For example, Martin Scheltema, 'An opinion on the core elements of the proposed EU mHREDD legislation,' International Bar Association, accessible at https://www.ibanet.org/article/F26F9B82-CD6E-47D4-B86B-6EB4C66B2C83.

companies, (C) court judgments against States indirectly affecting transnational business, (D) criminal cases, (E) import controls, (F) international investment treaties and arbitration, and (G) the potential UN treaty on BHR. Section IV addresses the broadening of international and transnational BHR norms through increased recognition of a human right to a clean, healthy and sustainable environment. Section V offers a brief Conclusion.

II. The UN Guiding Principles on Business and Human Rights

II.A. Background

The long and tortuous history of debates in the UN over business and human rights goes back at least to the 1970s.[72] As recently as two decades ago, it was often argued that only States had institutional responsibilities to safeguard human rights, and that only State actors could violate human rights.

Since then, the predominant view has changed dramatically. By 2014, a reputable survey indicated that senior corporate executives "*overwhelmingly perceive a responsibility to protect human rights*,"[73] while all 47 member States of the UN Human Rights Council, acting by consensus, called upon "*all business enterprises to meet their responsibility to respect human rights in accordance with the [UNGPs]*."[74]

In 2003 a UN human rights body had attempted to define the legal responsibilities of corporations with respect to human rights. The UN Sub-commission on the Promotion and Protection of Human Rights approved draft 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.'[75]

The Sub-commission Norms applied a long list of human rights treaties and international instruments regulating States to transnational corporations. Critics, among other objections, viewed the Norms as too prescriptive.[76] Although non-binding, the draft Norms aspired to extend human rights obligations to companies as well as States. Their preamble recognised that even though States have the "*primary responsibility*" to protect human rights, "*transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights*."[77]

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[72] *See* John Ruggie, "Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors", Institute for Human Rights. & Business (Sept. 9, 2014), accessible at https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors

[73] The Economist Intelligence Unit, "The Road from Principles to Practice: Report Summary, "*The Economist* (Mar. 16, 2015), http://www.economistinsights.com/business.

[74] Human Rights Council Res. 26/22, U.N. Doc. A/HRC/RES/26/22, at ¶ 3 (July 15, 2014).

[75] UN Sub-commission. on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12 (2003).

[76] *See* Special Representative of the Secretary-General, *Interim Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 56–69, UN Doc. E/CN.4/2006/97 (Feb. 22, 2006) (by John Ruggie), for a summary critique.

[77] *Id.* at 7.

The UN Commission on Human Rights considered the draft Norms in 2004. While recognising that they contained "*useful elements and ideas for consideration*," the Commission declared that they had "*no legal standing*".[78]

Following this false start, in 2005 the Commission (soon reconstituted as the UN Human Rights Council) asked UN Secretary-General Kofi Annan to appoint a special representative on the issue of "*human rights and transnational corporations and other business enterprises*".[79] Annan appointed his former advisor, Harvard University political scientist John Ruggie. The focus of Ruggie's mandate, and of subsequent business and human rights discourse, paid special (albeit not exclusive) attention to the role of transnational businesses and their investments and operations in host States –addressing issues of the impact of these companies operating outside their home jurisdictions.

Among other assignments, Ruggie's initial mandate was to "*identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights*", and to "*elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation*."[80]

II.B. The Three-Part Framework on Business and Human Rights

After studies and consultations with stakeholders worldwide, in 2008 Ruggie recommended a three-part Framework on BHR: *Protect, Respect and Remedy*.'[81] In summary, the Framework comprises three core principles:

- the State duty to protect against human rights abuses by third parties, including business;
- the corporate responsibility to respect human rights; and
- the need for more effective access to remedies.

The three principles "*form a complementary whole in that each supports the others in achieving sustainable progress.*"[82]

Ruggie explained the need for the Framework as follows:

> *Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. But markets work optimally only if they are embedded within rules, customs and institutions. Markets themselves require these to survive and thrive, while society needs them to manage the adverse effects of market dynamics and produce the public goods that markets undersupply.*[83]

Ruggie identified the 'root cause' of contemporary BHR problems as 'governance gaps':

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[78] UN Commission on Human Rights Dec. 2004/116, UN Document E/CN.4/2004/127 (Apr. 20, 2004).

[79] UN Commission on Human Rights Res. 2005/69, UN Document E/CN.4/RES/2005/69 (Apr. 20, 2005).

[80] *Id.*

[81] Special Representative of the Secretary-General, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

[82] *Id.* at 4–5, ¶ 9.

[83] *Id.* at 3, ¶ 2.

> *The root cause of business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.*[84]

The three-part Framework was Ruggie's response to those governance gaps. Under existing international human rights law, he noted, States have the legal duty to protect persons within their jurisdiction from human rights violations, including those committed by business[85] (or in which business is complicit)[86] This State duty has come to be known as 'Pillar One' of the three-part Framework.

What is now called 'Pillar Two' of the Framework is the business responsibility to respect human rights. Ruggie articulated the business 'responsibility to respect,' not as a new international legal obligation, but as a duty assumed "*because it is the basic expectation society has of business*."[87] It is 'part of what is sometimes called a company's social license to operate."[88]

Ruggie noted that international organisations such as the International Labour Organization and the Organisation for Economic Co-operation and Development, as well as major business organisations, and the thousands of individual companies that had joined the UN Global Compact, recognise that business has a responsibility to respect human rights.[89]

In essence, the business responsibility to respect human rights has two components. The first is a negative obligation: "*To respect rights essentially means not to infringe on the rights of others - put simply, to do no harm*."[90]

The second is a positive responsibility: "*What is required is due diligence - a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it*", mitigating it, and providing remediation in the event harm occurs. "*The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities*."[91]

These dual responsibilities apply to all human rights enumerated in a core set of human rights treaties:

> *Because companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts*.[92]

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84 *Id.*

85 *Id.* at 7–8, ¶¶ 18–22.

86 *Id.*

87 *Id.* at 4–5, ¶ 9.

88 *Id.* at 16–17, ¶ 54.

89 *Id.* at 8, ¶ 23.

90 *Id.* at 9, ¶ 24.

91 *Id.* at 9, ¶ 25.

92 *Id.* at 9, ¶ 24. The UNGP's, later drafted by Ruggie and endorsed by the Human Rights Council in 2011, specifically identify, as a minimum set of human rights instruments to be respected by business in all contexts, the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the

Finally, meeting these two responsibilities is not always enough:

> *There are situations in which companies may have additional responsibilities—for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations*.[93]

The Third Pillar of the Framework requires a remedy for victims when human rights violations occur. States have a duty to provide both judicial and non-judicial remedies, while business has a responsibility to provide non-judicial remedies for violations in which it is involved.[94]

By consensus without dissent, the UN Human Rights Council formally "*welcome[d*]" Ruggie's three-part Framework and recognised the "*need to operationalize*" it. Extending his mandate for three years, the Council asked him to elaborate on the Framework, and encouraged governments, business and civil society to co-operate with him.[95]

II.C. The UN Guiding Principles on Business and Human Rights

After further research and consultations, Ruggie in 2011 presented a set of some 31 *Guiding Principles on Business and Human Rights*, together with Commentaries on each Principle.[96] The UN Human Rights Council, again by consensus without dissent, formally endorsed the Guiding Principles, now known as the *UN Guiding Principles on Business and Human Rights*.[97]

II.C.1. State duty to protect

The first ten principles of the UNGPs elaborate on Pillar One of the Framework, the State *duty to protect* human rights.

The 'foundational principles' articulate the basic State duty and its territorial scope. The State duty is as follows:

> *States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication*.[98]

The territorial scope of the duty is global: "*States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations*."[99] However, the Commentary notes that *at present* (2011),

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International Labour Organization's Declaration of Fundamental Principles and Rights at Work. UNGP 12.

93 *Id*.

94 *Id.* at 24–27.

95 Human Rights Council Res. 8/7, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008). Principles 1-10 cover the State duty to protect; Principles 11-24 detail the business responsibility to respect; and Principles 25-31 address the need to provide victims access to effective remedies.

96 Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), accessible at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

97 Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, ¶ 1 (July 6, 2011).

98 Principle 1.

99 Principle 2.

international law neither generally requires, nor prohibits, states to regulate extraterritorial activities of their businesses, so long as there is a recognised jurisdictional basis for doing so.[100]

The remaining eight principles under Pillar One detail *operational principles* of the State duty to protect in a variety of contexts.

II.C.2 Business responsibility to respect

The business *responsibility to respect* human rights (Pillar Two of the Framework) comprises UNGP Principles 11 to 21. The first 'foundational principle' sets forth the basic, two-pronged rule: "*Business enterprises should respect human rights. This means that they should (1) avoid infringing on the human rights of others and should (2) address adverse human rights impacts with which they are involved*."[101]

This responsibility differs between impacts caused by a company's own activities, and those to which a company is only 'directly linked' through its business relationships. In regard to a company's own activities, the company should (1) *"[a]void causing or contributing to adverse human rights impacts*" and (2) "*address such impacts when they occur*."

In contrast, in regard to adverse impacts only "*directly linked to their operations, products or services by their business relationships*," such as those with business partners and entities in their value chain, companies need only "*seek to prevent or mitigate adverse human rights impacts*".[102] This best efforts responsibility applies to companies "*even if they have not contributed to those impacts*."[103]

The responsibility to respect applies to "*all enterprises regardless of their size, sector, operational context, ownership and structure*." However, *"the scale and complexity of the means … may vary according to these factors and with the severity of the enterprise's adverse human rights impacts*."[104]

To meet their responsibility to respect, and as appropriate to their size and circumstances, companies should have in place three key elements:[105]

- A human rights policy;
- A "*human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights*"; and
- Remediation processes for adverse impacts they cause or to which they contribute.

Policy: The BHR policy should be approved at the most senior level of the company. It should be informed by expertise, publicly communicated, operationalised internally, and should spell out expectations for employees and business relationships.[106]

Due Diligence: The human rights due diligence process should include "*assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed*."[107] It should involve "*meaningful*

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[100] Principle 2 Commentary.

[101] Principle 11.

[102] Principle 13.

[103] *Id.*

[104] Principle 14.

[105] Principle 15.

[106] Principle 16.

[107] Principle 17.

consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation."[108]

Remedy: Where companies "*identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes*."[109] These may include effective operational-level grievance mechanisms. Especially where crimes are alleged, they may also require a company to cooperate with judicial mechanisms.[110]

Regardless of context, companies should:

- Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- Seek ways to honour the principles of internationally recognized human rights when faced with conflicting national requirements; and
- Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

Finally, the responsibility to respect recognises that companies will sometimes need to prioritize their human rights due diligence. Where that is necessary, they should "*first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable*."[111]

II.C.3 Access to remedy

States must provide access to remedy "*through judicial, administrative, legislative or other appropriate means*" to persons whose human rights are adversely affected by business activities.[112]

Companies should establish or participate in effective operational-level grievance mechanisms.[113] The mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, sources of continuous learning, and based on engagement and dialogue with stakeholders.[114]

III. The 'Hardening' of International and Transnational Norms on Business and Human Rights

Since the UNGPs were adopted a decade ago, and especially in the last six years, there is a trend to 'harden' the soft law norms of the business responsibility to respect human rights through legal initiatives mandating companies to carry out human rights due diligence and requiring States to provide access to remedy for adverse impacts and business to cooperate in such remedies. Mainly but not only in Europe, the trend can be seen in regional and national legislation with transnational effect (Section III.A. below), national court judgments against companies with transnational effect (Section III.B.), court judgments against States

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[108] Principle 18 (b).

[109] Principle 22.

[110] Principle 22 Commentary.

[111] Principle 24.

[112] Principle 25.

[113] Principle 29.

[114] Principle 31.

which indirectly affect business (Section III.C.), criminal cases against companies and executives (Section III.D.), import controls (Section III.E.), international trade and investment treaties and arbitration (Section III.F.), and the UN process to negotiate a treaty on BHR (Section III.G.)

III.A. Regional and National Human Rights Due Diligence Legislation with Transnational Effect

Mandatory human rights due diligence laws have to date been enacted or are close to enactment only in Europe. This section begins by discussing the draft EU Directive on Corporate Sustainability Due Diligence. Although not yet enacted, the Directive appears likely to be enacted and would have the broadest impact on the largest number of companies. It has also been subject to the widest debate and input by stakeholders, illustrating the range of policy and technical issues arising in due diligence laws addressing a broad range of human rights.

This section then turns to three broad-based human rights due diligence laws already enacted: the French law of 2017, the Norwegian law of 2022, and the German law of 2022 (which came into force in 2023). Similar legislative proposals have been introduced in parliaments or committed to by governments in Austria, Belgium, Finland, Luxembourg and The Netherlands.[115]

More narrowly targeted due diligence laws, addressing only child labour or conflict minerals in supply chains, have been enacted in The Netherlands[116] and Switzerland.[117]

III.A.1. EU Draft Directive on Corporate Sustainability Due Diligence 2022[118]

In February 2022 the European Commission proposed a Directive on *Corporate Sustainability Due Diligence*.[119] The Directive would impose extensive and legally enforceable duties on large European companies, and on large non-EU companies doing business in Europe, with respect to the human rights and environmental impacts of their operations and value chains. In November 2022 the European Council published its *General Approach* to the Directive,[120] supporting the proposal subject to modifications outlined below.

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[115] European Parliamentary Research Service Briefing, 'Corporate Sustainability Due Diligence,' May 2022, p. 3, Figure 1, accessible at https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729424/EPRS_BRI(2022)729424_EN.pdf .; 'Six political parties in The Netherlands submit corporate accountability bill,' mvoplatform, 1 Nov 2022, accessible at https://www.mvoplatform.nl/en/six-political-parties-in-the-netherlands-submit-corporate-accountability-bill/; Business & Human Rights Resource Centre, 'National & regional movements for mandatory human rights & environmental due diligence in Europe', January 2023.

[116] Dutch Child Labor Due Diligence Act, approved by the Senate May 14, 2019. See Ropes & Gray, 'Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies,' June 5, 2019.

[117] *See* Ropes & Gray, 'Swiss Conflict Minerals and Child Labor Due Diligence Legislation Takes Effect – Will Require Due Diligence and Reporting by Many U.S.-Based Multinationals Doing Business in Switzerland,' February 2, 2022.

[118] The text below is adapted from King & Spalding, 'Proposed New EU Directive on Corporate Sustainability Due Diligence,' February 24, 2022, accessible at https://www.kslaw.com/news-and-insights/proposed-new-eu-directive-on-corporate-sustainability-due-diligence.

[119] The text of the European Commission's February 23, 2022 proposed Directive can be found at https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[120] The European Council's November 30, 2022 'General Approach' to the proposed Directive can be found at https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf.

As proposed by the Commission, the Directive would initially apply to all EU companies with more than 500 employees and EUR150 million in annual turnover (revenues) worldwide, and to non-EU companies active in the EU with turnover generated in the EU of EUR 150 million. Two years later, it would also apply to EU companies with 250 employees and EUR 40 million annual turnover, and to non-EU companies with turnover of EUR 40 million generated in the EU, in defined "high-impact sectors", such as extractive industries, agriculture and textiles. The Commission estimated that the Directive would cover about 13,000 EU companies and about 4,000 non-EU companies.

Intended to go into effect two years after adoption by the European Parliament and Council, the Directive would affect companies' human rights and environmental policies, board responsibilities, due diligence procedures, and actions to avoid or mitigate adverse impacts. It would be enforceable by administrative or judicial fines and enforcement orders. It would allow suits for damages in European national courts, for which due diligence may be a defence.

Once approved, member States would have two years to implement the Directive in domestic legislation.

Background: In April 2020 EU Justice Minister Didier Reynders announced that the European Commission would develop a proposal on human rights due diligence during 2021. The proposal was originally scheduled for release in June 2021, but its release was repeatedly postponed until February 2022. Meanwhile, Germany, Norway and Switzerland adopted national legislation on BHR due diligence, joining France, which did so in 2017. Similar legislation is being considered in other European States.

Due Diligence: The Directive would require companies to follow the steps identified in the *OECD Due Diligence Guidance for Responsible Business Conduct*.[121] As implemented in the Directive, these steps include

- integrate due diligence into policies and management systems;
- identify and assess actual or potential adverse human rights and environmental impacts;
- prevent or adequately mitigate potential adverse impacts;
- cease or minimise actual adverse impacts, including by financial payments to affected persons and communities;
- periodically assess the effectiveness of the due diligence policy and measures;
- publicly communicate on due diligence; and
- provide for remediation, including appropriate procedures for complaints by affected persons, trade unions and civil society organisations.

Due diligence should address adverse impacts throughout the life-cycle of production and use and disposal of products or services, in a company's own operations and in those of its subsidiaries and value chain.

Director Responsibilities: Duties for directors of covered EU companies would have included adopting a due diligence policy, setting up and overseeing the implementation of due diligence processes, and integrating due diligence into corporate strategy. In addition, when directors act in the interest of the company, they would have a duty of care to take into account the human rights, climate and environmental consequences of their decisions and the likely short-, medium- and long-term consequences. Rules on directors' duties would be enforced through existing Member State laws.

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[121] Published in 2018. Accessible at https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.

However, these duties were later eliminated by the Council (see below) and are unlikely to be restored to the Directive. But a related provision remains in the Council's text: when remuneration is linked to a director's contribution to business strategy and long-term interests and sustainability, companies must take due account of the fulfilment of the corporate climate change plan.

Administrative Fines and Orders: National administrative enforcement tools would include sanctions and orders to cease or suspend infringing actions. Administrative or judicial fines for failure to conduct adequate due diligence should be "*dissuasive, proportionate and effective*".

Civil Suits for Damages: Civil liability would concern a company's own operations and those of its subsidiaries and "*established business relationships*" with which it cooperates on a regular and frequent basis. Liability would arise where the harm could have been identified and prevented, adequately mitigated, ended, or minimised, by appropriate due diligence measures. Due diligence should be a defence to liability, except where it was unreasonable to expect that the measures taken would suffice to prevent, mitigate, end, or minimise the adverse impact. The issue of which party has the burden of proof on whether measures were adequate is left to national law. Member States are required to adapt their rules on civil liability to cover cases where damage results from failure by a company to comply with due diligence obligations.

High-Risk Sectors: High-impact sectors under the Directive would include manufacture and wholesale trade of textiles, clothing and footwear; agriculture, forestry, and fisheries; manufacture of food products; wholesale trade of agricultural raw materials, live animals, wood, food, and beverages; extractive industries; manufacture of basic metal and mineral products (except machinery and equipment); and wholesale trade of mineral resources and basic and intermediate mineral products. Additional sectors may be added in the future. The financial sector is not high-impact but should include very large companies as regulated financial undertakings.

Human Rights: Unlike the UNGPs, the Directive would not cover 'all internationally recognised human rights'. Instead, it would cover certain specified human rights considered relevant to business activity, as recognised in international instruments. Nevertheless, its scope is broad. Covered rights would range from the rights to life; personal security; liberty; freedom from torture; privacy; freedom of thought, conscience and religion; children's rights; and freedom from slavery and human trafficking; to economic rights, including the rights to dispose of a land's natural resources; non-deprivation of means of subsistence; labour rights including fair and adequate living wages, decent working conditions, freedom from forced and child labour, non-discrimination and rights to associate, assemble, organise unions and engage in collective bargaining; freedom from harmful environmental degradation; freedom from unlawful eviction and development; and rights of indigenous peoples to land, territories and resources.

In addition, the Directive would protect other rights in some 22 international instruments, where a violation "*directly impairs*" a protected legal interest, and the company could have "*reasonably established the risk of such impairment and any appropriate measures to be taken*" in the circumstances. These instruments include 12 leading human rights treaties and declarations of the United Nations, and the two main declarations and eight core conventions of the International Labour Organization.

