Abhandlungen

Business and Human Rights: Towards a 'Smart Mix' of Regulation and Enforcement

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Abstract

Current regulatory efforts in the European Union (EU) (the proposal for a Corporate Sustainability Due Diligence Directive) and in the United Nations (UN) (the draft for a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises) seek to bring States to activate and operationalise their domestic public law, private law, and criminal law for preventing and

mitigating human rights abuses in the context of transnational business activities.

The paper maps the current legal landscape, including the international, European, and Inter-American case law on human rights obligations of business actors. It argues against a direct opposability of international human rights treaties against business actors, with the exception of peremptory human rights. The paper uses the domestic law examples of the French *Loi de Vigilance* and the German *Lieferkettensorgfaltspflichtengesetz* to explain how the various levels and branches of law can complement each other, with private and administrative law standing in the foreground, and criminal legal enforcement as a means of last resort. The national and potential European rules need to be aligned to the overarching standards set by international human rights law. The combination of international law with domestic administrative, private, and criminal law promises an effective enforcement of human rights vis-à-vis global corporations.

Keywords

transnational corporations – multinational enterprises – international human rights – corporate social responsibility – extraterritorial jurisdiction – tort law – corporate crime

I. Introduction

International human rights law has been called 'the phoenix that rose from the ashes of World War II and declared global war on human rights abuses'.[1] A key issue in the vast and complex phenomenon we commonly call globalisation are human rights abuses in the context of foreign investment and transnational business operations. In a case concerning indefinite conscription of Eritrean young men in a mine owned by the Canadian company Nevsun, the Canadian Supreme Court decided that 'the breaches of customary international law, or jus cogens, relied on by the Eritrean workers may well apply to Nevsun'.[2] International human rights 'do not exist simply as a

1 Canadian Supreme Court, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, judgment of 28 February 2020, para. 1.

2 *Nevsun Resources* (n. 1), para. 114. The S. Ct. only decided that 'it is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law"' (citing Harold Koh).

contract with the State. […] They are discrete legal entitlements, held by individuals, and are "to be respected by everyone"' […] these rights may be violated by private actors […] There is no reason, in principle, why "private actors" excludes corporations.'[3] Because the case was settled outside of court in 2020, there is no judicial pronouncement on whether Nevsun indeed breached the international law prohibitions of slavery, forced labour and inhuman treatment.

Besides such litigation in courts all over the world, regulatory projects seeking to improve business accountability are ongoing on all levels and have triggered a vast array of approaches, including software-based smart monitoring of supply chains for human rights risks.[4] The European Union is currently preparing a Corporate Sustainability Due Diligence Directive.[5] The United Nations are hosting a treaty making process conducted in a working group of the Human Rights Council. The latest draft text of 2021[6] harnesses the States' public, private, and criminal law. The revised draft acknowledges that a purely public international law-based protection of human rights would be ineffective and insufficient. However, domestic tort law and criminal law do not easily reach business either. Tortious liability under domestic law faces numerous doctrinal obstacles, notably problems of attribution. Finally, criminal law is not available in most cases, due to a wide-spread reluctance to consistently close accountability gaps in corporate groups and to solve jurisdictional issues.

Against this background, we conceptualise a complementary approach of these three branches of law, with private and administrative law forming the foreground, and criminal legal enforcement as a means of last resort. We argue for linking civil (tort) and criminal liability for harm caused by hands-off corporate policies, complemented by the obligation to interpret managerial duties in conformity with the human rights standards of public international law.

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3 *Nevsun Resources* (n. 1), para. 110 (citing Andrew Clapham).

4 Stephanie L. Wang, Yejee Lee and Dan Li, 'Smart Disclosure: An Enabler for Multinationals to Promote Suppliers' Human Rights Commitments', Academy of Management Proceedings (2022), 1090.

5 CSDDD proposal COM (2022) 71 final of 23 February 2022; amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD))(2).

6 Open-ended intergovernmental working group (OEIGWG), OEIGWG Chairmanship, third revised draft of 17 August 2021 of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises. No new draft has been produced until the time of writing (as of 1 May 2023). See <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>.