Environment: In addition to the human right to be free from harmful environmental degradation (see above), the environmental rights covered by the Directive would include rights protected by specified international conventions and EU regulations on biodiversity,

endangered species, mercury, toxic chemicals and waste, ozone depletion and hazardous waste.

Climate Change: The Directive would require companies to adopt strategies to ensure that their business plans are compatible with the 1.5 degree global warming target of the Paris Agreement. Companies for which climate is a principal risk should include emissions reduction targets in their plans. Although the Directive would not mandate civil remedies for failure to comply, neither would it prohibit national or regional courts from ordering remedies. Climate change cases against companies under national or regional laws are already pending in France, Germany, The Netherlands and elsewhere (see Section IV.C. below).

Value Chains: Covered value chains would have included direct and indirect "*established business relationships*", both upstream and downstream (but see Council modifications below). Companies should utilise contractual provisions and financial or technical assistance to build and exercise leverage over small and medium enterprises in their value chains. Companies should prioritize engagement with entities in the value chain rather than termination, which should be only a last resort.

Relation to other EU Legislation: The proposed Directive is without prejudice to other EU legislation on human rights, the environment and climate change. In case of conflict, the other legislation prevails.

The EU regulatory context is as follows: in 2022 the European Council approved a new *Corporate Sustainability Reporting Directive*,[122] which requires more extensive reporting than the existing EU *Non-Financial Reporting Directive* of 2014. The proposed new *Corporate Sustainability Due Diligence Directive* would "underpin" reporting under the reporting Directive, and under the EU *Sustainable Finance Disclosure Regulation* governing financial market participants and advisers.[123] The proposed Directive would also complement other EU initiatives, including the *Taxonomy Regulation*,[124] which categorises environmentally sustainable investments in economic activities that also meet a minimum social safeguard; the *Directive on human trafficking*;[125] the *Employer Sanctions Directive*, which prohibits employment of "*irregularly staying third-country nationals*";[126] the *Conflict Minerals Regulation*;[127] the proposed *Regulation on deforestation-free supply chains*;[128] the proposed *Batteries Regulation*;[129] and the future *Sustainable Products Initiative*.[130] The European

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[122] *See* EU Council Press Release, 'Council gives final green light to corporate sustainability reporting directive,' 28 November 2022, accessible at https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/council-gives-final-green-light-to-corporate-sustainability-reporting-directive/.

[123] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector

[124] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

[125] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

[126] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

[127] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

[128] *See* European Commission, Press Release, 'Green Deal: EU agrees law to fight global deforestation and forest degradation driven by EU production and consumption,' 6 December 2022.

[129] *See* European Parliament, Press Release, 'Batteries: deal on new EU rules for design, production and waste treatment,' December 9, 2022.

Commission is separately preparing a legislative proposal that would effectively prohibit placing on the EU market products made by forced labour, including forced child labour.[131]

Approvals: The proposal must still be approved by the European Parliament and Council. In 2021 the Parliament approved an even stronger proposal. As of this writing, the Parliament's Committee on Legal Affairs voted on certain amendments to the Commission proposal and adopted a mandate for negotiations in April 2023, and the negotiating mandate was approved by the plenary of the Parliament in June 2023.

In November 2022 the Council published its *General Approach* to the proposed Directive, mandating the Council President to enter into negotiations with the Parliament. [132] The major changes suggested by the Council are as follows:

- ***Companies***: Initially the Directive would apply, after three years, only to EU companies with more than 1000 employees and annual turnover of more than EUR 300 million, and to non-EU companies with more than EUR 300 million turnover in the EU. Thereafter coverage of companies would be phased in using the same size thresholds as in the Commission's proposal.[133] Criteria for covered companies would have to be met for two consecutive financial years.[134]
- ***Group Due Diligence***: Companies could fulfil some due diligence obligations at a group level.[135]
- ***Business relationships***: The concept of 'established business relationships' in value chains is dropped in favour of a risk-based approach. Companies should prioritize adverse impacts based on severity and likelihood. Severity depends on gravity, number of persons or extent of environment affected, and the difficulty of restoring the situation prevailing prior to the impact.[136]
- ***Value chain***: The term 'value chain' is replaced by 'chain of activities', reflecting divergent views of States on whether to cover the entire 'value chain' or only the 'supply chain'.[137] Much of the downstream value chain is not covered.
- ***Financial services***: Whether to cover financial services by regulated financial undertakings, and pension institutions treated as social security schemes under EU law, is left up to each State when transposing the Directive.[138] If a State chooses to cover financial services by a regulated financial undertaking, the undertaking would be required to identify adverse impacts of business partners only before providing a financial service.[139]
- ***EU company directors***: The duty of directors to set up and oversee due diligence and corporate strategy to take into account adverse impacts and due diligence measures is deleted.[140]

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[130] European Commission, 'Sustainable Products Initiative,' accessible at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en

[131] *See* Section III.E.2 below.

[132] European Council, November 30, 2022 'General Approach' to the proposed Corporate Sustainability Due Diligence Directive, ¶ 4, accessible at https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf.

[133] *Id*. ¶ 14.

[134] *Id*. ¶ 12.

[135] *Id.*

[136] *Id*. ¶ 17.

[137] *Id*. ¶ 18.

[138] *Id*. ¶¶ 20 and 21.

[139] *Id*. ¶ 23.

[140] *Id*. ¶ 31.

- ***Civil liability***: For a company to be held liable, four conditions must be met – damage to a natural or legal person, breach of duty, causal link, and fault (intention or negligence).[141]
- ***Compensation***: Victims of adverse impacts are entitled to full compensation but not punitive damages.[142]
- ***Joint and several liability***: A company and subsidiary or business partner may be held jointly and severally liable. The safeguard for companies that sought contractual assurances from their indirect business partners is deleted.[143]
- ***Treaties***: Human rights and environmental treaties covered would include only those ratified by all EU Member States. Covered obligations and prohibitions would include only those that can be observed by companies.[144] Fewer human rights and more environmental treaties are included.[145]
- ***Adverse impacts***: The definition of adverse human rights impacts is clarified.[146] Except for specifically mentioned rights or prohibitions (such as torture), treaty violations amount to adverse impacts only if the company could have reasonably identified them.[147]

III.A.2 *Loi sur le Devoir de Vigilance*, France 2017

The French law was the first mandatory human right due diligence law in the world. It mandates adoption and publication of a 'vigilance plan' by companies registered in France with more than 5000 employees in France or more than 10,000 employees worldwide two years running.[148] This includes subsidiaries of foreign companies which are based in France and have the requisite headcounts. The headcounts include employees of a company's direct and indirect subsidiaries.

The vigilance plan:

> *shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls […], as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship.*[149]

The main aims of the plan are thus to identify risks and prevent severe violations. The plan must include elements such as risk mapping; regular assessment of risks; an alert mechanism with the participation of labour unions; *"appropriate action to mitigate risks or*

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[141] *Id*. ¶ 27.

[142] *Id*. ¶ 28.

[143] *Id*. ¶ 29.

[144] *Id*. ¶ 34.

[145] *Id*. ¶ 35.

[146] *Id*. ¶ 36.

[147] In its own operations or those of its subsidiaries or business partners, taking into account the circumstances, including the nature and extent of the company's business operations and its chain of activities, and the characteristics of the economic sector and the geographical and operational context. *Id*. p. 71 ¶ (c).

[148] English translation at https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf. *See generally* Elsa Savourey and Stéphane Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption," *Business and Human Rights Journal* Volume 6, p. 141, 17 February 2021.

[149] *Id*. Article 1.

prevent serious violations"; and a "*monitoring scheme to follow up on the measures implemented and assess their efficiency*."[150]

The 'recitals of the law' specify that the plan and its implementation correspond to the concept of human rights due diligence outlined in the UNGPs.[151]

At the request of any person with a 'legitimate interest', if a company does not meet its obligations after three months' notice, a court can order the company to meet them. Under the French Civil Code, a company that fails to meet its obligations "*shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid*."[152]

According to a May 2022 report:

- *Around 260 companies are subject to the French law. In the financial year after its introduction, 70% of companies started or revised their human rights and environmental risk mapping, and 65% of companies had dedicated human rights impacts identification processes (compared to 30% before the law).*
- *A study by PWC and others on the French law found that 80% of SMEs (small and medium enterprises) are being required to take various steps to comply with human rights obligations by the large actors in their value chains, without receiving accompanying support (financial or otherwise) for such compliance.*[153]

The first legal claim under the Law was brought in 2019 against oil major TotalEnergies. The claim sought an injunction requiring the company to disclose the human rights and environmental impacts of an oil pipeline in which its Ugandan and Tanzanian affiliates own a majority share.[154] A jurisdictional dispute between a non-commercial and a commercial court delayed the proceeding but was eventually resolved, first by a *Cour de Cassation* decision in favour of the non-commercial court, and then by a December 2021 law granting the judicial Tribunal of Paris exclusive jurisdiction.

Next came a dispute over what the 'duty of vigilance' requires. The NGO claimants argue that Total's plan lacked details of concrete measures taken by the company and did not include environmental risks and climate impacts associated with its projects. Total argued, among other points, that all persons to be relocated will be compensated; that the majority have already received compensation; that there is broad satisfaction with the amount of the compensation; that the persons relocated will be monitored for three years; and that Total has taken measures to produce a net benefit for biodiversity.[155] In contrast, a recent NGO report claims that single women have been left out of the compensation scheme, that the

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[150] *Id*.

[151] European Coalition for Corporate Justice, FAQ's, Question 4, accessible at https://respect.international/wp-content/uploads/2017/10/french-corporate-duty-of-vigilance-law-faq.pdf.

[152] *Id.* Article 2.

[153] Owain Johnstone and Olivia Hesketh, "Modern Slavery PEC Policy Brief 2022-1, 'Effectiveness of mandatory human rights and environmental due diligence,'" *Bingham Centre of the British Institute of International and Comparative Law*, May 2022 (footnotes omitted), accessible at https://modernslaverypec.org/assets/downloads/mHREDD_briefing_FINAL.pdf.

[154] Justfinance, 'Risk of poverty after land acquisitions for Uganda's mega oil pipeline,' November 16, 2022, accessible at https://justfinanceinternational..org/2022/11/16/risk-of-poverty-after-land-acquisitions-for-ugandas-mega-oilpipeline/. According to the report, Total has a 62% share; the Ugandan and Tanzanian national oil companies each have 15%; and China National Offshore Oil Company has 8%.

[155] Duty of Vigilance: TotalEnergies Regrets NGOs' Refusal of the Mediation Process Proposed by the Paris Civil Court, October 12, 2022, accessible at https://totalenergies.com/media/news/press-releases/duty-vigilance-totalenergies-regrets-ngos-refusal-mediation-process.

compensation is insufficient to buy comparable land, and that there is broad dissatisfaction with the amount of compensation.[156]

However, in February 2023, a Paris civil court reportedly dismissed a fast-track request to halt the pipeline on the grounds that only a standard trial could provide a proper foundation for such an order, and that the claimants' notice to Total was not the same as in their amended complaint before the court.[157] At the same time, the court reportedly rejected Total's contention that French courts cannot exercise jurisdiction over the company's activities in Africa.[158]

Separately, a coalition of NGOs and local officials sued Total in 2020 for an allegedly inadequate climate change plan. In February 2023 they asked a Paris civil court to order provisional measures pending trial, such as the suspension of new oil and gas plants.[159]

Recently another lawsuit was filed against Total because of alleged torture at an Emirati gas plant where Total is reportedly the largest shareholder, but where Total is still only a minority shareholder and reportedly contends that it has no controlling interest and therefore excludes the plant from its vigilance plan.[160]

Three-month notices or court claims against other French companies under the *Loi* have been filed, but have not advanced as far in litigation proceedings. They include, for example, claims against:

- a telemarketer for an allegedly deficient vigilance plan;[161]
- a supermarket chain for alleged deforestation and human rights violations in the Amazon;[162]
- a water company for alleged service interruptions and contamination of water supply in Chile;[163]
- a cosmetics company for its Turkish subsidiary's allegedly violating workers' rights, including the freedom to join a union;[164]

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[156] Justfinance, 'Risk of poverty after land acquisitions for Uganda's mega oil pipeline,' November 16, 2022, accessible at https://justfinanceinternational..org/2022/11/16/risk-of-poverty-after-land-acquisitions-for-ugandas-mega-oilpipeline/.

[157] Reuters, 'French court dismisses Uganda lawsuit against TotalEnergies', March 1, 2023; RFI, 'French court dismisses case against TotalEnergies E. Africa oil project', February 28, 2023.

[158] Reuters, note 157 above.

[159] Sherpa, 'Climate change litigation against Total: NGOs and local authorities' request for provisional measures pending trial', February 10, 2023; see Business & Human Rights Resource Centre, *TotalEnergies lawsuit (re climate change, France)*, accessible at https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-climate-change-france/.

[160] Dania Akkad, 'Yemen: Torture victims accuse Total of breaching French corporate duty law', MIDDLE EAST EYE, 23 February 2023.

[161] Sherpa, 'Sherpa and UNI Global Union send formal notice to Teleperformance—calling on the world leader in call centers to strengthen workers' rights,' July 18, 2019, accessible at https://www.asso-sherpa.org/sherpa-and-uni-global-union-send-formal-notice-to-teleperformance-calling-on-the-world-leader-in-call-centers-to-strengthen-workers-rights-2.

[162] Sherpa, 'Amazon indigenous communities and international NGOs sue supermarket giant Casino over deforestation and human rights violations,' 2021, accessible at https://www.asso-sherpa.org/amazon-indigenous-communities-and-international-ngos-sue-supermarket-giant-casino-over-deforestation-and-human-rights-violations.

[163] International Federation of Human Rights, 'In wake of Osorno health emergency in Chile, SUEZ is served notice to amend vigilance plan,' 9 July 2020, accessible at https://www.fidh.org/en/issues/globalisation-human-rights/in-the-wake-of-the-osorno-health-emergency-in-chile-suez-is-served

- nine companies, including food and drink manufacturers, supermarket groups, and a fast-food chain, for allegedly inadequate acknowledgement and management of plastics pollution in their business activities;[165] and
- a major bank, said to be the leading financier of fossil fuel projects in Europe and fifth in the world, for continued financing of oil and gas fields and infrastructure.[166]

III.A.3. Norwegian Transparency Act 2022[167]

The Norwegian Transparency Act entered into force in July 2022. Expected to apply to approximately 9,000 medium and large Norwegian companies[168] – and to medium and large foreign companies doing business in Norway – the Act requires companies to implement and account for human rights due diligence in their own operations, their supply chains, and the use and disposal of their products and services. Companies have until June 2023 to publish inaugural reports.

The Act applies directly to Norwegian public limited and listed companies. It also applies to other Norwegian companies and foreign companies that pay taxes in Norway, if they meet at least two of the following criteria:

- Annual sales revenue of at least NOK 70 million (approximately USD 7 million);
- A balance sheet total of NOK 35 million (approximately USD 3.5 million); or
- At least 50 full time employees

In practice, the Act will have even broader application. As companies covered by the Act (including oil and gas majors with concessions in Norway) look to demonstrate that they have engaged with business partners in their supply chain, they are likely to seek assurance from their suppliers, including through contractual obligations, that they adhere to international standards on human rights and forced labour. There are already market examples of large Norwegian companies increasing due diligence on their foreign suppliers (even if they have no connection to Norway) and seeking to require them to put in place global systems to address the risk of forced labour and human rights impacts in their onward supply chains.

The Act imposes three core obligations on qualifying companies:

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164 Sherpa, 'French cosmetics company Yves Rocher facing court proceedings for failure to ensure freedom of association and workers' rights in Turkey,' 23 March 2022, accessible at https://www.asso-sherpa.org/french-cosmetics-company-yves-rocher-facing-court-proceedings-for-failure-to-ensure-freedom-of-association-and-workers-rights-in-turkey.

165 ClientEarth, 'Duty of Vigilance: Nestlé, Danone, others on legal notice over threadbare plastics approach,' September 28, 2022, accessible at https://www.clientearth.org/latest/press-office/press/duty-of-vigilance-nestle-danone-others-on-legal-notice-over-threadbare-plastics-approach/; Tassilo Hummel, 'France's Danone faces legal action over plastic use and reporting practices', Reuters, January 9, 2023.

166 'French bank BNP Paribas sued by NGOs over Amazon deforestation link', Energyworld.com, February 27, 2023, accessible at https://energy.economictimes.indiatimes.com/news/oil-and-gas/french-bank-bnp-paribas-sued-by-ngos-over-amazon-deforestation-link/98271967.

167 An unofficial English translation and a link to the Norwegian text of the Act can be found at https://lovdata.no/dokument/NLE/lov/2021-06-18-99. The text below is adapted from King & Spalding, "The Norwegian Transparency Act Comes Into Force: Mandatory Human Rights Due Diligence for Large Companies Doing Business in Norway (And, in Practice, Many of Their Foreign Suppliers)," *JD Supra*, 5 July 2022, accessible at https://www.jdsupra.com/legalnews/the-norwegian-transparency-act-comes-1524308/.

168 Haavind, 'The new Norwegian Transparency Act enters into force on 1 July 2022,' 16 March 2022, accessible at https://haavind.no/en/the-new-norwegian-transparency-act-enters-into-force-on-1-july-2022/.

- Conduct human rights due diligence in accordance with the *OECD Guidelines for Multinational Enterprises* (which are consistent with the UNGPs). As discussed in section II.C.2. above, this far-reaching obligation requires companies to embed respect for human rights, including decent working conditions, into their policies; identify, prioritize, and take measures to address (i.e. by implementing suitable measures to cease, prevent or mitigate) adverse impacts the company causes or to which it contributes; track the implementation and results; communicate with affected stakeholders; and co-operate in remediation.
- Account for their due diligence by reporting publicly on these activities and making the information available on the company's website.
- Respond to information requests from members of the public about the risks relating to human rights and decent working conditions in their operations and value chains and how these have been addressed.

The Act empowers the Norwegian Consumer Authority to oversee compliance. In cases of non-compliance, the Act provides for administrative penalties. In cases of repeated infringements of the duty to conduct due diligence, the size of the penalty will reflect the severity, scope, and effects of the infringement.

III.A.4. German Supply Chain Due Diligence Act 2023

The German Supply Chain Due Diligence Act entered into force in January 2023. It requires large German companies (including some German subsidiaries of foreign multinationals) to conduct due diligence on human rights and environmental issues in their supply chains.

The Act applies to all companies which have their headquarters, main branch, centre of administration or registered seat in Germany and have more than 3000 employees on January 1, 2023 (falling to 1000 employees on January 1, 2024). The Act applies to German subsidiaries of non-German multinationals, provided that the subsidiary meets the headcount threshold.

Even where the Act does not apply directly to a company, it may still have an indirect effect (irrespective of where that company is based or its headcount). For example, as with the Norwegian Transparency Act, where a foreign company supplies a purchaser company caught by the Act, the purchaser may look to cascade its due diligence obligations by way of contractual provisions. A failure adequately to implement such obligations could lead to contractual liability.

The Act's 'due diligence obligations' require companies to verify, document and monitor that suppliers comply with basic human rights and environmental standards. These obligations include, among others:

- Setting up a risk management system to identify risks of human rights or environmental violations, to prevent such violations and to mitigate their impact should they occur (if the company has caused or contributed to them);
- Performing regular risk analysis, in order to identify risks of human rights and environmental violations, at least annually and whenever the risk exposure alters, such as through new products or entry into a new business field;
- Where risks are identified, taking preventive measures such as adopting a policy on the relevant human rights and environmental standards, implementing the policy across the supply chain, training personnel and setting up a control mechanism;
- Where a violation occurs or is imminent, taking corrective action to cease the violation or mitigate its consequences;

- Establishing a reporting system allowing persons across the supply chain to report risks or violations to a neutral body within the company, confidentially and with protection from retaliation or discrimination; and
- Documenting the fulfilment of the due diligence obligations, keeping the records for seven years, and publishing an annual report on the company's website.

These obligations broadly align with those required for supply chain human rights due diligence under the UNGPs and the OECD Guidelines for Multinational Enterprises, as well as under the mandatory human rights due diligence laws in France and Norway and proposed in the EU.

One difference is that the German Act requires due diligence only for supply chains. Unlike the Norwegian Act, companies are not obliged to conduct due diligence on their own operations or on downstream value chains. Mandatory due diligence is further limited to tier-one suppliers. It extends to sub-tier suppliers only where there is 'substantiated knowledge' of a human rights or environmental impact.

The Federal Office of Economic Affairs and Export Control is authorised to verify that the annual report has been made, requires improvements on the report, and acts to ensure compliance with the due diligence obligations, either on its own initiative or on request by an affected individual. Companies must cooperate, for example, by producing documents in their custody (or that of their suppliers) or by allowing access to their premises.

Unlike other mandatory human rights due diligence legislation, the German Act expressly excludes civil claims arising out of a failure to conduct due diligence. It relies instead on enforcement orders, fines and sanctions. A company which fails to comply with an enforcement measure may be fined up to EUR 50,000. Depending on the violation, a company that intentionally or negligently violates the Act itself is subject to a fine of up to EUR 8 million. For companies with an average annual turnover of more than EUR 400 million, the fine can amount to up to 2 percent of the turnover. The exact amount depends on the significance of the violation, the motives and the consequences. In addition, depending on severity, a company may be excluded from public tenders for up to three years.

III.A.5. Conclusion on Human Rights Due Diligence Laws

The enactment of national and regional human rights due diligence laws for large and medium size companies in Europe is the element of the broader trend toward hardening BHR norms which immediately affects the largest numbers of companies – an estimated 260 in France, 9000 in Norway, thousands in Germany, and 13,000 EU and 4000 non-EU companies under the proposed EU Directive. These figures dwarf the number of civil lawsuits, criminal prosecutions, import seizures and investment arbitrations in other elements of the overall trend to harden BHR norms.

In fact, the number and locations of companies affected by these due diligence laws are far greater, because the companies directly affected will likely seek to cascade their due diligence obligations down the supply chain to numerous suppliers far away.

The methods of enforcement also vary. Germany excludes civil suits as a remedy and relies on administrative sanctions. France relies on civil suits but has no administrative penalties. Norway has administrative sanctions.

The proposed EU Directive would have both. This highlights the importance of another element in the hardening trend – civil lawsuits, discussed in the next sections.

III.B. Court Judgments against Companies

To this writer's knowledge, no judgment by the highest court of any country has yet enforced the UNGPs directly against a company (although at least one lower Dutch court has done so).[169] However, judgments against companies in common law tort cases by the English and Canadian Supreme Courts hold that transnational corporations can be held liable with regard to activities of foreign subsidiaries that, in fact, adversely affect the human and environmental rights of persons and communities overseas.

In contrast, the U.S. Supreme Court has interpreted the Alien Tort Statute narrowly to exclude similar claims.[170] However, a majority of justices sitting on the Court in mid-2021 recognised that business corporations are not immune from suit for violations of international law.[171]

In addition, a Dutch district court has held a global oil company liable under the general Dutch 'unwritten standard of care', relying in part on the UNGPs and human rights under the European Convention on Human Rights. A German appeals court has allowed a suit by a Peruvian farmer to proceed against a German electric utility under German nuisance laws. Since both judgments concern climate change, they are addressed in Section IV below on environmental issues.

III.B.1 English Tort Law

Two recent judgments of the United Kingdom Supreme Court are consistent with the trend toward increased risk of global companies being held liable for damages for adverse impacts on human rights caused directly by the operations of their subsidiaries overseas. Under these British precedents, imaginative theories to pierce the corporate veil are not needed. Instead, parent companies can be held liable for their own negligent oversight or deficient supervision of foreign subsidiaries.

On the other hand, to the extent the British common law tort rulings create additional risks for parent companies which attempt to engage in due diligence to police the activities of their subsidiaries, they run counter to the UNGP guidance that companies should exercise human rights due diligence.

The first precedent was the unanimous jurisdictional ruling of the UK Supreme Court in 2019 in *Vedanta Resources PLC and another v Lungowe and others.*[172] *Vedanta* was at the time the most important judicial decision in the field of BHR since the jurisdictional ruling of the U.S. Supreme Court in *Kiobel v Royal Dutch Petroleum* in 2013.[173] But the difference between the two cases was night and day: whereas *Kiobel* drastically curtailed the jurisdiction of U.S. courts, *Vedanta* confirmed and extended a trend in UK courts to expand jurisdiction over transnational BHR cases.

Vedanta found jurisdiction in UK courts over a suit by Zambian farmers against both Vedanta Resources, a UK parent company, and its majority-owned Zambian subsidiary. The farmers alleged that their health and livelihoods were harmed by water pollution caused by a copper plant owned and operated by the subsidiary in Zambia.

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169 *See* Section IV.B below.

170 *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013).

171 *Nestle, USA v. Doe*, 141 S. Ct. 1931, 1941-42 (Justices Gorsuch and Alito), 1947 n. 4 (Sotomayor, Breyer and Kagan), 1950 (Alito) (2021).

172 [2019] UKSC 20. The following text is adapted from Doug Cassel, "Beyond *Vedanta*: Reconciling Tort Law with International Human Rights Norms", *OpinioJuris*, April 19, 2019, accessible at http://opiniojuris.org/2019/04/19/vedanta-v-lungowe-symposium-beyond-vedanta-reconciling-tort-law-with-international-human-rights-norms%EF%BB%BF/.

173 569 U.S. 108 (2013).

Formally, *Vedanta* ruled only on jurisdiction: both a UK parent company and its foreign subsidiary can be sued together in the UK, provided there is a 'real issue' which is reasonable for a UK court to try against the parent company, at least when there is also a 'real risk' that claimants could not obtain substantial justice against the subsidiary in the courts of the foreign jurisdiction.

Equally important, however, was *Vedanta*'s exposition of when a parent company owes a 'duty of care' for purposes of tort law to persons affected by its subsidiary. As in earlier transnational claims against parent companies in the UK, the issue was not the parent's vicarious liability for wrongs committed by its subsidiary, but rather the parent's own, direct liability for negligent supervision of the subsidiary.

In this context the Court refused to be limited by the restrictive, four-part test discussed by several courts of appeal following *Chandler v Cape.*[174] Originally tailored to the facts of *Chandler*, that test held a parent company liable where, in relevant respects, (1) the businesses of the parent and subsidiary are the same; (2) the parent has, or ought to have, superior knowledge; (3) the subsidiary's system is unsafe as the parent company knew or should have known; and (4) the parent knew or should have foreseen that the subsidiary or its employees would rely on the parent's superior knowledge.

Liberating courts from these factors, the Supreme Court announced, "*Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations […] of the subsidiary*."[175]

This broad supervisory spectrum ranges from the parent's 'taking over' relevant operations to its merely 'advising' the subsidiary. Depending on the extent and manner of the advice, simply advising a subsidiary can trigger a duty of care by the parent toward persons affected by the subsidiary. Persons affected may include, not only employees of the subsidiary, but also residents of communities affected by its operations (as in *Vedanta*).

Even group-wide corporate policies may sometimes suffice to establish a parental duty of care. Counsel for Vedanta argued that a parent could never incur a duty of care toward persons affected by its subsidiary "*merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them.*" But the Court responded that it was "*not persuaded that there is any such reliable limiting principle*." Corporate group guidelines can contain 'systemic errors' which, if implemented by a subsidiary, could harm third parties.[176]

Turning to the case at hand, the Court found it "*well arguable that a sufficient level of intervention*" by Vedanta might be shown at trial, after 'full disclosure' of relevant internal documents and communications. The Court based this finding on

> *the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement*.[177]

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[174] [2012] 1 WLR 3111.

[175] [2019] UKSC 20, ¶ 49.

[176] *Id.* ¶ 50.

[177] *Id.* ¶ 61.

The unfortunate message: the more a parent company sets policies for subsidiaries, and implements them by training, monitoring and enforcement, the more likely it will he held to owe a duty of care to persons harmed by the subsidiary. Still, the duty of care is only a threshold issue. Claimants must still show negligence, harm, causation, and damages.

Nonetheless, establishing a duty of care can, as in *Vedanta*, overcome a motion to dismiss for lack of a 'well arguable' claim against the parent, while helping to overcome a key objection to jurisdiction over the subsidiary. Crucially, it may also open the door to discovery of potentially revealing internal company documents and communications. For purposes of common law torts, then, *Vedanta* was an important victory for claimants.

But for purposes of international norms on the responsibility of business to respect human rights, *Vedanta* was problematic. By basing a duty of care – leading to potential liability -- on how closely a parent company supervises its subsidiary, *Vedanta* incentivized parent companies to take a hands-off approach. The fewer group-wide policies they adopt and the less they attempt to implement them, the less likely they are to owe a duty of care. The safest path for them to avoid liability is to see no evil and hear no evil.

This incentive is in tension – indeed, contradiction – with international norms on BHR. The UNGPs call on business enterprises to respect human rights "*wherever they operate*",[178] regardless of whether "*through a corporate group or individually"*,[179] and regardless of "*ownership or structure*".[180] Companies should avoid causing or contributing to adverse human rights impacts through their own activities – whether by action or omission – and should seek to prevent or mitigate adverse impacts to which they are directly linked through their business relationships.[181]

Companies should therefore adopt a policy stipulating their human rights expectations of subsidiaries (among others); communicate that policy to subsidiaries; and reflect it in operational policies and procedures which embed it throughout the business enterprise.[182] Among those procedures, companies should adopt a "*human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.*"[183]

In other words, the UNGPs recognise the responsibility of parent companies to adopt human rights policies and to actively supervise implementation of those policies by subsidiaries. This is precisely the sort of supervisory activity which, under *Vedanta*, is likely to lead a common law court to recognise a duty of care of a parent company towards persons affected by its subsidiaries.

Many other international instruments impose human rights supervisory responsibilities on parent companies. For example, the OECD *Guidelines for Multinational Enterprises*, which recognise the business responsibility to respect human rights, "*are addressed to all the entities within the multinational enterprise (parent companies and/or local entities)*".[184] They

> *extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries. Furthermore, the board's monitoring of governance includes continuous review*

[178] Principle 11, Commentary.

[179] Principle 14, Commentary.

[180] Principle 14.

[181] Principle 13 and Commentary.

[182] Principle 16.

[183] Principle 15(b).

[184] Guideline I, par. 4.

of internal structures to ensure clear lines of management accountability throughout the group.[185]

In a globalised economy dominated by multinational companies, typically operating through subsidiaries, such international human rights norms sensibly recognise that parent companies have a responsibility to adopt group-wide policies and to monitor and enforce them.

Yet, under *Vedanta*, if parent companies endeavour to carry out these responsibilities, they become more – not less – exposed to potential common law tort liability.

The tension could be eased by further evolution of the common law of torts. A next step could and should be to hold parent companies liable for failing adequately to supervise their subsidiaries, as required by the UNGPs, which are widely endorsed by States including the UK. Tort law could thereby align with human rights law. By recognising a parent company's liability for failure to supervise its subsidiaries, *Vedanta*'s perverse incentive would be removed. Rather than evade potential liability by adopting a hands-off approach, a parent company would face greater risk of liability if it failed to adopt and implement group-wide human rights and environmental policies and procedures.

Without addressing the perverse incentive, in *Okpabi v. Royal Dutch Shell*,[186] the UK Supreme Court in 2021 reaffirmed and clarified *Vedanta*. The Court again ruled that a British parent company may in certain circumstances owe a duty of care, for purposes of liability in a suit for negligence, towards persons affected by the operations of its foreign subsidiary. Specifically, the Court found a real issue to be tried as to whether Royal Dutch Shell (Shell) owed a duty of care to persons affected by spills from its subsidiary's oil pipeline in Nigeria.

The Court's ruling in *Okpabi*, as in *Vedanta*, opens a path to bypass the issue of 'piercing the corporate veil'. Whether the parent owes a duty of care is not constrained by formalities such as the separate corporate identities of parent and subsidiary. The parental duty of care turns instead on business realities, such as whether the parent shares *de facto* management of a particular activity (e.g., pipeline safety) with its subsidiary. *Okpabi* is important both for claimants and for multinational companies -- not only those headquartered in the UK, but also in common law jurisdictions that may follow British precedent.

Vedanta had ruled that a foreign subsidiary could be brought within the jurisdiction of UK courts, as a necessary and proper party to a suit against its UK parent company, provided (i) there is a real issue to be tried against the UK parent as the 'anchor' defendant,[187] and (ii) even where the foreign jurisdiction would otherwise be the 'proper place' for trial,[188] 'there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction.'[189]

In deciding prong (i) – a real issue to be tried against the parent company – *Vedanta* set forth the criteria for whether the parent company owes a duty of care towards persons affected by the activities of its foreign subsidiary. "*Everything depends on the extent to which, and the*

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[185] Guideline II, Commentary, par. 9.

[186] [2021] UKSC 3. The following text is adapted from Doug Cassel, 'UK Supreme Court in Okpabi Clarifies Parent Company Duty of Care Toward Persons Allegedly Harmed by Subsidiaries,' February 17, 2021, accessible at https://media.business-humanrights.org/media/documents/Okpabi_analysis_2.17.21.pdf.

[187] *Vedanta* ¶ 20.

[188] *Id*. ¶ 87. The 'proper place' for trial depends on such case-specific factors as, e.g., where the acts at issue primarily occurred, where most claimants and witnesses are located, and which country's laws apply to the claims. *Id*. ¶¶ 85, 87.

[189] *Id*. ¶ 88.

way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations … of the subsidiary."[190]

In *Okpabi* the Supreme Court clarified these criteria. Parental 'control' of the subsidiary's activities need not always be shown. 'Shared' or '*de facto*' management may suffice to trigger a parental duty of care.[191] The UK trial court had dismissed the complaint against Shell on summary judgment, and accordingly found no jurisdiction over its Nigerian subsidiary. The dismissal was affirmed by a 2-1 court of appeals decision.

However, on the jurisdictional appeal, the UK Supreme Court unanimously reversed, finding a real issue to be tried as to whether Shell owed a duty of care to Nigerians allegedly harmed by the oil spills. The Court addressed only the first *Vedanta* prong: whether there was a real issue to be tried against Shell. Because the lower courts had granted summary judgment for Shell and had no need to reach the second prong of *Vedanta* (the risk that claimants could not obtain substantial justice in Nigeria), the Supreme Court in *Okpabi* did not address that second prong.

The Court found a real issue to be tried against Shell, even though the evidence indicated that the most likely cause of the spills was third party sabotage.[192] The claim was that Shell was negligent in failing to prevent such spills and to limit their environmental impact.[193] In reaffirming *Vedanta*, the Supreme Court in *Okpabi* made four important clarifications of substance and one of procedure.

On substance, the Court held that:

Ordinary Tort Law: The Court clarified that there is no special category or test for a parental duty of care for negligence with respect to acts of corporate subsidiaries. Whether a duty exists "*is to be determined on ordinary, general principles of the law of tort regarding the imposition of a duty of care*."[194] (Although not discussed either in *Vedanta* or *Okpabi*, 'ordinary' tort law may pose obstacles for claimants, such as statutes of limitations, which can lead to dismissal of BHR claims formulated as ordinary tort claims,[195] whereas a case can be made for longer limitations periods for claims formulated as human rights allegations.[196])

At Least Four Routes: The Court clarified that *Vedanta* set forth four 'routes' to find a parental duty of care towards persons affected by the acts of a subsidiary.[197]A parental duty of care can be found where:

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[190] *Id*. ¶ 49.

[191] *Okpabi* ¶ 147. The Court explained that 'control is just a starting point. The issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity (here the pipeline operation). That may or may not be demonstrated by the parent controlling the subsidiary. In a sense, all parents control their subsidiaries. That control gives the parent the opportunity to get involved in management. But control of a company and de facto management of part of its activities are two different things. A subsidiary may maintain de jure control of its activities, but nonetheless delegate de facto management of part of them to emissaries of its parent.'

[192] *Id*. ¶ 1.

[193] *Id*. ¶¶ 5, 7, 33 and 34.

[194] *Id*. ¶¶ 25, 149.

[195] *E.g., Jalla v. Shell Int'l Trading and Shipping Co.,* [2023] UKSC 16 (oil spill not "continuing nuisance" and therefore claim barred by six-year statute of limitations).

[196] *E.g.*, UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, ¶¶ 6 and 7.

[197] *Id*. ¶ 25.

(1) The parent takes over the management or joint management of the relevant activity of the subsidiary;
(2) The parent provides defective advice and/or promulgates defective group-wide safety/environmental policies which are implemented as of course by the subsidiary;
(3) The parent promulgates group-wide safety/environmental policies and takes active steps to ensure their implementation by the subsidiary, and
(4) The parent holds out that it exercises a particular degree of supervision and control of the subsidiary.

While recognising these four 'routes' the Court clarified that they are only 'convenient headings' and not 'special or separate parent/subsidiary duty of care tests'. It is not appropriate 'to shoehorn all cases of the parent's liability into [the four] specific categories.'[198]

Reality, not Formality: In evaluating whether a parental duty of care exists, the Court looked to business and functional reality, not to the formalities of the separate corporate identity of parent and subsidiary.[199] Shell globally is organised and operates along business and functional lines, even while structured as separate corporations for legal and tax purposes.[200] Decisions on environmental precautions and safety, including prevention and remediation of pipeline spills, are generally shaped in practice by the group's business and functional executives, and only later confirmed by the heads of the affected separate corporation within the Shell group. As the Court explained, "*Whilst 'formal binding decisions' are taken at corporate level, these are taken on the basis of prior advice and consent from the vertical Business or Functional line and organisational authority generally precedes corporate approval*."[201]

Policy Direction, Oversight and Control: The claim against Shell focused on only two of the *Vedanta* routes, namely that Shell (i) exercised direction, control and oversight of environmental management generally and pipeline precautions in particular by its subsidiary, and (ii) promulgated group-wide safety/environmental policies and took active steps to ensure their implementation by its subsidiary.[202]

Reviewing both the pleadings and the evidence, the Court found that claimants had sufficiently pled a duty of care by Shell under these two headings to raise a real issue of fact which deserved to be tried.[203] The Court articulated a more relaxed version of the control test articulated by *Vedanta*. Parental 'control' of the subsidiary's activities need not always be shown. 'Shared' or '*de facto*' management may suffice to trigger a parental duty of care.[204]

The Court did not address the other *Vedanta* routes to find a duty of care, except to note that claimants had not pled that Shell's environmental and pipeline safety standards and policies were systematically in error.[205]

On procedure, the Court held that:

Summary Judgment on Pleadings: Summary judgment on whether there is a real issue to be tried as to the parent company's duty of care should focus on the claim as pled. If the

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[198] *Id*. ¶ 27.
[199] *Id*. ¶ 150.
[200] *Id*. ¶ 156-57.
[201] *Id*. ¶ 157.
[202] *Id*. ¶ 153.
[203] *Id*. ¶ 153-59.
[204] *Id*. ¶ 147.
[205] *Id*. ¶ 153.

claim adequately pleads a duty of care, no evidence should be heard, except where facts alleged are 'demonstrably' untrue or unsupportable.[206] Defendant companies should not generally present evidence to refute the claim.[207] Internal company documents, which claimants may not possess at the summary judgment stage, could well be probative at a later trial.[208] The Supreme Court referred to internal company documents such as those ordered to be produced by the Dutch Court of Appeals in related litigation against Shell.[209]

Key Lessons: The main lessons for claimants and for multinational companies headquartered in the UK, or in other common law jurisdictions that may treat *Vedanta* and *Okpabi* as precedent, are as follows:

Duty of Care: To the extent parent companies of multinational enterprises adopt, supervise and enforce group-wide environmental and safety policies applicable generally to entities and subsidiaries in the corporate group, including through management which may be *de facto* or may be shared with the subsidiary, these actions may give rise to a duty of care toward persons allegedly harmed by the operations of foreign subsidiaries.