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First, we sketch out the legal framework on business and human rights as it stands, along international, European, and comparative law parameters. This includes the international, European, and Inter-American case law on human rights obligations of business actors. It will become apparent that companies are, in principle, not held responsible for respecting human rights (II.). Secondly, we discuss whether constitution-based fundamental rights or international human rights should be activated against business actors. We conclude that simply extending State-tailored human or fundamental rights to the sphere of transnational businesses is, in principle, not normatively desirable (III.). Therefore, we argue for an approach that ties the indeterminate principles of human rights to national rules on corporate liability. We use the domestic law examples of the French *Loi de Vigilance* and the German *Lieferkettensorgfaltspflichtengesetz* to explain how the various levels and branches of law can complement each other. This means that the applicable private law of torts (IV.) as well as the applicable criminal law (V.) must be linked to and interpreted in the light of international human rights and constitutional law to allow for an effective enforcement of human rights vis-à-vis global corporations (VI.).

II. The Law as It Stands: Corporate Irresponsibility

1. International Law Parameters

The international debate on business actors as potential addressees (duty bearers) of international human rights obligations goes back to the 1980s. Current international human rights treaty norms do not impose hard, i. e. directly effective and enforceable legal obligations on private economic actors to respect, promote, or fulfil international human rights because these actors are not parties to the relevant conventions.[7] A special case are only those human rights belonging to the small number of peremptory *ius cogens* norms (such as the right not to be enslaved, forced to labour, and discriminated against on account of one's race). These are sometimes considered directly opposable to private actors, due to their absolute charac-

[7] See on the non-opposability of various treaty provisions in the field of international humanitarian law to business actors: Administrative Court of Appeal Versailles, *Association France-Palestine Solidarité (AFPS) and Palestine Liberation Organization (PLO) v. Société Alstom transport SA and ors*, appeal judgment of 22 March 2013, No. 11/05331 (final), 23.

ter.[8] This allows addressing (only) the worst corporate abuses through the human rights route, but not more.

a) Current International Frameworks

The 'current globally agreed baseline'[9] in the matter of business and human rights are the UN Guiding Principles on Business and Human Rights (UNGPs) of 2011.[10] The UNPGs have established three pillars: (1) the States' duty to protect human rights against abuses committed notably by business actors within their territory and/or jurisdiction; (2) the corporate responsibility to respect human rights, and (3) the State obligation to ensure access to effective remedies.

A parallel soft framework are the *Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises*, revised as in 2011,[11] and the 2016 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.*[12] National contact points in the OECD Member States monitor their implementation in weakly legalised procedures.

Universal, regional international, and domestic institutions have referenced, absorbed, and operationalised these Guiding Principles.[13] The third

8 Canadian S. Ct., *Nevsun Resources* (n. 1) held the company directly bound by the prohibitions of slavery, forced labour, and crimes against humanity. These are peremptory norms of international law. The Court did not properly distinguish between ius cogens and other, ordinary norms with regard to the question of opposability to private actors. See also IACtHR, *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion 18/03), A 16 (2003), 113, holding no. 5: 'That the fundamental principle of equality and non-discrimination, which is of a *peremptory nature*, entails obligations erga omnes of protection that bind all States and *generate effects with regard to third parties, including individuals*.' (emphasis added).

9 Council of Europe, Recommendation CM/Rec (2016) 3 of the Committee of Ministers to Member States on Human Rights and Business, adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies, with Appendix on the Implementation of the UN Guiding Principles on Business and Human Rights, Appendix I a 1.

10 UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (John Ruggie), with Guiding Principles in the Annex, UN Doc. A/HRC/17/31 of 21 March 2011, adopted by the UN Human Rights Council, UN Doc. A/HRC/RES/17/4 of 6 July 2011.

11 OECD Guidelines for Multinational Enterprises, <http://mneguidelines.oecd.org/guidelines/>.

12 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 3rd ed. 2016, <https://www.oecd.org/corporate/mne/mining.htm>.

13 See, e.g., General Conference of the International Labour Organisation, Resolution Concerning Decent Work in Global Supply Chains, adopted by the 105th Session of the

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pillar, remediation, has received particular attention by inter-governmental and transnational private initiatives.[14]

At the domestic level, the implementation of the UNGPs began with so-called national action plans (NAPs). So far, 30 States worldwide have launched such plans, among them the majority of the EU Member States, and at least 21 NAPs are currently being worked out.[15] The topics of these plans range from children's rights to corruption, forced labour, gender, indigenous peoples, to persons with disabilities. The forms of action as envisaged in these plans are diverse but for the most part weak. We submit that the objective of any national action should be an effective legal framework which ultimately needs to include 'hard' statutory laws on business obligations.