Third Party Fault: The fact that harm may have been caused by a third party is not necessarily a defence. If the parent or subsidiary did not take reasonable measures to prevent and contain such harm, they may be found liable in negligence.

Settlement Pressure: If the parent company is sued in its home jurisdiction for negligence in a well-pled claim, summary judgment will likely be denied, and the door opened to discovery of internal company documents and eventual trial. Well-pled claims will thus enhance the bargaining power of claimants to pressure defendant companies to settle.[210]

Hands Off or Diligent Oversight?: Parent companies seated in jurisdictions applying *Okpabi* face two stark alternatives. One would be to try to avoid a duty of care altogether, by relinquishing direction, oversight or shared management of high-risk operations of subsidiaries. This approach is probably not viable. It would run counter to the widely endorsed UNGPs, which call on companies to exercise due diligence with regard to the human rights risks (including environmental and safety risks) posed by their operations. Such a 'hands off' approach would also run afoul of the growing number of mandatory human rights due diligence laws being enacted in several jurisdictions. It could also raise potentially costly reputational risks. And in the end, it might not work, because laws and jurisprudence could evolve to erect a parental duty of care even in the absence of extensive oversight of subsidiaries.

An alternative approach may be more prudent from a business standpoint as well as more socially responsible. This is to exercise diligent policy and operational oversight over operations of subsidiaries which pose human rights risks (including environmental and safety risks). In doing so, a parent company should take every reasonable management measure to prevent those risks from materialising, and to minimise their impact if, despite prior precautions, they do arise. Granted, under *Vedanta* and *Okpabi*, a company exercising such diligent and reasonable oversight may be more likely to owe a duty of care towards persons allegedly harmed by its subsidiary's acts or omissions. However, and more important, the

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[206] *Id*. ¶¶ 22, 107.

[207] *Id*. ¶ 22.

[208] *Id*. ¶¶ 126-34.

[209] ¶ 137. In *Akpan v. RDS*, the Dutch Court of Appeals ordered RDS to disclose to claimants' counsel specific audit reports, assurance letters, incident reports, and documents with respect to the relevant oil pipelines, relating to the extent of the parent company's supervision and the subsidiary's implementation of that supervision. See David Vetter, 'Niger Delta Oil Spills: Shell Ruled Responsible In Landmark Verdict', FORBES, January 29, 2021; Cees van Dam, 'Preliminary judgments Dutch Court of Appeal in the Shell Nigeria case' (2016), ¶¶ 28-30.

[210] Perhaps not by coincidence, *Vedanta* was settled in 2021 for an undisclosed sum. 'Legal claim by more than 2,500 Zambian villagers in a case against Vedanta Resources Limited,' Leigh Day, quoting joint statement with Vedanta issued 18 January 2021 ("settlement of all claims").

diligent parent company is less likely to be found liable for negligent breach of its duty of care. If sued, the company is better positioned to present a defence – its prudent oversight and shared management – which could not only avoid liability, but also enhance its reputational capital.

Both *Vedanta* and *Okpabi* addressed the duty of care of parent companies towards subsidiaries. They did not address whether companies might owe a duty of care towards persons injured by their overseas contractors and suppliers. In *Begum v. Maran*,[211] the Court of Appeal in 2021 unanimously held that a company's duty of care could extend to an employee of a third-party contractor overseas in its value chain, where the company should have foreseen the risk of that contractor being retained in dangerous circumstances. Whether the UK Supreme Court will extend its parent company duty of care holdings from overseas subsidiaries to indirect overseas contractors remains to be seen.[212]

III.B.2 Canadian Tort Law

In *Nevsun Resources Ltd. v. Araya*,[213] the Canadian Supreme Court in 2020 ruled by 5 to 4 that it is not 'plain and obvious' that international law grants corporations 'blanket immunity' from liability. Affirming the denial of a corporate defendant's motion to strike the pleadings, the Court remanded for determinations of (i) whether the particular human rights norms at issue bind corporations and if so, (ii) whether a damages remedy should be grounded directly on customary international law as part of the common law, on recognition of a new common law tort or, less likely, on existing torts and punitive damages.

Although decided under common law rather than statutory law, the Canadian ruling is at odds with the import of a 2018 U.S. Supreme Court decision under the Alien Tort Statute. In *Jesner v. Arab Bank*,[214] a Jordanian bank was sued for allegedly facilitating terrorist killings and injuries. In a 5-4 ruling, Justice Anthony Kennedy held for the court that foreign corporations cannot be sued under the statute for violating international law, absent congressional authorisation.

Jesner's holding addressed only foreign corporations. However, its broad reasoning could potentially have shielded all corporations.[215] Justice Kennedy found no "*specific, universal and obligatory norm of corporate liability under currently prevailing international law*."[216] Even if a damages remedy were viewed as a matter of domestic law, he wrote, courts must defer to Congress.

In contrast, Canada's *Nevsun* majority held that it is not clear that "*corporations today enjoy a blanket immunity under customary international law from direct liability for violations of 'obligatory, definable, and universal obligations of international law'*,'' or from direct liability for complicity.[217] The court ruled in a suit brought by Eritrean refugees in Canada against

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[211] [2021] EWCA Civ 326.

[212] At least one such lawsuit has been filed. See Business & Human Rights Resource Centre, 'Burmese workers at Thai garment factory bring "landmark" lawsuit against Tesco over alleged "sweatshop conditions"' ("It is believed to be the first time a UK company has been threatened with litigation in the English courts over a foreign garment factory in its supply chain that it does not own.").

[213] 2020 SCC 5. The following is adapted from Doug Cassel, "Suing Corporations Under International Human Rights Law", *New York Law Journal*, March 19, 2020, accessible at https://www.kslaw.com/attachments/000/007/696/original/3-19-20_New_York_Law_Journal.pdf?1584647293.

[214] 138 S. Ct. 1386 (2018).

[215] But *see* note 171 above.

[216] 138 S. Ct. 1386, 1401 (2017).

[217] [2021] EWCA Civ 326, ¶ 113.

Nevsun, a Canadian company which (through subsidiaries) owned 60% of an Eritrean gold and minerals mine. The other 40% was owned by Eritrea's state-owned mining company.

The plaintiffs alleged that, while working at the mine under Eritrea's national service law, they had been subjected to violations of norms of customary international law and *jus cogens* norms against forced labour, slavery, and crimes against humanity; and also to cruel, inhuman or degrading treatment, freedom from which, the majority noted, has been described by a commentator as an 'absolute right'.[218]

The majority ruled that customary international law is part of the common law, enforceable by courts in the absence of contrary legislation or prior controlling judicial decision. Finding no such obstacle in this case, the court tasked the trial court on remand to determine whether any of the foregoing customary international law norms relied on by plaintiffs are of a "*strictly interstate character"* and, even if so, "*whether the common law should evolve so as to extend the scope of these norms to bind corporations*."[219]

If any of these norms binds corporations, then a damages remedy could be allowed. The majority relied on the common law power of courts to recognise remedies; on Canada's duty under the International Covenant on Civil and Political Rights to provide effective remedies for violations; and on the general principle of domestic law that "*where there is a right, there must be a remedy for its violation*."[220]

Not only does the Canadian ruling on potential corporate liability appear inconsistent with the reasoning of the U.S. judgment in *Jesner*, it also goes beyond the then recent decision of the UK Supreme Court in *Vedanta*.[221] Until *Nevsun*, *Vedanta* had arguably been the high-water mark of human rights damages suits against corporations. However, *Vedanta* allowed companies to be sued under existing common law torts. Unlike *Nevsun*, *Vedanta* did not address corporate liability under customary international human rights law.

In addition to the Canadian Court's holdings that at least some international human rights norms may bind corporations and that damages may be awarded for violations, *Nevsun* overcame another significant hurdle to plaintiffs' international law claims. By a vote of 7 to 2, the justices rejected *Nevsun*'s defence that, under the 'act of state' doctrine, Canadian judges could not pass on the validity of the acts of a foreign sovereign in its own territory – here Eritrea's subjecting the plaintiffs to its national service law, in which *Nevsun* was allegedly complicit. The court held that the judicially created 'act of state' doctrine has no application in Canada – unlike in Australia, the UK and the United States. The purposes of the doctrine, said the court, are adequately served by Canadian doctrines of judicial restraint and conflict of laws. This holding is of particular importance to transnational companies engaged in joint ventures with foreign governments that allegedly violate international law.

Nevsun is arguably the most important ruling for plaintiffs to date in the field of corporate liability for violations of international human rights law. It may inspire progeny in other common law and even civil law jurisdictions.

Nonetheless, Canada's closely divided court ruled only on a preliminary motion to strike, and even then, only under the lenient 'plain and obvious' standard for rejecting a claim. It might

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[218] *Id.* ¶ 103.

[219] *Id.* ¶ 113.

[220] *Id.* ¶ 120.

[221] [2019] UKSC 20. See discussion in the preceding Section of this article.

have been narrowed on remand and subsequent appeal. However, *Nevsun* was settled for an undisclosed sum later in 2020.[222]

The *Nevsun* judgment could still be trimmed or foreclosed if Canada's Parliament were to pass a limiting statute.[223] Meanwhile *Nevsun* merits close attention, especially by counsel for transnational corporations based in common law countries and by counsel for human rights plaintiffs. Other transnational BHR cases are pending in Canadian lower courts.[224]

III.B.3 Conclusion on Court judgments against companies

Transnational civil suits against companies for alleged adverse impacts on human rights are difficult and expensive to bring, even if legally possible in many common law and some other jurisdictions. It should be no surprise that they are few in number, especially compared to the number of companies directly affected by European due diligence laws.

Moreover, when claimants win a judgment or reach a successful settlement, only the companies sued are directly affected (although in common law jurisdictions the doctrine of *stare decisis* means that companies sued in future may be constrained by the rulings of law made in earlier cases).

Though difficult and few in number, civil suits are nonetheless important. Without them, the credibility and effectiveness of human rights due diligence laws might depend entirely on administrative enforcement, which may be legally weak, financially limited, and politically variable. And in common law jurisdictions like the UK, Canada and the U.S., which currently have no human rights due diligence legislation, common law tort suits may be essential if persons whose human rights are adversely affected by business are to have a remedy at all.

III.C. Court Judgments against States

The duty of the State to protect human rights under the European Convention on Human Rights was in part the basis of the landmark ruling by the Dutch Supreme Court in *Urgenda* in 2019.[225] The Court required the State to reduce greenhouse gas emissions in The Netherlands by so much that, as a result, the State was compelled to require private companies to reduce their emissions as well. Similar claims against more than 30 States are pending at this writing before the Grand Chamber of the European Court of Human Rights.

Such cases illustrate how trends in human rights suits against States can have important indirect impacts on companies. Because the foregoing cases deal with the environmental issue of climate change, they are discussed in Section IV below. This section considers a

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[222] Yvette Brend, "Landmark settlement is a message to Canadian companies extracting resources overseas: Amnesty International," *CBC News*, October 23, 2020.

[223] The four dissenting justices argued that only Parliament may subject companies to international human rights law and to concomitant claims for damages.

[224] *Choc et al. v Hudbay Minerals et al.*, 2013 ONSC 1414 (Ontario); see RAID, 'Tanzanian human rights victims file first ever legal case in Canada against Barrick Gold,' November 23, 2022, accessible at https://www.raid-uk.org/blog/tanzanian-human-rights-victims-file-first-ever-legal-case-canada-against-barrick-gold; Barrick, 'Barrick refutes North Mara Human Rights Allegations,' December 13, 2022, accessible at https://w–ww.barrick.com/English/news/news-details/2022/Barrick-Refutes-North-Mara-Human-Rights-Allegations/default.aspx.

[225] *Urgenda Foundation v. The Netherlands* [2015] HAZA C/09/00456689 (24 June 2015); aff'd (9 October 2018) (District Court of the Hague, and The Hague Court of Appeal (on appeal)) (affirmed by the Supreme Court, 20 December 2019). Unofficial English translation accessible at https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf.

separate human rights case against a State with important indirect impacts on companies operating or investing in Latin America.

III.C.1 The Inter-American Court of Human Rights

Until recently, the business responsibility to respect human rights in Latin America was guided mainly by soft law, namely the UNGPs.[226] Two legal developments in 2021, however, harden the regional law on BHR. One development, the entry into force of the Escazú Agreement on the environment, is discussed in Section IV below.

The other significant development is a judgment of the Inter-American Court of Human Rights. The Court is empowered by the American Convention on Human Rights (Convention) to issue legally binding judgments against Latin American States which accept its contentious jurisdiction (nearly all except Cuba and arguably Nicaragua and Venezuela).[227] In *Miskito Divers v. Honduras,*[228] the Court interpreted the Convention to require States' parties to regulate private companies effectively in accordance with the UNGPs.

The Court began by reiterating general principles of its longstanding jurisprudence. A State party to the Convention is obligated to 'ensure' the free and full exercise of the rights recognised by the Convention to every person subject to its jurisdiction.'[229] This State obligation 'encompasses the duty to prevent third parties, in the private sphere, from violating the protected rights.'[230] Although this duty does not entail 'unlimited responsibility' for acts by third parties, and private acts are not 'automatically' attributed to the State, the duty may apply depending on the facts of the case.[231]

The Convention further obligates States' parties to "*adapt their domestic laws to the provisions of the Convention in order to guarantee the rights enshrined therein*."[232] This requires "*the promulgation of norms and the development of practices conducive to the effective observance of those guarantees*."[233]

For example, the Court had earlier ruled that States have a "*duty to regulate, supervise and oversee the practice of dangerous activities by private companies that involve significant risks to the life and integrity of persons under their jurisdiction*."[234]

The Court in *Miskito Divers* then proceeded to elaborate on the broader duties of States and the responsibilities of business in light of the UNGPs. The Court considered it "*pertinent to emphasize"* that the UN Human Rights Council had adopted the UNGPs.[235] The Court "*highlight[ed]*" the three pillars of the UNGPs, together with the "*foundational principles derived from these pillars, which are fundamental in determining the scope of the human rights obligations of States and business enterprises*."[236]

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[226] *See* Organization of American States (OAS) (2014), 'Promotion and Protection of Human Rights in Business,' AG/doc.5452/14.

[227] *See* note 251 below.

[228] Series C, No. 432, Judgment of August 31, 2021.

[229] *Id.* ¶ 43.

[230] *Id.* ¶ 44.

[231] *Id*

[232] *Id.* ¶ 45.

[233] *Id*. (footnote omitted).

[234] *Id.* ¶ 46 (footnote omitted).

[235] *Id.* ¶ 47.

[236] *Id.*

Devoting a full page of its opinion to quoting key provisions of the UNGPs,[237] the Court then interpreted the Convention to require measures by States –and by business –tracking the UNGPs, as follows:

Mandatory Human Rights Regulation*: "States have a duty to prevent human rights violations by private companies, and therefore must adopt legislative and other measures to prevent such violations, and to investigate, punish and provide reparation when they occur. Thus, States must establish regulations requiring companies to implement actions aimed at ensuring respect for the human rights*" recognised in the Inter-American System, including but not limited to economic, social and cultural rights,[238] and "*especially*" but not only in relation to hazardous activities.[239]

Prevention and Redress by Business: "*Under these regulations*," the Court specified, echoing the UNGPs, "*businesses must ensure that their activities do not cause or contribute to human rights violations, and must adopt measures to redress such violations*."[240] In line with the UNGPs, the Court clarified that "*corporate responsibility is applicable regardless of the size or sector of the company; however, their responsibilities may vary in the legislation based on the activity and the risk they pose to human rights."*[241]

Company Human Rights Policies, Due Diligence and Grievance Procedures: States must adopt measures to ensure that businesses have: "*a) appropriate policies for the protection of human rights; b) due diligence processes for the identification, prevention and correction of human rights violations, […;] and c) processes that allow businesses to remedy human rights violations that result from their activities, especially when these affect people living in poverty or belonging to vulnerable groups*."[242]

Effective Remedies: States must "*ensure the existence of judicial or extrajudicial mechanisms that provide an effective remedy*" for business-related human rights violations.[243] Formal remedies are not enough. "*States have the obligation to eliminate existing legal and administrative barriers that limit access to justice, and adopt those aimed at achieving its effectiveness. The Court emphasizes the need for States to address cultural, social, physical or financial barriers that prevent access to judicial or extrajudicial mechanisms for persons belonging to groups in situations of vulnerability."*[244]

Prevention by Business: The Court observed that "*it is the companies that are primarily responsible for behaving responsibly in the activities they carry out, since their active participation is fundamental for the respect and enforcement of human rights*."[245] Therefore: "*Businesses should adopt, at their own expense, preventive measures to protect the human rights of their workers, as well as measures aimed at preventing their activities from having a negative impact on the communities in which they operate or on the environment*."[246]

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[237] *Id.*

[238] Here the Court cited the Protocol of San Salvador, an 'Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.' OAS Treaty A-52, adopted 17 November 1988, in force 16 November 1999. The Protocol has 15 States Parties, including Brazil and 14 Spanish-speaking States in Latin America.

[239] *Miskito Divers,* ¶ 48.

[240] *Id.* ¶ 47.

[241] *Id.* ¶ 47.

[242] *Id.* ¶ 49.

[243] *Id.* ¶ 50.

[244] *Id.* (footnote omitted).

[245] *Id.* ¶ 51.

[246] *Id.*

As suggested by the UNGPs, however, this business responsibility to prevent is one of conduct, not result: "*the regulation of business activities does not require companies to guarantee results, but rather should aim to ensure that they carry out continuous assessments of the risks to human rights, and respond through effective and proportional measures to mitigate the risks caused by their activities, in consideration of their resources and possibilities, and with accountability mechanisms to remedy any damage caused*."[247]

Leaving no doubt as to the allocation of responsibility for prevention, the Court concluded, "*This obligation must be assumed by companies and regulated by the State*."[248]

Vulnerable Groups: "*States must ensure that business activities are not carried out at the expense of the fundamental rights and freedoms of individuals or groups of individuals, including indigenous and tribal peoples, peasant communities or Afro-descendant populations as cohesive collectives […].*"[249]

Transnational Corporations and Supply Chains: Avoiding infringement on the rights of vulnerable groups "*is essential in relation to all companies whose activities may affect*" them, and "*in particular, in relation to the acts of transnational corporations […], States must adopt measures aimed at ensuring that transnational companies are held accountable for human rights violations committed in their territory, or when they benefit from the activity of national companies that participate in their production chains*."[250]

As a formal matter, then, a legally binding treaty (the Convention) has been interpreted by a legally binding judgment to require the 24 States parties[251] to the Convention to regulate their businesses – and transnational corporations doing business in their territories – in accord with the UNGPs. On the other hand, as of this writing, so far as this author is aware, no State has yet enacted legislation or regulations to implement the Court's rulings in *Miskito Divers*.

Some years, then, may pass to put the judgment into practical effect. Moreover, the respondent State (Honduras) is not formally obligated to take steps beyond those benefiting the particular victims in the case, because the Court's general language relating to the UNGPs and BHR appears only in its reasoning and not in the operative part of the judgment.[252]

Still, the judgment 'hardens' BHR norms in Latin America, in accord with the UNGPs, in at least two ways. First, under the Court's doctrine of control of confidentiality, "*all the*

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[247] *Id.*

[248] *Id.*

[249] *Id.* ¶ 51. Here the Court was quoting the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights of the Inter-American Commission on Human Rights. Int.-Am. Comm. H. Rts., *Report on Business and Human Rights: Inter-American Standards,* REDESCA, November 1, 2019, ¶ 3.

[250] *Miskito Divers* ¶ 52.

[251] *See* table at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm. However, the status of two States parties is disputed. Venezuela's ratification of the Convention in 2019 was done by the disputed government of Juan Guaidó. See https://www.oas.org/es/sla/ddi/docs/B-32_venezuela_RA_7-31-2019.pdf. In April 2022 Nicaragua purported to withdraw from the OAS and all its 'mechanisms.' See https://www.voanews.com/a/nicaragua-expels-oas-leaves-organization-early-foreign-minister-/6543602.html. However, Article 78.1 of the Convention requires a one-year notice period before denunciation is effective, and Article 143 of the Charter of the Organization of American States requires a two-year notice period before denunciation of the Charter is effective.

[252] Convention Article 68.1. *See Gelman v. Uruguay*. 'Monitoring Compliance with Judgment.' Order of the Inter-American Court of Human Rights of March 20, 2013, ¶ 62.

authorities of States Parties to the Convention have an obligation to exercise a control of conventionality, so that the interpretation and application of national law is consistent with their international human rights obligations."[253] The Court interprets this to require State authorities, not only to comply with the Convention, but to do so "*taking into account*" the jurisprudence of the Court[254] – such as its interpretation of the Convention in *Miskito Divers*.

Second, although the Court does not follow a strict doctrine of *stare decisis* as in common law jurisdictions, it generally follows its own jurisprudence as set forth in prior cases. Thus, in future cases challenging alleged failures by States to regulate companies in accordance with the UNGPs, the Court is highly likely to apply the principle enunciated in *Miskito Divers*.[255]

III.C.2. Conclusion on suits against States

Unlike suits against companies, suits against States do not immediately affect companies. On the other hand, if successful, they may require a State to regulate companies generally, and thereby indirectly affect far more companies than can be sued individually.

Whether this possibility is realised, however, depends on the content of the judgment, the effectiveness of the court where the State is sued, and the likelihood that States will enact legislation or regulations to implement its judgment. That likelihood is high where the court is a national court in a rule of law State, like the Dutch Supreme Court in *Urgenda* (discussed in Section IV below), or is an effective regional court, like the European Court of Human Rights in the pending climate change cases (also discussed in Section IV).

To this writer's knowledge, no State has to date enacted legislation to implement the Inter-American Court's opinion in *Miskito Divers,* which requires States to regulate business in accord with the UNGPs. The Inter-American Court has a comparatively good track record of compliance when it orders a defendant State to enact a particular legislative reform.[256] However, its opinion on the UNGPs was only in the reasoning section of *Miskito Divers*, not in the operative part of the judgment.[257] Other Latin American States are less likely to feel compelled to heed an opinion stated only in the reasoning section of the Court's judgment against another State.

Time will tell whether States choose to follow *Miskito Divers*. In any event, the Inter-American Court will almost certainly follow its reasoning in future judgments in relevant cases. In such cases the Court's injunction to States to regulate in accord with the UNGPs may migrate into the operative portion of the judgment. Over time, then, the Court may be able to achieve the objective of using a judgment in one case to leverage broader legislative or regulatory change.

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[253] *Miskito Divers* ¶ 45.

[254] *Gelman v. Uruguay*. 'Monitoring Compliance with Judgment.' Order of the Inter-American Court of Human Rights of March 20, 2013, ¶¶ 66, 69 and 72.

[255] At least two such cases have been argued and await the Court's judgment. *Caso Pueblos Indígenas U'Wa y sus Miembros v. Colombia*, https://www.corteidh.or.cr/docs/tramite/pueblos_indigenas_uwa_y_sus_miembros.pdf; *La Oroya Community v. Peru*, Int.Am.Ct.H.Rts., Press Release, 'Inter-American Court of Human Rights Held Its 153rd Regular Session in Uruguay', October 31, 2022.

[256] *See, e.g.*, D.A. Gonzalez-Salzberg, "Do States comply with the compulsory judgments of the Inter-American Court of Human Rights? An empirical study of the compliance with 330 measures of reparation," *Revista do Instituto Brasileiro de Direitos Humanos*, 13 (2014).

[257] *See* notes 252-54 above.

III.D. Criminal Cases

After World War II, business corporations complicit in German violations of customary international law were dissolved, liquidated and their assets seized for reparations.[258] Business executives were convicted of war crime including slave labour.[259] For decades thereafter, however, there were few, if any, prosecutions of companies or executives for crimes related to international human rights or humanitarian law.

III.D.1. Contemporary criminal cases

By the turn of the century times began to change. In 2007, after an inquiry by the U.S. Justice Department, Chiquita Brands International pled guilty in U.S. federal court to knowingly providing material support to a paramilitary organisation widely known for violent attacks on civilians during Colombia's civil war. Chiquita agreed to pay a fine of USD 25 million under the U.S. Global Terrorism Sanctions Act.[260] In a 2008 Sentencing Memorandum submitted to the court, the U.S. Department of Justice reported that "*Chiquita's money helped buy weapons and ammunition used to kill innocent victims*" from 1989 to 2004. Chiquita's support was "*prolonged, steady, and substantial*."[261]

Chiquita's resultant legal problems continue. A civil proceeding for damages brought in U.S. federal court by a class of 4000 alleged Colombian victims is set for trial in January 2024.[262] A criminal accusation was brought by Colombia's chief prosecutor in 2018 against 13 former Chiquita directors and employees for conspiracy to finance a terrorist group.[263] Although charges against three were dropped in 2020, the other ten apparently remain charged.[264]

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[258] *See generally* Brief of Amici Curiae Nuremberg Scholars in Support of Respondents, filed in *Nestle, USA v. Doe*, US Supreme Court docket Nos. 19-416 & 19-453, October 21, 2020, accessible at https://www.supremecourt.gov/DocketPDF/19/19-416/158418/20201021154022816_40250%20pdf%20Green.pdf.

[259] Case No. 9, the Zyklon B, *Case Trial of Bruno Tesch and Two Others* [1946] Gr. Brit. Military 93; *see generally* Matthew Lippman, "The Other Nuremberg: American Prosecution of Nazi War Criminals in Occupied Germany," 3 *Indiana International & Comparative Law Review* 1, 15-20 (1992).

[260] Andy Sullivan, "Chiquita pleads guilty to Colombia terror payments"' *Reuters*, March 19, 2007; Partners in Justice International, 'Crimes Against Humanity and Chiquita Banana,' 2022, accessible at https://partnersinjustice.org/our-work/current-projects/crimes-against-humanity-and-chiquita-bananas/.

[261] Full text quoted at pp. 80-84 of Verified Consolidated Shareholder Derivative Complaint in *In re Chiquita Brands, Int'l*, No. 08-01916 (S.D. Fla), September 11, 2008, accessible at https://www.law.du.edu/documents/corporate-governance/international-corporate-governance/in-re-chiquita-verified.pdf.

[262] *See Garcia v. Chiquita Brands Int'l*, 48 F. 4th 1202 (11th Cir. 2022). In March 2023 the U.S. District Court ordered the trial for the first group of plaintiffs to begin in January 2024. EarthRights International, 'U.S. Court Orders Chiquita to Stand Trial for Colombians' Murder Claims,' March 15, 2023, accessible at https://earthrights.org/media_release/u-s-court-orders-chiquita-to-stand-trial-for-colombians-murder-claims/.

[263] Office of the Prosecutor, International Criminal Court, 'Report on Preliminary Examination Activities 2018,' December 5, 2018, ¶ 151; National Security Archive, 'Colombia's attorney general filed new charges against 13 Chiquita officials in 2018, accusing them of crimes against humanity. Charges against three of these officials were dropped in 2020,' *Chiquita's Bagman: Key Intermediary Sentenced in Paramilitary Payments Case*, April 18, 2023, accessible at https://nsarchive.gwu.edu/briefing-book/colombia-chiquita-papers/2023-04-18/chiquitas-bagman-key-intermediary-sentenced.

[264] *Id*. and Office of the Prosecutor, International Criminal Court, 'Report on Preliminary Examination Activities 2020,' December 14, 2020, ¶¶ 114-15.

The UNGPs, adopted in 2011, cautioned that business enterprises should "[*t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate*."[265] The Commentary warned of potential criminal prosecutions:

> *Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the … incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses*.[266]

National prosecutions for transnational crimes against human rights are difficult to bring, and national prosecutors are often reluctant to commit the necessary investigative and prosecutorial resources.[267] Nonetheless, the decade since the adoption of the UNGPs has seen a number of high profile prosecutions of companies and executives, mainly (but not only) in France, whose laws grant its courts jurisdiction over war crimes and crimes against humanity committed by French companies outside its territory.[268]

The following are examples of companies and executives accused of human rights crimes. They are presented here, not to express an opinion on their guilt, and they are entitled to the presumption of innocence. Still, no business aspires to be the subject of an official criminal inquiry for alleged human rights crimes. These cases, among others,[269] illustrate the need for business to exercise heightened due diligence when operating in conflict zones or in the territories of repressive regimes.[270]

Several involve alleged complicity with belligerents in armed conflicts. For example:

- In France, the Lafarge company (since purchased by another company) and its Syrian subsidiary face charges of complicity in crimes against humanity for allegedly paying EUR 13 million to armed groups, including the Islamic State, to keep the subsidiary's cement plant running in Syria.[271]

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[265] UNGP 23 (c).

[266] UNGP 23 Commentary.

[267] *See generally* Independent Commission of Experts, *The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases*, October 2016, accessible at https://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf.

[268] *See generally* International Committee of the Red Cross, *International Humanitarian Law Database*, "France," accessible at https://ihl-databases.icrc.org/en/customary-ihl/v2/rule157?country=fr.

[269] *See*, for example, the list of cases against companies and corporate executives at International Bar Association, 'IBA War Crimes Committee shines a light on corporate liability cases,' November 25, 2022, accessible at https://www.ibanet.org/IBA-War-Crimes-Committee-shines-a-light-on-corporate-liability-cases.

[270] *See*, for example, United Nations Development Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide*, June 16, 2022, accessible at https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide.

[271] Sherpa, 'Charges Confirmed against Lafarge for Complicity in Crimes against Humanity in Syria,' May 18, 2022, accessible at https://www.asso-sherpa.org/charges-confirmed-against-lafarge-complicity-crimes-against-humanity.

- In the United States, also arising from the situation in Syria, Lafarge SA and LFC pled guilty to conspiring to provide material support to foreign terrorist organisations. They agreed to pay USD 778 million in fines and forfeitures.[272]
- In Sweden, the former Chairman and Chief Executive Officer of Lundin Energy (since renamed) have been indicted for allegedly aiding and abetting war crimes committed by the Sudanese regime in South Sudan during 1999-2003.[273] Their trial began in September 2023.[274]
- In France, human rights groups filed a complaint before courts calling for investigation of possible complicity by French arms companies Dassault Aviation, Thales Group and MBDA France in alleged war crimes and crimes against humanity committed by Saudi Arabia and the United Arab Emirates in Yemen.[275]

Other cases involve alleged complicity with gross violations of human rights by repressive regimes. For example:

- In France, Amesys (since renamed), its Chief Executive Officer and other executives have been indicted for alleged complicity in torture by providing surveillance equipment to the Gaddafi government in Libya. The original complaint filed in 2011 alleged that the company's technology allowed the government to intercept and monitor private internet communications, which the regime then used to identify, detain and torture opponents.[276]
- In France, Samsung Electronics France was indicted for misleading advertising for claiming ethical commitments on workers' rights that it allegedly did not respect in factories in China, Korea and Vietnam. The allegations include child labour, abusive working hours, working conditions and accommodations incompatible with human dignity and endangering workers' lives.[277]
- In France, courts opened a preliminary investigation of alleged concealment of crimes against humanity by several multinational garment and footwear companies, including Inditex, Uniqlo, SMCP and Skechers USA for ties with factories using Uyghur forced labour in the Xinjiang region of China.[278] Several companies denied the allegations or responded that they have rigorous standards and procedures for their suppliers.[279]

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[272] Sandra Cossart, "Multinational Lafarge Facing Unprecedented Charges for International Crimes: Insights Into the French Court Decisions," *OpinioJuris*, November 15, 2022, accessible at http://opiniojuris.org/2022/11/15/multinational-lafarge-facing-unprecedented-charges-for-international-crimes-insights-into-the-french-court-decisions/.

[273] Unpaid Debt, 'Supreme Court: Sweden has Jurisdiction over Lundin's Alex Schneiter,' 10 November 2022, accessible at https://unpaiddebt.org/supreme-court-sweden-has-jurisdiction-over-lundins-alex-schneiter/; and 'Prosecutor Updates the Indictment in the Lundin War Crimes Case,' December 12, 2022, accessible at https://unpaiddebt.org/prosecutor-specifies-alleged-war-crimes-and-gerhart-baum-to-be-heard-shortly/.

[274] Christian Pavon, 'Swedish Lundin Oil – Charged for Exploitation and Mass Murder of People in Sudan,' 8 November 2023, accessible at https://newsvoice.se/2023/11/swedish-lundin-oil-exploitation-mass-murder/.

[275] Sherpa, 'Complaint for complicity in war crimes in Yemen: How could French arms companies be linked to the conflict in Yemen?,' September 27, 2022, accessible at https://www.asso-sherpa.org/complaint-for-complicity-in-war-crimes-in-yemen-how-could-french-arms-companies-be-linked-to-the-conflict-in-yemen.

[276] International Federation for Human Rights, 'Surveillance and torture in Libya: The Paris Court of Appeal confirms the indictment of Amesys and its executives, and cancels that of two employees,' November 21, 2022, accessible at https://www.fidh.org/en/impacts/Surveillance-torture-Libya-Paris-Court-Appeal-indictment-AMESYS.

[277] Sherpa, 'Violations of workers' rights: landmark indictment of SAMSUNG France for misleading advertising,' July 3, 2019, accessible at https://www.asso-sherpa.org/violations-of-workers-rights-landmark-indictment-of-samsung-france-for-misleading-advertising.

[278] Sherpa, 'Complaint against 4 textile giants for forced labour of Uyghurs: French justice opens an investigation for concealment of crimes against humanity,' July 2, 2021, accessible at https://www.asso-

- In France, after an earlier inquiry was dismissed, the Vinci construction company has been indicted for alleged forced labour, reduction to servitude, working and housing conditions incompatible with human dignity, and obtaining services in exchange for remuneration clearly unrelated to the importance of the work performed, at its construction sites in Qatar.[280]

Still other cases allege criminal negligence. For example, a Brazilian court has allowed criminal charges to proceed against mining company Vale, certification company Tuv Sud, and 16 individuals for the 2019 collapse of a tailings dam in Brumadinho, Brazil, reportedly leaving 270 people dead. The individuals, including Vale's former CEO, are reportedly charged with 270 counts of aggravated homicide; all defendants are also charged with crimes against flora and fauna and criminal pollution.[281] In addition, Vale recently agreed to pay USD 55.9 million to settle charges by the U.S. SEC over allegedly false and misleading disclosures about the safety of its dams.[282]

Not only are criminal cases being brought, but important jurisprudence is being developed. In the Lafarge case, for example, the French Supreme Court held that a company's commercial motive for complicity is not a defence. A company is complicit if it knows that the principal perpetrators are committing or about to commit a crime against humanity, and if the company's aid or assistance facilitates the preparation or commission of the crime. Moreover, the aid or assistance need not be indispensable to the commission of the main crime.[283]

In addition to national criminal proceedings, there are signs that international courts may in future prosecute companies or executives for human rights crimes. A 2014 African Union treaty, although not in force, would allow prosecutions of corporations for human rights and other crimes before the African Court of Justice and Human Rights.[284] A 2014 judgment by a divided Appeals Panel of the Special Tribunal for Lebanon, after canvassing trends towards holding corporations criminally accountable under international human rights law, found a company guilty of criminal contempt of court.[285] And the prosecutor of the International

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sherpa.org/complaint-against-4-textile-giants-for-forced-labour-of-uyghurs-french-justice-opens-an-investigation-for-concealment-of-crimes-against-humanity.

[279] *France24.com*, "France opens probe into four fashion retailers over forced labour in China's Xinjiang," July 2, 2021.

[280] Sherpa, **'**French construction giant Vinci under judicial investigation for its construction sites in Qatar,' November 10, 2022, accessible at https://www.asso-sherpa.org/vinci-under-judicial-investigation-qatar.

[281] Mining.com, 'Vale, Tüv Süd and 16 individuals named defendants in Brumadinho disaster,' January 24, 2023, accessible at https://www.mining.com/vale-tuv-sud-and-16-people-become-defendants-for-the-brumadinho-disaster/.

[282] U.S. SEC, Press Release, 'Brazilian Mining Company to Pay $55.9 Million to Settle Charges Related to Misleading Disclosures Prior to Deadly Dam Collapse,' March 28, 2023.

[283] As quoted in Sandra Cossart, "Multinational Lafarge Facing Unprecedented Charges for International Crimes: Insights Into the French Court Decisions," *OpinioJuris*, November 15, 2022, accessible at http://opiniojuris.org/2022/11/15/multinational-lafarge-facing-unprecedented-charges-for-international-crimes-insights-into-the-french-court-decisions/**.** Compare *Twitter v. Taamneh*, U.S. Supreme Court, No. 21-1596, Judgment of May 18, 2023, and *Gonzalez v. Google*, No. 21-1333, Judgment of May 18, 2023.

[284] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 27, 2014 (15 signatures, no ratifications), Annex, Articles 28A, 46A ('Corporate Criminal Liability').

[285] Special Tribunal for Lebanon, Appeals Panel, *Case Against NEW TV S.A.L. et al.*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶¶ 45-67, October 2, 2014, accessible at https://www.stl-tsl.org/crs/assets/Uploads/20141002_F0012_PUBLIC_AP_Dec_on_InteLoc_Appl_Jurisdic_Cont_Proceed_EN_AR_FR_Joomla.pdf.

Criminal Court gives "*particular consideration*" to international crimes committed by means of "*the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land"* – all crimes for which business executives could be prosecuted.[286]

III.D.2. Conclusion on criminal cases

There have been relatively few criminal cases brought against multinational companies for complicity in human rights crimes. Moreover, in only two of the previous examples – the guilty pleas by Chiquita and Lafarge in U.S. courts – has guilt been adjudicated.

Yet the fact that such cases are increasingly brought adds to the overall trend of 'hardening' the business responsibility to respect human rights. Criminal prosecutions serve notice to senior business executives that disregard of human rights norms, at least in extreme cases, can carry severe personal and corporate consequences. Criminal cases are thus quantitatively few, but qualitatively important.

III.E. Import Controls

Import (and export) controls are often imposed by reason of economic sanctions, national security and other grounds not based on human rights. Sceptics might attribute U.S. sanctions on China, for example, to great power rivalry. However, in recent years the U.S. has ramped up import controls based on human rights grounds – specifically forced labour – and not only for imports from China. Forced labour import controls have also been discussed and the subject of judicial proceedings in the United Kingdom[287] and in Canada.[288] The European Commission has recently proposed forced labour import controls (not limited to China). Canada recently passed a law which requires reporting on and measures against forced and child labour, and expands criminal prohibitions on forced labour to include child labour.