Disappointed by the soft approach pursued by the UNGPs and national action plans, States of the global south pressed for an actual treaty. The UN Human Rights Council in 2014 established an 'Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (OEIGWG), whose mandate is to elaborate an 'International legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'. The working group has to date produced four drafts.[16] Importantly, the project does not foresee direct human rights obligations of businesses but is basically a mediatory instrument: it obliges State parties to regulate, monitor and supervise businesses,[17] in line with established human

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General Conference of the International Labour Organisation (10 June 2016), para. 13; Committee on Economic Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities of 23 June 2017, UN Doc. E/C.12/GC/24, passim; Recommendation CM/Rec. (2016) 3 (n. 9); IACtHR, *Caso de los Buzos Miskitos (Lemoth Morris et al) v. Honduras,* judgment of 31 August 2021, Series C No. 432, paras 42-52. See on domestic law also Sec. C.

14 See notably UN High Commissioner for Human Rights, Report on Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, Annex: Guidance to Improve Corporate Accountability and Access to Judicial Remedy for Business-Related Human Rights Abuse (A/HRC/32/19 of 10 May 2016) with companion document: High Commissioner for Human Rights, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance (A/HRC/32/19/Add.1 of 12 May 2016); European Union Agency for Fundamental Rights (FRA), 'Improving Access to Remedy in the Area of Business and Human Rights at the EU Level', Opinion – 1/2017 of 10 April 2017.

15 See <https://globalnaps.org/>; <https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10.aspx>, as of 1 May 2023.

16 From the 'zero draft' of 2018 to the 'third draft' of 2021 (see note 6). See for a critical assessment: Steven Ratner (convener), 'Symposium on Soft and Hard Law on Business and Human Rights', AJIL Unbound 114 (2020), 163-191.

17 See, e.g., Art. 8(1) of the Revised Draft 2021: 'State Parties shall ensure that *their domestic law* provides for a comprehensive and adequate system of legal liability […]' (emphasis added).

rights case law.[18] The draft also foresees a standing treaty body to monitor compliance, like in other human rights treaties. The draft's new contributions are a very broad extraterritorial jurisdiction of States, reporting and due diligence obligations on corporations, and an overarching duty on States to ensure that these business obligations are fully justiciable and that remedies are provided.[19] The work on this treaty seems to be stagnating, as no new draft has been published since 2021.[20]

Although it is currently doubtful that the mentioned treaty project will materialise, its approach is helpful, as a matter of principle. Using the latest draft as a starting point, we suggest that States ultimately need to agree on a 'smart mix' of measures. Importantly, this regulatory mix should comprise all three branches of law, interlocking international and domestic law. Regulation should be oriented at and geared towards realising the international human rights guarantees as codified in international human rights treaties. International law here deploys a constitution-like function that governs the adoption, application, and interpretation of domestic tort law, domestic administrative law, and finally criminal law as the *ultima ratio.*

b) Regional Human Rights Adjudication

The regional human rights courts in Europe and America have so far not produced a coherent body of case law in relation to business actors. The recent parallel trend of both courts is to refrain from opposing the respective Convention rights against private actors but rather to sharpen and spell out the State Parties' obligations to protect individuals against harm emanating from business.

In 1998 still, the European Court of Human Rights (ECtHR) had held that '[t]he fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made

18 See, e.g., IACtHR, Advisory Opinion OC-23/17, 15 November 2017, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Right to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), paras 146-155.

19 Ilias Bantekas, 'Towards a Business and Human Rights Treaty' in: Ilias Bantekas and Michael Ashley Stein, The Cambridge Companion to Business & Human Rights Law (Cambridge: Cambridge University Press 2021), 583-610 (610).