III.E.1. United States

A U.S. law in effect since 1930 bans importation of merchandise produced, wholly or in part, by forced labour.[289] Forced labour broadly includes "*all work or service… exacted… under the menace of any penalty for its non-performance and for which the worker does not offer himself voluntarily."*

The import ban is administered by the U.S. Customs and Border Protection (CBP). CBP may subject merchandise produced by forced labour to exclusion, seizure or both. Where

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[286] Office of the Prosecutor, International Criminal Court, 'Policy paper on case selection and prioritization,' ¶¶ 41, September 15, 2016.

[287] *See also* "Britain to tighten laws on imports linked to alleged Chinese human rights abuses: Telegraph," *Reuters*, January 11, 2021; KPMG, "Canada and UK announce trade restrictions, response to forced labor in China's Xinjiang region," January 13, 2021, accessible at https://home.kpmg/us/en/home/insights/2021/01/tnf-canada-and-uk-announce-trade-restrictions-response-to-forced-labor-in-china-xinjiang-region.html. Whether UK imports from Xinjiang are also subject to the Foreign Prison-Made Goods Act 1897 and the Proceeds of Crime Act 2002 is presently before a court. See Haroon Siddique, "Failure to investigate UF imported goods linked to forced Uyghur labour unlawful, court told," *The Guardian*, October 25, 2022.

[288] Jim Bronskill, "Court rejects bid to ban imports from China's Xinjiang region over labour concerns," *The Canadian Press*, April 10, 2022, accessible at https://www.ctvnews.ca/canada/court-rejects-bid-to-ban-imports-from-china-s-xinjiang-region-over-labour-concerns-1.5856395; Robert Fife and Steven Chase, "Uyghur Canadians call for tougher law against Chinese goods produced by forced labour," *The Globe & Mail*, November 21, 2022.

[289] 19 U.S. Code ¶1307.

information reasonably but not conclusively indicates that items were produced by forced labour, CBP may issue a 'withhold release order'. The item is then held at the border and cannot be sold in the U.S. pending further determination. By itself, this order can result in costly delays even if later lifted, as well as reputational damage, since the order is published on CBP's webpage. Moreover, if CBP then obtains sufficient information to make a finding of forced labour, the item cannot enter or be sold in the U.S.

As of May 2023, CBP was administering 52 active withhold release orders: 40 on imports from China or Chinese fishing vessels, and others on imports from the Democratic Republic of the Congo, the Dominican Republic, India, Japan, Malawi, Malaysia, Mexico, Nepal, Turkmenistan and Zimbabwe.[290]

The Uhygur Forced Labor Prevention Act entered into force in June 2022.[291] However, well before then, the CBP looked sceptically at imports from the Xinjiang region of China. Between 2019 and 2021, CBP issued withhold release orders against Chinese companies producing garments and hair products in Xinjiang, against all cotton and tomato products from Xinjiang, as well as derivative products and products produced outside Xinjiang that use cotton or tomatoes sourced from Xinjiang, and against a Xinjiang company making silica-based products and its subsidiaries.[292] CBP's investigation reported the following forced labour indicators in Xinjiang: "*debt bondage, restriction of movement, isolation, intimidation and threats, withholding of wages, and abusive living and working conditions*."[293]

The Uhygur Forced Labor Prevention Act creates a rebuttable presumption that goods produced in Xinjiang, or by certain identified entities, are made with forced labour. They are therefore subject to the import prohibition in the U.S. Under the Act, violations can empower CBP to detain, exclude or seize goods, and to assess monetary penalties, unless "*clear and convincing evidence*" shows that no forced labour, anywhere in the supply chain, produced any part of the goods. The Act contains no *de minimis* exception.

III.E.2 European Union

In September 2022 the European Commission adopted a proposal for a regulation to prohibit products made with forced labour in the EU market.[294] The proposed regulation would have wide practical consequences for companies in the EU and beyond. It would cover all products made by forced labour that are produced outside of the EU and imported into the single market, or that are produced within the EU for domestic consumption or export. It covers all industries and does not contain a monetary value threshold.

National authorities in EU member States would have responsibility for implementing the prohibition. This would be done through a two-stage process.

Preliminary Assessment: At the first stage, authorities would seek to assess whether there are well-founded reasons to suspect that a product was made with forced labour. The

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[290] CBP, 'Withhold Release Orders and Findings List', accessible at https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings (visited May 23, 2023).

[291] Public Law 117 - 78 - An act to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes.

[292] See CBP, 'Withhold Release Orders and Findings List,' accessible at https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings.

[293] CBP, National Media Release, 'CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang,' January 13, 2021.

[294] European Commission, Press Release, 'Commission moves to ban products made with forced labour on the EU market,' September 14, 2022, accessible at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5415.

authority would make this assessment on the basis of all of the relevant information available to it, including:

- Representations by the economic operator as to its due diligence processes;
- Submissions by third parties, potentially including victims, competitors, trade unions and non-governmental organisations;
- Information from a new Commission database of forced labour risks;
- Information from other national authorities.

Investigation: Where, on the basis of the information gathered during the preliminary stage, the authority determines that there is a substantiated concern that the prohibition on forced labour has been breached, it would proceed to the second, investigative stage. It would then be able to request from the economic operator any information relevant to the products, their manufacturer or producer, and the product suppliers.

Human rights due diligence: During the preliminary stage, companies would have a 15-day window during which to submit evidence of their forced labour due diligence processes. Where they show that the risk of forced labour has been the subject of effective due diligence on their supply chains, such as to mitigate, prevent and bring to an end risks of forced labour, this will be taken into account by the competent authorities when they assess whether there is a well-founded suspicion that a product is likely to have been made with forced labour.

The due diligence required to convince a national authority to terminate an investigation would substantially overlap with the due diligence required under the draft EU Directive on Corporate Sustainability Due Diligence. There would also be considerable overlap with the due diligence required under U.S. legislation.

Enforcement: If the national authority determines that there has been a violation of the prohibition, it would prohibit the product from being sold in, or exported from, the EU, and order the economic operator to withdraw and dispose of the product.

Other EU member States would then be required to recognise and enforce these decisions within their national jurisdictions. This would include requiring their customs authorities to carry out controls at their borders on products entering or leaving the EU.

Third Countries: The authority would also be empowered to carry out investigations in third countries, including where the economic operator is based and where the suspicion of forced labour arises, but only if the economic operators and the third country consent. Lack of co-operation from the companies concerned may lead to a decision based only on the available facts.

Next steps: The European Parliament and the EU Council will now consider the proposed regulation. If adopted, it would apply 24 months after entry into force.

Non-EU Companies: An EU forced labour ban would have significant knock-on effects for companies based outside the EU. Subsidiaries or branches of a non-EU business importing goods into the EU would be covered by the proposed regulation, as would non-EU businesses exporting to the EU. Where an EU member State opens an investigation, the EU importer, in order to persuade the authorities to close that investigation, will likely seek to demonstrate that it carried out due diligence on its supply chain. In turn, this would require non-EU companies in the importer's supply chain to demonstrate the steps they took to identify and address the risk of forced labour. Even in anticipation of a forced labour ban coming into force, as well as the proposed EU Directive on Corporate Sustainability Due Diligence, EU-based importers are likely to place increasingly stringent demands on their foreign suppliers, irrespective of where they are domiciled, to carry out human rights due diligence.

III.E.3. Canada

Canada has gone beyond both U.S. law and proposed EU law by imposing import restrictions and reporting, not only on forced labour, but also on child labour. In May 2023 Parliament passed a bill designed to reduce the use of forced labour and child labour by increasing transparency in supply chains.[295] Effective January 2024, the Act will require reports with respect to goods manufactured in (or imported into) Canada. Covered entities, including Canadian companies and many foreign companies that do business or own assets in Canada, must file annual public reports on measures taken to identify, address, and prevent forced labour and child labour in their supply chains.[296]

The law requires reporting by private sector producers, sellers, distributors, and importers, as well as by entities that control them. To be covered, a company must be listed on a Canadian stock exchange or have a place of business, do business, or have assets in Canada, and generally meet at least two of the following three conditions: at least CAD 20 million in assets, CAD 40 million in revenue, or 250 employees.

In addition to steps taken to prevent and reduce the risk of forced or child labour, reports must address, among other things, a company's structure and supply chain; its relevant policies and due diligence; remedial measures; measures taken to remediate loss of income to the most vulnerable families resulting from measures taken to eliminate forced or child labour; training to employees; and how the company assesses the effectiveness of its measures against forced and child labour.

The law will be enforceable through warrantless searches and seizures (except in residences), Ministerial orders to take necessary measures, and criminal fines of up to CAD2 50,000. Every company director or officer who directs, authorises, assents to, acquiesces or participates in forced or child labour offences will be personally liable.

III.E.4. Conclusion on import controls

Human rights import controls until now have been largely confined to one country (United States), one sector of the economy (imports), and one kind of human rights violation (forced labour). Although the magnitude of U.S. imports, led by imports from China, is significant,[297] more time is needed to see what volume of imports will actually be affected by the U.S. import ban, as well as the expected EU ban and the ban on both forced and child labour imports in Canada's new law. While import bans are an element in the overall trend towards a hardening of BHR norms, it may be too early to assess their impact over time on business behaviour.[298]

III.F. Investment Law

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[295] Bill S-211, An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff (the "Act"). Following royal assent, the Act will take effect January 1, 2024.

[296] Government institutions are also covered. Much of this summary is take from King & Spalding, 'Canadian Parliament Passes Bill to Mandate Reporting on Forced and Child Labor in Supply Chains', May 11, 2023, accessible at https://www.kslaw.com/news-and-insights/canadian-parliament-passes-bill-to-mandate-reporting-on-forced-and-child-labor-in-supply-chains.

[297] Note 53 above.

[298] For similar conclusions based on extensive analysis, see Irene Pietropaoli, Owain Johnstone, Alex Balch, 'Policy brief: Effectiveness of forced labour import bans,' Modern Slavery & Human Rights, led by the Bingham Centre, July 2021, accessible at https://modernslaverypec.org/assets/downloads/PEC-Policy-Brief-Effectiveness-Forced-Labour-Import-Bans.pdf.

International investment law has developed almost entirely apart from the growing body of international and transnational norms on BHR. Few investment treaties in force, and few international arbitral tribunals, have taken account of the human rights responsibilities of business as set forth in the UNGPs and other global, regional and national instruments.

However, it is generally reasonable and consistent with international law to interpret existing investment treaties in light of developing BHR norms. Moreover, a new generation of treaties increasingly refers explicitly to BHR norms.

III.F.1. Arbitral awards, decisions and enforcement

In arbitrations under the older generation of Bilateral Investment Treaties (BITs), a number of tribunals and committees have noted or considered relevant provisions of human rights treaties.[299] One decision extensively relying on human rights norms – albeit on procedural issues, not on substantive responsibilities of companies – was the 2015 annulment decision in *Tulip Real Estate v. Turkey.* [300] In declining to annul an award under the 1986 Dutch-Turkish BIT, the *ad hoc* committee noted "*widespread sentiment that the integration of the law of human rights into international investment law is an important concern*."[301]

Citing arbitral awards and decisions where human rights norms had been touched upon,[302] the Committee observed:

> *In investment cases involving parties to the [European Convention on Human Rights], some tribunals have relied on the Convention and its case law. In other cases involving non-parties, that case law was used as authority on a number of points concerning individual rights. In a similar way, investment tribunals have relied on the Inter-American Convention on Human Rights (IACHR) and on the practice of its Court. In one case, the tribunal was "mindful" of the Universal Declaration of Human Rights (UDHR). One tribunal undertook an extensive examination of the right to a fair trial in international human rights instruments, especially the International Covenant on Civil and Political Rights (ICCPR), for purposes of interpreting a treaty provision on fair and equitable treatment.*[303]

The Committee then found human rights instruments relevant to interpret a "*fundamental rule of procedure*" under the ICSID Convention:

> *Provisions in human rights instruments dealing with the right to a fair trial and any judicial practice thereto are relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention. This is not to add obligations extraneous to the ICSID Convention. Rather, resort to authorities stemming from the field of human rights for this purpose is a legitimate method of treaty interpretation*.[304]

In assessing Claimant's right to be heard, the Committee noted,

> *The ECtHR has recognized "equality of arms" as an important component of the right to a fair trial. The requirement is that "each party must be afforded a reasonable opportunity to present his case – including his evidence – under*

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[299] *See* listings in *Tulip Real Estate v. Turkey*, ICSID Case No, ARB/11/28, Decision on Annulment, 30 December 2015, ¶ 91 and notes 64-68.

[300] *Id.*

[301] *Id.* ¶ 86 (footnote omitted).

[302] *Id*. ¶ 91 and notes 64-68.

[303] *Id*. ¶ 91 (footnotes omitted).

[304] *Id*. ¶ 92.

> *conditions that do not place him at a substantial disadvantage vis-à-vis his opponent*."[305]

On the facts, however, the Committee found no violation of Claimant's right to be heard.

In assessing the Tribunal's alleged failure to give reasons for its Award and the scope of the duty to give reasons, the Committee cited the judgment of the European Court of Human Rights in *Ruiz Torija v. Spain*,[306] where the European Court stated:

> *The Court reiterates that Article 6(1) [of the ECHR] obliges the Courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the Courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a Court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case*.[307]

The Committee opined that "*these broad parameters apply equally to international tribunals constituted under the ICSID Convention*."[308] Applying them, the Committee found no violation of the Tribunal's duty to give reasons.[309] Accordingly it could not annul the Award, "*as there has been no serious departure from a fundamental rule of procedure by the Tribunal in the original proceeding*."[310]

Because the *Tulip Real Estate* Committee relied on human rights instruments only to interpret a fundamental rule of procedure under the ICSID Convention, one might deem its opinion irrelevant to whether the business responsibility to respect human rights should be taken into account in arbitral proceedings. The older generation of BITs, such as the 1986 BIT at issue in Tulip Real Estate, makes no reference to any such responsibility of business.

Nonetheless, the reasoning of Tulip Real Estate supports the interpretation of investment treaties in light of the business responsibility to respect human rights. In relying on human rights jurisprudence to interpret the ICSID Convention, the Committee's point of departure was the Vienna Convention on the Law of Treaties. The Vienna Convention governs the interpretation of both investment treaties and human rights treaties. The Committee reasoned:

> *Article 31(3)(c) of the VCLT directs that, in the interpretation of treaties, "any relevant rules of international law applicable in the relations between the parties" are to be taken into account. The relevant rules of international law cover all sources of international law. The only requirements of Article 31(3)(c) are that the rules are relevant and that they are applicable as between the States parties to the treaty to be interpreted*.[311]

Thus, arbitral tribunals may take international human rights law norms into account so long as they are (1) relevant to the dispute and (2) applicable as between the States parties to the

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[305] *Id*. ¶ 146.

[306] *Ruiz Torija v. Spain*, ECtHR App. No. 18390/91, A/303-A, Merits and Just Satisfaction, December 9, 1994, ¶ 29.

[307] *Tulip Real Estate* ¶ 152 (footnote omitted).

[308] *Id*. ¶ 153.

[309] *Id*. ¶ 159.

[310] *Id*. ¶ 160.

[311] *Id*. ¶ 87.

treaty to be interpreted. In Tulip Real Estate, that treaty was the ICSID treaty. In other arbitral proceedings, the treaty to be interpreted could be the BIT or a multilateral investment treaty.

Under the Committee's reasoning, the European Convention on Human Rights, where relevant to an issue in dispute before an arbitral tribunal, would be applicable to interpreting investment treaties in arbitrations between member States of the Council of Europe.[312] Likewise, the American Convention on Human Rights, where relevant, would be relevant to investment arbitrations between States parties to that Convention. Even more broadly, global human rights treaties like the International Covenant on Civil and Political Rights – with 173 States parties[313] could be used to interpret investment treaties between States parties to the Covenant.

Moreover, because international human rights courts,[314] and quasi-judicial bodies such as the UN Human Rights Committee in interpreting the Covenant,[315] routinely cite and rely on interpretations of other human rights treaties by their authorised courts and panels, *all* of these treaties, where relevant, could be used to assist in the interpretation of investment treaties.

The Committee bolstered its reliance on the Vienna Convention by citing the International Law Commission Study Group's injunction that, *"[I]f it is indeed the point of international law to coordinate the relations between States, then it follows that specific norms must be read against other norms bearing upon those same facts as the treaty under interpretation*."[316]

The Committee noted with approval that *"[t]he ILC Study Group has rejected any suggestion that tribunals should restrict themselves to the treaty upon which their jurisdiction is based and which constitutes the treaty under dispute*."[317] The Committee quoted the Study Group's reasoning, as follows:

> *It is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply the law that goes 'beyond' the four corners of the constituting instrument or that when arbitral bodies deliberate the award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute or the relevant compromis. But if, […], all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment - that is to say 'other' international law. This is the principle of systemic integration to which article 31(3)(c) VCLT gives expression.*[318]

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[312] The Convention is a treaty of the Council of Europe, not of the EU. Although investment arbitrations between EU member States are now largely barred by *Slovak Republic v. Achmea B.V.* (Case No. 284/16) (2018), the Council of Europe's 46 member States are not limited to the 27 EU member States. See https://www.coe.int/en/web/portal/46-members-states.

[313] United Nations Treaty Collection, at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

[314] *See, e.g.,* Kanstantsin Dzehtsiarou, "What Is Law for the European Court of Human Rights?", *Georgetown Journal of International Law*, Vol. 49, p. 89 (2018).

[315] *See generally* Alex Conte and Richard Burchill, *Defining civil and political rights: the jurisprudence of the United Nations Human Rights Committee* (Ashgate, Farnham, England, 2009).

[316] *Tulip Real Estate* ¶ 88, citing ILC, 'Report of a study group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,' UN Doc A/CN.4/L.682, ¶ 416 (April 13, 2006).

[317] *Tulip Real Estate* ¶ 89.

[318] *Id.*

Under this principle of 'systemic integration,' arbitral tribunals interpreting BITs and other investment treaties should take into account the 'normative environment' of the developing law of the business responsibility to respect human rights. They are not foreclosed from doing so because BHR norms might not be found within the 'four corners' of the investment treaties.

However, to this writer's knowledge, only one investment arbitral tribunal has yet invoked the business responsibility to respect human rights as set forth in the UNGPs and elsewhere to interpret the responsibilities of business claimants. However, in this writer's view, the Tribunal still overlooked the responsibilities of business.

In *Urbaser v. Argentina*,[319] the Tribunal cited the UNGPs in support of the "*corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce*."[320] It also cited the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and the International Labour Organization's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy.[321]

Citing *Tulip Real Estate,*[322] The Tribunal correctly affirmed:

> *The Tribunal further retains that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties…, and that Article 31 § 3 (c) of that Treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties.' The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights*.[323]

Interpreting the BIT at issue in light of other relevant rules of international law was even more appropriate, because the BIT expressly directed the Tribunal to apply the law of the host State "*and such rules of international law as may be applicable*."[324]

Unfortunately, the Tribunal then proceeded to misread (or at least to oversimplify) the allocation of human rights responsibilities between States and business. Distinguishing between negative obligations not to violate human rights, and positive obligations to ensure human rights, the Tribunal reasoned that only States, not private companies, can have positive obligations under international human rights law. Companies, the Tribunal mistakenly proposed, have only negative responsibilities not to violate human rights.

As for positive obligations, the Tribunal stated: "*The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service*."[325]

In contrast, for negative obligations:

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[319] *Urbaser v. Argentina*, ICSID Case No. ARB/07/26, Award, December 8, 2016.

[320] *Id*. ¶ 1195 and n. 434.

[321] *Id*. ¶¶ 1196-98.

[322] *Id*. ¶ 1200 n. 437.

[323] *Id*. ¶ 1200.

[324] *Id*. ¶ 1202.

[325] *Id*. ¶ 1208.

> *The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case*.[326]

This dichotomy misses the middle ground staked out by the UNGPs. Under the UNGPs, companies do not have the positive *substantive* responsibility to guarantee the enjoyment of human rights. However, they do have the positive *procedural* responsibility to exercise due diligence to anticipate and avoid or mitigate adverse impacts. If the Tribunal had followed the UNGPs in *Urbaser*, it should have asked – but in fact did not -- whether the contractor exercised due diligence to anticipate and mitigate failures to supply water to sectors of the affected population.

Still, following *Tulip Real Estate*, *Urbaser* was correct to hold that the BIT "*cannot be interpreted and applied in a vacuum*." Nor can other investment treaties be so read. The opportunity remains for future arbiters to interpret investment treaties taking into account the responsibility of claimant investors to exercise human rights due diligence.

A later arbitral tribunal following *Urbaser*'s general approach did not address claimant's positive procedural responsibilities under the UNGPs to carry out human rights due diligence.[327] On the other hand, in *Bear Creek Mining Corporation v. Peru*,[328] the legal analysis of partially dissenting arbitrator Philippe Sands was consistent with the UNGPs (even though he did not rely on them).

First, Sands cited *Urbaser* for the points that the BIT in that case, like the BIT in *Bear Creek*, authorised the Tribunal to resort to applicable rules of international law, and that the BIT "*has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights…*'"[329]

Sands then opined that the fact that the Claimant "*failed to take active – or, in some instances, any – steps to address the concerns*" of affected communities contributed to the demise of its project.[330] He observed that it is not the State's function to 'deliver a "*social license*" to the investor. Rather, "*It is for the investor to obtain the 'social license', and in this case it was unable to do so largely because of its own failures*."'[331]

Independently of whether this assessment was correct on the facts,[332] Professor Sands, for purposes of assessing damages in the case, asserted a positive responsibility on the part of the investor to take active steps to address community concerns, in order to obtain a 'social license' to operate. He did so by invoking the consultation requirement, not of the UNGPs,

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[326] *Id*. ¶ 1210 (footnotes omitted).

[327] *Aven v. Costa Rica*, Case No. UNCT/15/3, Final Award, September 18, 2018, ¶ 738 (investor's environmental obligations).

[328] *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017. The law firm in which I am presently Counsel represented Claimant in that case. Accordingly, I express no view here on the facts or outcome of the case. The text above addresses only the single point of law raised by the dissenting arbitrator.

[329] Partial Dissenting Opinion, Professor Philippe Sands QC, ¶ 10 (italics omitted), quoting *Urbaser* ¶ 1200.

[330] *Id*. ¶ 19. I express no view here on whether this assertion was factually correct. I note only that Professor Sands recognised a positive duty on the part of Claimant to take steps to address community concerns.

[331] *Id*. ¶ 37.

[332] For the reason stated, I express no view on the facts.

but of the ILO Convention on the Rights of Indigeneous Peoples.[333] Nonetheless, his approach was consistent with the UNGPs injunction that companies should engage in "*meaningful consultation with potentially affected groups*".[334] Sands' partial dissent was also consistent with the overall purpose of the UN Framework to secure 'social license' for companies to operate.[335]

Indeed, it would arguably have been more appropriate to derive the company's responsibility to address community concerns, not from the ILO Convention, which expressly addresses only consultation by *governments*, but rather from the UNGPs, which set forth the consultation responsibilities of *business*.

In sum, *Tulip Real Estate*, *Urbaser*, and the Sands partial dissent in *Bear Creek,* make a persuasive case that arbitral tribunals in investment cases generally may and should consider other norms of international law – including norms on human rights – in interpreting investment treaties. Increasingly, international BHR norms, as reflected in the UNGPs; the OECD Guidelines for Multinational Enterprises; the Inter-American Court's authoritative interpretation of the American Convention on Human Rights; national legislation in France, Germany and Norway; and the forthcoming EU Directive on Corporate Responsibility Due diligence; all recognise the responsibility of business to respect human rights.

The sources of international law supporting this BHR norm vary. Some BHR norms are in human rights treaties in force between the parties to an investment treaty; some are in customary international law or even *jus cogens* norms; and some are in national laws which may collectively imply general principles of law. Whatever the source of international law,[336] unless the terms of an investment treaty clearly bar considering international law beyond the 'four corners' of the treaty, arbitral tribunals interpreting investment treaties can and should take into account international law norms on the responsibility of business to respect human rights.

Even more broadly than international law, BHR norms can be taken into account by national courts, in deciding whether to recognise and enforce awards of international arbitral tribunals, whether as 'international public policy,' as in the French Civil Code,[337] or as a matter of national public policy, as authorised by many international instruments and national laws.[338]

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[333] *Id*. ¶ 11, citing ILO Convention 169, Indigenous and Tribal Peoples Convention, 1989, Article 15. Article 15.2 provides in part: 'In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.'

[334] UNGP 18 (b).

[335] Special Representative of the Secretary-General, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), at 16-17, ¶ 54.

[336] For sources of international law, see Statute of the International Court of Justice, Article 38 (treaties, customary law, general principles of law), and Vienna Convention on the Law of Treaties, 1969, Articles 53 and 64 (*jus cogens*).

[337] Article 1520, 5° requires arbitral awards to be set aside if their recognition or enforcement is contrary to 'international public policy.' *See generally* Clyde&Co, 'The approach of French courts to violations of international public policy: Cour de Cassation pinpointing recent developments and trends,' November 15, 2022, accessible at https://www.clydeco.com/en/insights/2022/11/the-approach-of-the-french-courts-to-violations.

[338] For example, New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article V.2 (b), (recognition and enforcement may be refused if competent national authority finds 'contrary to the public policy of that country'); Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Article 2 (arbitral awards have extraterritorial validity if, among other things, they are 'not manifestly contrary to the principles and laws of the public policy (*ordre public*) of the State in which recognition or execution is sought'); cf. National Conference

III.F.2. New treaties

Unlike the older generation of BITs in the preceding section, a number of recent BITs or Model BITs explicitly incorporate BHR norms. They 'harden' the norms in various ways: as rights of States, defences for States, obligations of investors, guides to interpretation, qualifications of arbiters, and limitations on the scope of investment arbitrations or on damages payable to investors.

Not all new investment agreements contain explicit human rights provisions, most that do are not yet in force, and their provisions are often incomplete or unenforceable.[339] Even so, the four examples cited below – one from the global North, one North-South, and two from the global South, all from the last seven years – illustrate both an incipient trend toward hardening human rights norms in BITs and the diversity of forms the hardening may take.

Dutch Model BIT: One example is the 2019 Dutch Model BIT.[340] Its article on *Corporate Social Responsibility* expressly embraces the UNGPs, investor responsibility to comply with human rights laws, and their responsibility to conduct human rights due diligence:

> *1. Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws.*
>
> *2. The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.*
>
> *3. The Contracting Parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment.*
>
> *4. Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.*
>
> *5. The Contracting Parties express their commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework*.[341]

Among other provisions supportive of human rights,[342] an investor's non-compliance with the UNGPs may reduce the amount of any compensation it might receive in an arbitration:

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of Commissioners on Uniform State Laws, Uniform Foreign-Country Money Judgments Recognition Act, 2005, Article 4.c (3) (US state courts need not recognize foreign country judgments if 'repugnant to the public policy of this state or of the United States).

[339] *E.g.*, Business & Human Rights Resource Centre, Briefing: 'How Do UK Trade Treaties Measure Up on Human Rights?', February 2, 2023, accessible at https://www.business-humanrights.org/en/from-us/briefings/how-do-uk-trade-agreements-measure-up-on-human-rights/.

[340] Netherlands Model Investment Agreement, 22 March 2019.

[341] Article 7.

[342] *See also* Articles 2.2 (right to regulate, exercise of which does not by itself breach BIT obligations), 5.3 (remedies for business-related human rights abuse), 6 (sustainable development), 6.6 (reaffirming human rights obligations under multilateral agreements), 12.8 (limits on indirect expropriation), and

Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.[343]

Morocco-Nigeria BIT: One of the first BITs with express provisions on human rights was the 2016 Morocco-Nigeria BIT.[344] Each party must "*ensure*" that its laws and regulations provide for "*high levels of labour and human rights protection appropriate to its economic and social situation, and [must] strive to continue to improve these law and regulations*."[345] The two States must also "*ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party*."[346]

The BIT includes *Post- Establishment Obligations* requiring that investors and investments shall:

- uphold human rights in the host state;
- act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998; and
- not manage or operate the investments in a manner that circumvents international environmental, labour and human rights.[347]

Aside from these obligations, investors and investments "*should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices*."[348] Although not obligatory, this hortatory provision could affect interpretation of the treaty, for example, by helping to clarify an investor's obligation to 'uphold' human rights.

A further article on *Investor Liability* makes investors "*subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state*."[349] And an article on the State's right to regulate clarifies that the State's compliance with its "*international obligations under other treaties*" – which could include human rights treaties – "*shall not constitute a breach*" of the BIT.[350]

Brazil-India BIT: The 2020 Brazil-India BIT is less elaborate on human rights but still explicitly incorporates positive and negative BHR obligations for companies.[351] Investors and their investments "*shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of*

20.5 (every effort to ensure expertise of arbitral tribunal in public international law including human rights law).

[343] Article 23, 'Behavior of the investor'.

[344] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, December 3, 2016, not in force.

[345] Article 15, 'Investment, Labour and Human Rights Protection,' ¶ (5).

[346] Article 15 (6).

[347] Article 18, ¶¶ 2, 3 and 4.

[348] Article 24 (1).

[349] Article 20.

[350] Article 23.

[351] Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India, January 25, 2020, not in force.

a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article…"[352]

Those "*voluntary principles and standards for a responsible business conduct*" direct companies to "*respect the internationally recognized human rights of those involved in the companies' activities*," and to "*refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, …*"[353]

Colombia-Spain BIT: The 2021 Colombia-Spain Agreement requires both States Parties to promote implementation of the OECD Guidelines for Multinational Enterprises (which incorporate the UNGPs).[354] Among other provisions,[355] a State Party may deny the benefits of the BIT to an investor convicted within the last ten years of committing, sponsoring or financing crimes defined by the Rome Statute of the International Criminal Court.[356] Human rights provisions of the BIT are exempted from investment arbitration.[357]

III.F.3. Conclusion on Investment Law

Both the new generation of investment treaties and the reasoning of some arbitral decisions hold promise that future investment treaties and tribunals will give weight to a state's right and duty to regulate to protect human rights, and will also take into account the business responsibility to respect human rights. But this has not happened yet. Most of the treaties with human rights clauses are not yet in force, and their clauses are often incomplete or unenforceable. The arbitral jurisprudence is limited and not yet reflective of the UNGPs.

Still, investment law is moving in the same general direction as other elements of the overall trend to harden BHR norms. Even so, another decade or so may be required for BHR norms to be decisive where relevant in investment disputes.

III.G. Potential UN Treaty on Business and Human Rights

In September 2013, claiming the support of some 85 countries, Ecuador urged the UN Human Rights Council to take up the issue of a legally binding treaty on business and human rights.[358] In November 2013, civil society groups meeting in Bangkok, Thailand, issued a Joint Statement echoing the call.[359] Within a year more than 600 civil society groups reportedly joined the call.[360]

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[352] *Id*. Article 12.1 ('Corporate Social Responsibility').

[353] *Id*. Article 12.2.

[354] Acuerdo entre la República de Colombia y el Reino de España Para la Promoción y Protección Recíproca de Inversiones, September 16, 2021, not in force, Artículo 17.

[355] *See also id*. Artículo 14.1 (right to regulate to achieve human rights objectives), 16.1 (protection of environmental, labor and human rights should not be weakened to attract investment)

[356] *Id*. Artículo 18.1 (d).

[357] *Id*. Artículo 19.1 (exempting Artículos 16 and 17).

[358] Bus. & Human Rights Res. Ctr., Calls for a Binding Treaty on Business and Human Rights-Perspectives, BUSINESs-HUMANRIGHTS.ORG (Dec. 6, 2013), http://business-humanrights.org/en/calls-for-a-binding-treaty-on-business-human-rights-perspectives.

[359] People's Forum on Human Rights and Business, Bangkok, Thai. Nov. 5-7, 2013, 'Joint Statement: Call for an International Legally Binding Instrument on Human Rights, Transnational Corporations and Other Business Enterprises' (Nov. 2013).

[360] International Federation for Human Rights (FIDH), FIDH and ESCR-Net New Joint "Treaty Initiative" (Jan. 30, 2015), https://www.fidh.org/International-Federation-for-Human-Rights/globalisation-human-rights/business-and-human-rights/16868-fidh-andescr-net-new-joint-treaty-initiative.

On the initiative of Ecuador and South Africa and supported by these civil society groups, the UN Human Rights Council in 2014 launched a negotiation process designed to lead to a legally binding treaty on BHR.[361] The Council "[d]ecides to establish an open-ended intergovernmental working group […] to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[362]

The initiative has been plagued from the start by diplomatic, geopolitical, geo-economic, and ideological divides. The 2014 Council resolution was supported by a plurality of only 20 of the 47 member States of the Council. Fourteen States opposed and thirteen abstained. All States voting in favour were from Africa and Asia, except for Russia and three leftist Latin American States (Cuba, Ecuador and Venezuela). The 14 opposing States included all other European States on the Council, plus the U.S., UK, Japan and the Republic of Korea. The 13 abstentions included four major Latin American economies (Argentina, Brazil, Mexico and Peru), three African States, three Gulf States and one Asian State.[363]

Opposition by the U.S., UK and EU States was intense. Not only did they vote against the resolution, they stated that they would refuse to participate in the Intergovernmental Working Group.[364] (In fact, at various times they all eventually did, but either minimally or only to oppose a treaty.[365])

The weakness of diplomatic support for the process was reflected in its calendar. The Working Group was authorised to meet only once a year, for a single week.[366] As of this writing in early 2023, the Working Group has met in eight annual sessions, with a ninth planned for the fall of 2023.[367] There is still no agreed text, and no end in sight.

Substantive disputes, too, have hindered the advance of the negotiations. Most notably, from the beginning, South Africa has insisted that the treaty should cover only transnational corporations, not local companies. Most other stakeholders – business, most civil society groups, and most States – argue that any treaty should cover all companies (or at least large ones), regardless of whether they are transnational or local.[368]

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[361] Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, ¶ 1 (June 26, 2014).

[362] *Id*.

[363] *Id*. p. 3, accessible at https://documents-dds-y.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement.

[364] *See*, for example, Statement by the Delegation of the U.S., 'Explanation of vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument: Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights' (June 26, 2014), https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermineefforts-to-implement-guiding-principles-on-business-and-human-rights/.

[365] *See*, for example, Business and Human Rights Resource Centre, 'Reflections on a week of negotiations on a legally binding instrument', November 1, 2022, accessible at https://www.business-humanrights.org/en/blog/reflections-on-a-week-of-negotiations-on-a-legally-binding-instrument-on-business-human-rights/.

[366] *See* Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, ¶ 4 (June 26, 2014).

[367] UN Human Rights Council, [draft] 'Report on the eighth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights,' UN Doc. A/HRC/52/XX, October 28, 2022, accessible at https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session8/2022-10-28/igwg-8th-draft-report.pdf

[368] *See*, for example, Doug Cassel, 'Ecuador's Revised Draft Treaty: Getting Down to Business,' September 3, 2019, accessible at https://www.business-humanrights.org/en/blog/ecuadors-revised-draft-treaty-getting-down-to-business/.

Whether over that issue or for other reasons, when Ecuador in 2022 established a 'Friends of the Chair' group of states to support the treaty process, South Africa was not among them. Nor was any other African State.[369] Not until the last day of the annual session of the Working Group in October 2022 did Ecuador announce that an African State (Cameroon) would participate.[370]

Another obstacle has been the sheer number and complexity of technical and policy issues raised by a treaty addressing all industries in regard to all human rights, in all states, in all economies at whatever stage of development.[371] Efforts to simplify matters have led both to calls for a stripped-down, framework treaty,[372] and to recent suggestions by the Ecuadorian Chair to reduce the level of detail and specificity in the text of the draft treaty.[373]

Reaching agreement on the substantive issues inherent in a broad-based, prescriptive BHR treaty would be difficult enough in negotiations enjoying broad diplomatic support. In a process as tenuously supported as this one, achieving agreement has been made even more difficult.

In the absence of real progress at the UN, the EU has opted to pursue its own path, through a proposed EU Directive on Corporate Sustainability Due Diligence.[374] Because the terms of the proposed Directive remain under debate, this has prevented the EU in recent years from taking positions on substantive issues in the UN treaty process. However, once the Directive is issued, the EU will be able to do so. Whether other states would be willing to write the EU approach into a UN treaty, or whether the EU would accept a UN treaty that differs from its Directive, remains to be seen.

Eventually, then, the hardening of BHR norms may be consolidated in a global treaty or, failing that, may continue to harden piecemeal at regional and national levels.

IV. The 'Broadening' of International and Transnational Norms on Business and Human Rights

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[369] *See* Doug Cassel, 'Friends of the Chair: New Impetus for the UN Business & Human Treaty Process?', September 26, 2022, accessible at https://www.business-humanrights.org/en/blog/friends-of-the-chair-new-impetus-for-the-un-business-human-treaty-process/.

[370] 'Reflections,' note 365 above.

[371] *See*, for example, Douglass Cassel & Anita Ramasastry, "White Paper: Options for a Treaty on Business and Human Rights," *Notre Dame Journal of International & Comparative Law*, Volume 6, p. 1 (2016); UN Human Rights Council, 'Text of the third revised draft legally binding instrument with the textual proposals submitted by States during the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights,' UN Doc. A/HRC/49/65/Add.1, 28 February 2022.

[372] For example, Claire Methven O'Brien, 'Submission to UN Open Ended Inter-Governmental Working Group on Transnational Corporations & Other Business Enterprises with Respect to Human Rights: *For a business and human rights treaty based on progressive national implementation of the UNGPs and modelled after the WHO Framework Convention on Tobacco Control,'* 30 September 2016.

[373] UN Human Rights Council, 'Suggested Chair proposals for select articles of the LBI (6 October 2022),' UN Doc. A /HRC/WG.16/8/CRP.1, 24 October 2022, accessible at https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/wgtranscorp/session8/2022-10-27/a-hrc-wg16-8-crp1.pdf; Draft Report, note 367 above, ¶ 8(a).

[374] *See* Section III.A.1 above.

As the UNGPs explain, "*Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights*."[375] Now that the right to a clean, healthy and sustainable environment has been formally recognised as a human right by nearly all States, with no dissent in the UN General Assembly, business has a responsibility to respect that basic environmental right. In addition, as courts have held, a company's environmental practices may adversely affect other human rights as well.