20 See Ruwan Subasinghe, 'A Neatly Engineered Stalemate: A Review of the Sixth Session of Negotiations on a Treaty on Business and Human Rights', Business and Human Rights Journal 6 (2021), 384-391.

between the two' and that 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals'.[21] However, this case had no follow-up. The Court's newer approach is not to bind the private institution directly to the rights enshrined in the Convention but to activate the State's obligation to protect. For example, in *Storck*, Germany was held responsible for not protecting a young woman suffering from a mental disorder against a privately run psychiatric facility.[22]

The Inter-American Court of Human Rights has, in a case on the seafood industry exploiting an indigenous people in Honduras, spelled out in more detail the State obligations to protect.[23] They go beyond a general obligation to adapt the domestic laws to the international standards, and are defined as concrete duties of States to regulate, supervise, and monitor business activities that pose risks to the human rights of persons under their jurisdiction. The overarching State obligation has a strong preventive dimension flowing from human rights in conjunction with the precautionary principle. It also encompasses duties to adopt regulations 'requiring companies to implement actions', and the duty to enforce and eventually even to punish business transgressions on human rights.[24] Additionally, the Court seems to establish a kind of *shared* obligation to prevent: 'This obligation must be assumed by companies and regulated by the State.'[25] Such activation and intensification of the State obligation to protect is the route also favoured in other jurisdictions and regulatory projects such as the UN OEIGWG.

c) Human Rights in International Investment Law

Transnational (human rights) obligations of business actors have also been addressed in international investment law.[26] Initially, the thousands of mostly bilateral international investment agreements did not impose obligations on investors. This is no longer the case. Among the new generation of model

21 ECtHR, *Costello-Roberts v. UK*, app. no. 13134/87 of 25 March 1993, para. 27.
22 ECtHR, *Storck v. Germany,* app. no. 61603/00 of 16 June 2005, paras 100-108.
23 IACtHR, *Caso de los Buzos Miskitos* (n. 13), paras 42-52.
24 IACtHR, *Caso de los Buzos Miskitos* (n. 13), para. 48.
25 IACtHR, *Caso de los Buzos Miskitos* (n. 13), para. 51.
26 Ursula Kriebaum, 'Human Rights and Investment Arbitration' in: Thomas Schultz and Federico Ortino (eds), The Oxford Handbook of International Arbitration (Oxford: Oxford University Press 2020), 150-185; Silvia Steininger, 'The Role of Human Rights in Investment Law and Arbitration – State Obligations, Corporate Responsibility and Community Empowerment' in: Ilias Bantekas and Michael Ashley Stein, The Cambridge Companion to Business & Human Rights Law (Cambridge: Cambridge University Press 2021), 406-427.

treaties,[27] Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs), a number of instruments encourage investors to incorporate into their internal policies internationally recognized standards (such as the UNGPs and the OECD Guidelines) and to exercise due diligence and establish corporate social responsibility.[28] The degree of commitment varies in these new instruments but almost inevitably remains stuck in a 'voluntary' engagement.

In investor-State arbitration, international law has rarely been applied by arbitral tribunals as a barrier to investor activity. So far, less than a handful of investment-related arbitral awards postulate direct human rights obligations of an investor under international law. For example, the award *Aven v. Costa Rica* found implicit investor obligations under the Dominican Republic – Central American Free Trade Agreement (DR CAFTA) with respect to the environmental laws of the host State.[29] However, because Costa Rica's counterclaim was not substantiated enough, the tribunal dismissed it and did not reach its merits.[30]*Bear Creek Mining Corporation v. Republic of Peru* accepted the 'indirect' obligation of investors to consult the indigenous population under International Labour Organization (ILO) convention 169.[31]

The most important case so far is an International Centre for Settlement of Investment Disputes (ICSID)-dispute arising out of water privatisation in the Argentinian province of Buenos Aires in which the Tribunal examined a human-rights based counterclaim filed by the host State Argentina on its merits (*Urbaser v. Argentina* 2016).[32] Argentina had alleged the investor's 'failure to provide the necessary investment into the Concession, thereby

27 See Art. 18 of the Belgium-Luxembourg Economic Union Model BIT (2019); Art. 7(2) of the Netherlands' Model BIT (2019); Art. 126 of the Canadian Model BIT (2021); Art. 19 'Corporate Social Responsibility and Responsible Business Conduct' of the Model BIT of Italy (2022).