IV.A. Treaties and Declarations

Non-binding international declarations on the environment have been prominent since at least the Stockholm Declaration on the Human Environment of 1972,[376] and the Rio Declaration on Environment and Development of 1992.[377] Since Stockholm, at least six regional treaties and declarations in Africa, Latin America, Europe, the Arab world, and Southeast Asia, in varying formulations, have recognised the 'human right', 'fundamental right', or 'right' to a healthy environment. In chronological order:

- African Charter on Human and Peoples' Rights (1981): right to a "*general satisfactory environment favourable to their development*".[378]
- Protocol to the American Convention on Human Rights (1988): right to a "healthy environment".[379]
- Charter of Fundamental Rights of the EU (2000): a "*high level of environmental protection and the improvement of the quality of the environment must be … ensured in accordance with the principle of sustainable development*."[380]
- Arab Charter of Human Rights (2004): right to a "*healthy environment*".[381]
- ASEAN Human Rights Declaration (2012): right to a "*safe, clean and sustainable environment*".[382]
- Escazú Agreement for Latin America and the Caribbean (2018): procedural rights contribute to the "*right of every person of present and future generations to live in a healthy environment and to sustainable development*."[383]

At the global level, the UN Human Rights Council in 2021 recognised the human right to a "*clean, healthy and sustainable environment*".[384] By that time, as the Council noted, "*more than 155 States have recognized some form of a right to a healthy environment in, inter alia, international agreements or their national constitutions, legislation or policies*."[385]

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[375] UNGP 12 Commentary.

[376] In Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972).

[377] UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992), adopted June 14, 1992.

[378] Article 24. Adopted June 28, 1981, in force October 21, 1986.

[379] Article 11.1. Adopted November 17, 1988, in force, November 16, 1999.

[380] Article 37.

[381] Article 38. League of Arab States, Arab Charter on Human Rights, May 22,2004, reprinted in 12 *International Human Rights Reports* 893 (2005), entered into force March 15, 2008.

[382] Article 28.f. ASEAN Human Rights Declaration, November 19, 2012, accessible at https://asean.org/asean-human-rights-declaration/. *See* also Article 36.

[383] Article 1. Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean, March 4, 2018, in force April 22, 2021.

[384] Resolution 48/13, 8 October 2021, UN Doc. A/HRC/RES/48/13, 18 October 2021, ¶ 1.

[385] *Id*., Preamble, p. 2.

Finally, the UN General Assembly in 2022, by an overwhelming vote, recognised the human right to a "*clean, healthy and sustainable environment*".[386] The Assembly called upon, not only States, but also business enterprises to adopt policies and take measures "*in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.*"[387]

The resolution did not detail what measures States might take and how they might affect private companies. One illustration of how States might act, and how companies might be affected, is provided by the Escazú Agreement –formally the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean –which came into force in 2021. It includes detailed provisions on the three topics in its title: access to information, public participation and justice. Among others, they include the following:

Right to a Healthy Environment: "*Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement*."

Precautionary Principle: The Agreement adopts the precautionary principle, which cautions in effect that, in case of scientific doubt, the course of action more favourable to the environment should be favoured.

Access to Information: The public must have access to environmental information from public authorities. This includes information about environmental permits and environmental impact statements for private companies.

Public Participation: "*Each Party shall guarantee mechanisms for the participation of the public in decision making processes, […] with respect to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment, including when they may affect health*." Public authorities "*shall make efforts to identify the public directly affected by the projects or activities that […] may have a significant impact on the environment and shall promote specific actions to facilitate their participation*."

Access to Justice: States parties must ensure access to "*judicial and administrative mechanisms*" to challenge any decision related to access to environmental information, public participation, or any other "*decision, action or omission that […] could affect the environment adversely*." Precautionary and interim measures must be available to "*prevent, halt, mitigate or rehabilitate*" environmental damage. Measures to facilitate the production of evidence of environmental damage should include "*reversal of the burden of proof and the dynamic burden of proof*."

Redress: Redress may include "*restitution […], restoration, compensation […], financial penalty, satisfaction, guarantees of non-repetition, assistance for affected persons and financial instruments to support redress.*"

As of May 2023, there are 15 States parties to the Agreement.[388] They include important investment destination countries such as Argentina, Chile, Ecuador, Mexico, and Panama. Brazil, Colombia, and Peru are signatories and may join the treaty in the future.

States parties are required to implement the Agreement in national legislation. Although to this writer's knowledge no State has yet passed implementing laws, at least 13 States in the

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[386] UNGA Res. A/RES/76/300, 'The human right to a clean, healthy and sustainable environment,' 28 July 2022. The vote was 161 in favour, none opposed, and eight abstentions.

[387] *Id*. ¶ 4.

[388] *See* table at https://observatoriop10.cepal.org/en/treaties/regional-agreement-access-information-public-participation-and-justice-environmental.

region already have laws requiring public participation in environmental impact statements,[389] and at least five States have laws on public participation in environmental decisions.[390]

IV.B. Judicial Rulings

The treaties and declarations discussed in the previous part concern the human right to a clean, healthy and sustainable environment. There are also judicial rulings on how negative environmental impacts may adversely affect other human rights. The following cases are illustrative, not exhaustive.

Inter-American Court: In its 2017 Advisory Opinion on *The Environment and Human Rights*,[391] the Inter-American Court of Human Rights confirmed the "*undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights*."[392] The Court cited jurisprudence of other human rights bodies:

> *The European Court of Human Rights has recognized that severe environmental degradation may affect the well-being of the individual and, consequently, give rise to violations of human rights, such as the rights to life, to respect for private and family life, and to property. Similarly, the African Commission on Human and Peoples' Rights has indicated that the right to 'satisfactory living conditions and development' is 'closely linked to economic and social rights insofar as the environment affects the quality of life and the safety of the individual.'*[393]

The Inter-American Court then articulated a more extensive list of rights that are "*particularly vulnerable to environmental impact*". They include

> *the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property, and the right to not be forcibly displaced. […] [O]ther rights are also vulnerable and their violation may affect the rights to life, liberty and security of the individual, and infringe on the obligation of all persons to conduct themselves fraternally, such as the right to peace, because displacements caused by environmental deterioration frequently unleash violent conflicts between the displaced population and the population settled on the territory to which it is displaced*.[394]

Given the relationship between environment and human rights, "*all States must regulate this matter and take other similar measures to prevent significant damage to the environment*."[395] This duty includes regulation of private companies. If a State fails to regulate the environmental performance of private companies, its international responsibility "*may result from a failure to regulate, supervise or monitor the activities of those third parties that caused environmental damage*."[396]

A State's duty to regulate private companies may also embrace their extraterritorial activities,

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[389] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, *The Environment and Human Rights*, November 2017, ¶ 167, listing Argentina, Belize, Brazil, Canada, Chile, Colombia, Ecuador, El Salvador, Guatemala, Peru, Dominican Republic, Trinidad and Tobago and Venezuela.

[390] *Id*., listing Bolivia, Costa Rica, Cuba, Honduras and Mexico.

[391] Advisory Opinion OC-23/17, November 2017.

[392] *Id*. ¶ 47 (footnote omitted).

[393] *Id*. ¶ 50 (footnotes omitted).

[394] *Id*. ¶ 66 (citations omitted).

[395] *Id*. ¶ 147.

[396] *Id*. ¶ 119 (footnote omitted).

within the limits of international law.[397] *"[I]n the case of companies registered in one State that develop activities outside that State's territory, the Court notes that a tendency exists towards the regulation of such activities by the State where such companies are registered*."[398] To meet their obligation to prevent human rights harm, States "*must regulate, supervise and monitor the activities within their jurisdiction that could produce significant environmental damage […]*."[399]

The Court has jurisdiction to issue judgments only against States, not private companies. Nonetheless it took note that, according to the UNGPs, "*business enterprises should respect and protect human rights, and prevent, mitigate and assume responsibility for the adverse human rights impacts of their activities*."[400] For example, the obligation to carry out environmental impact assessments is "*independent of whether a project is being implemented directly by the State or by private individuals*."[401]

As noted in Section III.C above, in 2021 the Court went on to rule more broadly that State Parties to the American Convention on Human Rights must regulate private companies consistently with the UNGPs. This obligation extends to environmental human rights.

Dutch Courts: In the landmark ruling on climate change in *Urgenda v. The Netherlands*, the Dutch Supreme Court ruled in 2019 that the Dutch government had a legal obligation to take serious measures to reduce greenhouse gas emissions.[402] The Court ruled partly on the ground that global warming would adversely impact the human rights under the European Convention on Human Rights to life and to private and family life, and that the ruling was necessary to provide an effective legal remedy as mandated by the Convention.[403]

In *Friends of the Earth v. Shell*, the District Court of The Hague in 2021 similarly ruled that Royal Dutch Shell is obliged to take measures to reduce greenhouse gases, again partly on the ground that global warming adversely affects the human rights to life and private and family life under the European Convention.[404] The Court factored these human rights into the 'unwritten standard of care' owed by Shell under Dutch law.[405] In addition, in interpreting the 'unwritten standard of care,' the Court expressly followed the UNGPs.[406]

The Court ordered Shell to reduce emissions by 45%. Specifically, the Court ordered Royal Dutch Shell,

> *both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions*

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[397] *Id*. ¶¶ 81, 90 and 97.

[398] *Id*. ¶ 151 (footnote omitted)

[399] *Id*. ¶ 242.b.

[400] *Id*. ¶ 155 (citation omitted).

[401] *Id*. ¶ 160 (footnote omitted).

[402] Case no. 19/00135, Hoge Raad, December 20, 2019, English translation accessible at https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf.

[403] *Id*. ¶¶ 5.2.1 to 5.5.3, 5.10. 6.1, 6.3-6.5, and 8.2.2.

[404] *Milieudefensie et al. v. Royal Dutch Shell plc.,* May 26, 2021, C/09/571932 / HA ZA 19-379, District Court The Hague, English translation accessible at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-1.pdf.

[405] *Id*. ¶¶ 4.4.9 – 4.4.10.

[406] *Id*. ¶¶ 4.4.11 – 4.4.17. The Court also noted that the European Commission had expressly expected European companies to meet their responsibilities under the UNGP's. *Id*. ¶ 4.4.11, citing European Commission 2011, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility,' note 5.

into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels.[407]

Shell's appeal, filed March 22, 2022, is pending.[408] Regardless of the outcome, one might suppose that the Hague Court decision against Shell, because it rests on the unique Dutch 'unwritten standard of care', might have no application outside The Netherlands. On the other hand, common law courts routinely apply unwritten 'duty of care' criteria in tort cases against private parties. Although none has yet relied on the UNGPs to define the duty of care owed by a company, the argument can be made that common law courts should do so.[409]

European Court of Human Rights: At least three climate change cases have been heard or set for hearing before the Grand Chamber of the European Court of Human Rights. The broadest is a case against 32 European States, relying on similar human rights theories used in *Urgenda*, which has been set for hearing in September 2023.[410] . A hearing was held in March 2023 in two other cases, now pending decision by the Grand Chamber.[411] Other cases are pending before the European Court.[412]

As in *Urgenda*, these cases are against States, not companies. However, in the event claimants prevail on their human rights theories, European States may have little choice but to require businesses to sharply reduce greenhouse gas emissions.

German Courts: The cases pending before the European Court of Human Rights may require European multinational companies to curtail greenhouse gas emissions, not only in Europe, but also from their international operations outside Europe. Meanwhile, a case pending before German courts may require a company to pay damages for the alleged effect of its emissions in Germany over more than a century on climate change half a world away.

In *Lliuya v. RWE*, a Peruvian farmer is suing Germany's largest electric utility for its historic contributions to global warming, which allegedly are causing glaciers to melt in the Andes, threatening his home, farm and hometown with flooding.[413] Some 50,000 people reside in the high hazard zone of a potential flood.[414] He relies, among other things, on nuisance theories

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[407] *Id*. ¶ 5.3.

[408] *Reuters*, "Shell filed appeal against landmark Dutch climate ruling," March 29, 2022.

[409] Doug Cassel, "Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence," *Business and Human Rights Journal*, Volume I, Issue 2, July 2016, pp. 179 – 202.

[410] *Duarte Agostinho and Others v. Portugal and 32 Other States*, Request No. 39371/20, submitted 7 September 2020. On June 30, 2022, the Chamber relinquished jurisdiction in favour of the Grand Chamber. Hearing is set for September 27, 2023 (https://youth4climatejustice.org/).

[411] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, hearing held before Grand Chamber, 29 March 2023 (rights to life and health of senior women) (https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7610087-10470692%22]}); *Carême v. France*, Appl. no. 7189/21, hearing held before Grand Chamber, 29 March 2023 (rights to life and private and family life) (https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7610561-10471513%22]}).

[412] *E.g., Greenpeace Nordic and Others v. Norway*, Appl. no. 34068/21, Communicated Case of 16 December 2021 (rights to life and private and family life); and *Mex M. v. Austria*, application filed on 25 March 2021, not yet communicated, available at www.michaelakroemer.com/wp-content/uploads/2021/04/rechtsanwaeltin-michaela-kroemer-klimaklage-petition.pdf. (right to private and family life).

[413] *Lliuya v. RWE AG*, No. Az. 2 O 285/15, Higher Regional Court of Hamm.

[414] Sarah Kaplan, "A melting glacier, an imperiled city and one farmer's fight for climate justice," *The Washington Post*, August 22, 2022.

and an expert opinion that RWE contributed 0.47% to global warming in the industrial era.[415] In 2017 a German appeals court allowed his suit to proceed.[416] In May 2022 German judges and experts arrived in Peru to assess the level of risk of flooding from a glacial lake.[417]

IV.C. Pending Requests for Advisory Opinions on Climate Change

Three pending requests for advisory opinions may produce significant guidance on the international human rights obligations of States to regulate companies (and take other measures) with regard to climate change.

One request, adopted by consensus of the UN General Assembly in April 2023,[418] asks the International Court of Justice (ICJ) to opine on the obligations of States in regard to climate change, *"[h]aving particular regard to*" among other instruments, the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.[419] Written statements are due in January 2024 and comments on the statements in April 2024.[420]

Separate requests are pending before the International Tribunal for the Law of the Sea (ITLOS) and the Inter-American Court of Human Rights (IACtHR). The latter request seeks "*to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, […].*"[421] Among other questions, the request asks "*what measures should States take to minimize the impact of the damage due to the climate emergency in light of the obligations established in the American Convention [on Human Rights]?*",[422] and "*What should a State take into consideration when implementing its obligations: (i) to regulate; (ii) to monitor and oversee; [and] (iii) to request and to adopt social and environmental impact assessments…?*"[423] Written submissions are due in December 2023.[424]

IV.D. Conclusion on Environment

Human rights and the environment now intersect in at least two distinct ways. One is the recognition of the human right to a clean, healthy and sustainable environment. The other is

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[415] *Id.*

[416] *Lliuya v. RWE AG*, No. Az. 2 O 285/15, Higher Regional Court of Hamm, November 30, 2017.

[417] Aliyah Elfar, 'Landmark Climate Change Lawsuit Moves Forward as German Judges Arrive in Peru,' August 4, 2022, accessible at https://news.climate.columbia.edu/2022/08/04/landmark-climate-change-lawsuit-moves-forward-as-german-judges-arrive-in-peru/.

[418] United Nations, 'General Assembly Adopts Resolution Requesting International Court of Justice Provide Advisory Opinion on States' Obligations Concerning Climate Change', GA/12497, 29 March 2023.

[419] Letter of 12 April 2023 from UN Secretary-General to the President of the ICJ, accessible at https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-APP-01-00-EN.pdf.

[420] ICJ, Order of August 2023, setting January 22, 2024 for statements and April 22, 2024 for comments (https://www.icj-cij.org/sites/default/files/case-related/187/187-20230420-ORD-01-00-EN.pdf).

[421] *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, January 9, 2023, p. 1, accessible at https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf. See also ITLOS Case No. 31.

[422] *Id*. at 8.

[423] *Id*. at 9.

[424] https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634

the recognition that negative environmental impacts may adversely affect other human rights, such as the rights to life, health, food, water, and private and family life.

Both aspects are likely to be the subject of increasing regulation and litigation in the near and medium terms. Many industries have large footprints which affect the quality of air, land, water and biodiversity in their immediate environs. In addition, the contributions of business emissions of greenhouse gases to climate change – especially by the energy, transportation, agricultural and construction industries – will become even more controversial as the global climate approaches Paris Accord limits.

Before both national courts and regional human rights courts, human rights are likely to remain a significant pathway for the adjudication of disputes involving environmental contamination. The extent to which they will also impact climate change disputes may depend in large part on the advisory opinions of the ICJ, the ITLOS and the IACtHR, and on the outcome of *Agostinho* and other climate change cases currently pending before the Grand Chamber of the European Court of Human Rights.

V. Conclusion

The international and transnational law trend toward 'hardening' the business responsibility to respect human rights is recent, multi-faceted and unmistakable. It is reflected in diverse areas of law, including:

- national and regional legislation mandating human rights due diligence, enforceable by sanctions and remedies;
- national court judgments against companies with transnational effects;
- court judgments against States, interpreting human rights treaties to require States to regulate companies to respect human rights, thereby indirectly affecting business;
- a limited but growing number of criminal prosecutions of companies and executives for complicity in war crimes and crimes against humanity;
- restrictions on the import of goods produced in violation of human rights, especially forced labour;
- international investment law, mainly in newer investment treaties not yet in force, but also in some arbitral decisions interpreting older treaties; and
- the ongoing process to negotiate a UN treaty on business and human rights.

These elements of the overall trend to harden BHR norms move at different paces and with differing impacts. Human rights due diligence legislation already directly affects thousands of companies, while civil suits affect only a few, and criminal prosecutions even fewer. Due diligence laws, civil suits and criminal cases already affect companies, while the impact on investment arbitration will not likely be felt for another decade or so. The proposed UN treaty may or may not be successfully negotiated.

What matters most is that the distinct elements of the overall trend move in the same direction. They are mutually reinforcing and complementary. How far and how fast the trend will continue cannot be predicted with confidence. Much may depend on the EU's decision on its draft Directive on Corporate Sustainability Due Diligence; on pending judicial rulings and advisory opinions on State duties to regulate companies with regard to climate change; on non-legal trends affecting business incentives; on the degree of resistance or acceptance by business and of mobilization by civil society; and, of course, on currently unforeseen contingencies.

While the future pace of change is thus difficult to predict, the confluence of all these legal factors, and of non-legal factors,[425] strongly suggests that the present trend overall will continue. International and transnational norms on the business responsibility to respect human rights are likely to be increasingly embodied in hard law. Companies, especially transnational companies, are well-advised to adopt human rights policies, to engage in human rights and environmental due diligence, and to commit to the United Nations *Guiding Principles on Business and Human Rights* and similar instruments.

Meanwhile, the business responsibility to respect human rights is also broadening, as additional human rights gain recognition. The newly recognised right most significantly affecting many large companies is the right to a clean, healthy and sustainable environment. Its status as a human right may give it greater weight in international law, while also opening the door to enforcement through regional and global human rights procedures. Clarity may be forthcoming soon in rulings by the Grand Chamber of the European Court of Human Rights in several climate change cases, and in advisory opinions on climate change by the International Court of Justice and the Inter-American Court of Human Rights.

Legal risks for business arise directly from suits against companies and indirectly from suits against States, seeking to require States to regulate or to strengthen their regulation of the responsibilities of business to respect human rights and the environment.

The trends both to harden and to broaden BHR norms reinforce the wisdom of the UNGPs advice that businesses should *"[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate*."[426] That advice made good business sense in 2011, when the UNGPs were adopted. It is even smarter today. It promises to be smarter still in future years.

At stake are not only negative risks. There are also positive opportunities to enhance reputational capital by getting ahead of the curve, especially for *highly visible firms in consumer-facing sectors*.[427] Enlightened self-interest suggests that now is the time for companies to adapt or strengthen policies and procedures to meet their responsibility to respect human rights and the environment.

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[425] *See* text and notes 18-27 above.

[426] UNGP 23 (c).

[427] *See generally* Kristoffer Marslev, *Doing Well by Doing Right?,* Danish Institute for Human Rights (2020). 'Despite irregularities, the empirical evidence seems to suggest that a business case for human rights is most likely to exist for highly visible firms in consumer-facing sectors, where public scrutiny is more intense and the costs of failing high stakeholder expectations are heavier.' *Id*. at 7.