28 Examples are Art. 13 of the Hong Kong, China SAR – Mexico BIT of 23 January 2020, entered into force 16 June 2021; Art. 7.18 of the Indonesia – Republic of Korea CEPA of 18 December 2020, in force since 1 January 2023. Many others are not yet in force: Art. 12 of the India – Brazil BIT of 25 January 2020, not in force; Art. 17 of the Colombia – Spain BIT of 16 September 2021, not in force; Art. 13.19 of the Australia – UK FTA of 17 December 2021, not in force; Art. 13 Indonesia-Switzerland BIT of 24 May 2022, not in force; Preamble para. 4 of the Hungary – San Marino BIT of 21 September 2022, not in force.

29 ICSID, *David Aven et al v. Republic of Costa Rica*, final award of 18 September 2018, case no. UNCT/15/3, paras 732-735. Also, the tribunal assumed jurisdiction to decide on the counterclaim against the investor (paras 739-742).

30 *David Aven et al* (n. 29), paras 745-747.

31 ICSID, *Bear Creek Mining Corporation v. Republic of Peru*, award of 30 November 2017, case no. ARB/14/21, para. 406. See notably partly dissenting opinion of Philippe Sands QC, paras 10-11.

32 ICSID *Urbaser S. A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, award of 8 December 2016, case no. ARB/07/26.

violating its commitments and its obligations under international law based on the human right to water'.[33] The tribunal ultimately rejected this counterclaim but made some important statements on the corporation's human rights obligations. The arbitrators stated that the corporation does not have a positive obligation to fulfil the human right to water directly, flowing from international human rights law.[34] Rather, in order to identify an international human rights-based 'obligation to perform' the water service that would be 'applicable to a particular investor, a *contract or similar legal relationship of civil and commercial law* is required. In such a case, the investor's obligation to perform has its source in *domestic* law; it does not find its legal ground in general international law.'[35] The tribunal added as an *obiter dictum* that 'the situation would be different in case of 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.'[36] The *Urbaser* arbitration shows how Argentina, an emerging State of the global south, requested the application of international human rights law, arguably in order to fill the gap left by weak domestic law and weak judiciaries. However, the *obiter dictum* is premature and not covered by other practice and *opinio iuris.*

The survey of public international law-based approaches to holding business accountable for human rights has shown that the current trend goes *against direct international human rights obligations of business actors* (with *Urbaser* being an outlier) and in the direction of *strengthening the State obligations to protect*. These State obligations need to be detailed both in international law and most of all in domestic law. The combination and interlocking of the principles and processes available in the various branches and levels of the law need to be analysed in more detail in order to work out coherent and effective accountability schemes.

2. Private Law Parameters

a) Corporate Tort Liability

Until the 19th and even the beginning of the 20th century, the shared notion was that corporations by means of their very corporate nature were

33 *Urbaser* (n. 32), para. 36.
34 *Urbaser* (n. 32), para. 1207 (emphasis added).
35 *Urbaser* (n. 32), para. 1210 (emphasis added).
36 *Urbaser* (n. 32), para. 1210.

technically unable to commit torts. It was not the corporation in and of itself, which was deemed to have committed a tort, but rather, torts committed by corporate representatives were attributed to the corporation.[37] In that form, corporate civil tort liability has been affirmed repeatedly and is deeply enshrined into western civil laws.

With regard to 'international torts', i.e. torts based on the violation of norms of conduct provided by public international law, the US Supreme Court in *Jesner v. Arab Bank, PLC* (2018) denied 'that current principles of international law extend liability – civil or criminal – for human-rights violations to corporations or other artificial entities'.[38] This seemed to imply that corporate civil torts based on international rules of conduct need to establish a *public international* standard of corporate tort liability in the first place. This assumption was valiantly opposed in the dissenting opinion delivered by Justice Sotomayor and joined by three further Justices. In essence, this dissenting opinion lays out that it suffices for international law to prohibit a certain conduct while it is upon national law to decide at what level and against whom to enforce liability based on that internationally prohibited conduct.[39] This dissenting opinion is – much more than the majority – in line with a conventional treatment of torts, where it is recognised that norms of conduct from whichever origin can be combined with national rules of tort liability. It is, for example, deemed sufficient for EU Regulations and Directives to formulate an abstract obligation to which Member States tort systems can refer and can convert it into an element of a national tort without any need of EU law itself providing a fully-fledged EU law of torts. The Supreme Court's majority opinion flies in the face of this commonplace. The Court's assertion that public international law would indeed have to provide itself for a genuinely international law of torts and – failing to do so – precludes that United States (US) law may endow international rules of conduct with national civil enforcement mechanisms is not in line with that established perspective. The unusual reasoning of the Court directly affects (and reduces)

37 See Art. 1384 of the French Code Civil (dating from 1804); § 31 of the German Civil Code (dating from 1900).

38 *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1400 (U. S. 2018). The Court saw this 'confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach'.

39 *Jesner* (n. 38). The issue had been discussed by the Second Circuit decision in *Kiobel v. Royal Dutch Petroleum*, Judge Cabranes writing for the majority, but later was not picked up upon by the Supreme Court, which could be read as an implicit rejection of the argument. See in more detail: Chris Thomale, 'The Forgotten Discipline of Private International Law: Lessons from Kiobel v. Royal Dutch Petroleum – Part 1', Transnational Legal Theory 7 (2016), 155-180.

corporate responsibility for human rights which typically manifests itself in civil tort liability.

b) Business Self-Regulation

Business actors, especially big brand-name players, have responded to reproaches of human rights problems by self-regulation using the tools of contract law. For example, big corporations regularly adopt codes of conduct in which they pledge to respect human dignity, implement workplace standards, safeguard ILO core labour norms, combat corruption and the like.[40]

Based on the freedom of contract, the big players then incorporate the content of their codes of conduct (which in turn more or less vaguely refer to or rely on international standards) into their contractual relationships with their suppliers, subcontractors, and other business partners. For example, No. 2 a) of the general purchase conditions (*Allgemeine Einkaufsbedingungen*) of the German Telekom Group states that the 'code of conduct for suppliers' in its current version forms part of any contract with suppliers.[41] Or, the Swiss-based company Nestlé which draws on suppliers on a global scale, possesses a 'Nestlé Responsible Sourcing Standard' which it calls 'mandatory'. This document sets up requirements for Nestlé Tier 1 suppliers which have a direct contractual relationship with Nestlé. The requirements encompass 'labour and universal human rights'.[42]

Contractual clauses which incorporate such codes are called Corporate Social Responsibility (CSR)-clauses. The contractual CRS-clauses can then be enforced via contractual penalties, liquidated damages, or auditing rights. Usually, the parties seek to secure those agreed standards along the entire supply chain by obliging their contractual partners to enforce those standards vis-à-vis their subcontractors as well. However, this enforcement depends on autonomous agreements between all parties in the supply chain; it cannot be imposed top down and unilaterally by only one (parent) company onto the entire supply chain.

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40 See Erika George, *Incorporating Rights: Strategies to Advance Corporate Accountability* (Oxford: Oxford University Press 2021) who concludes that such codes should be considered as 'de facto obligatory' (326). See also Florian Wettstein, Business and Human Rights: Ethical, Legal, and Managerial Perspectives (Cambridge: Cambridge University Press 2022).

41 Deutsche Telekom, Allgemeine Einkaufsbedingungen der Deutschen Telekom Gruppe (AEB), March 2019, available at <https://www.telekom.com/de/konzern/einkauf/details/einkaufsbedingungen-523652>.

42 Standard, Mandatory, July 2018, 6-12, point 2.2., available at <https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/suppliers/nestle-responsible-sourcing-standard-english.pdf>.

In addition, business measures are frequently combined with or embedded in governmental measures. An example for public-private co-regulation is the arrangement between the national readymade garment business association of Bangladesh, transnational textile enterprises, trade unions, and international organisations, with regard to labour rights and factory safety in Bangladesh, launched in response to the Rana Plaza fire incident of 2013.[43]

Business self-regulation and even co-regulation first and foremost seeks to pre-empt stricter State or inter-State regulation, to create a positive image of the brand and to shield business from liability. It suffers from vague contents and lacking enforcement. Self-regulation may therefore be one step forward, but it is not sufficient.

c) Private Law Based Human Rights Obligations for Corporations

Private law enforcement is in many contexts the most promising enforcement mechanism a well-developed legal system has to offer. Human rights just like other social, environmental and ethical standards may be enforced by means of private law. Recent statutes on human rights due diligence and transparency adopted in various countries are good starting points.

Besides the British[44] and Norwegian[45] statutes, the Dutch legislative project[46] and the Canadian Act[47], the French statute on due diligence obligations

43 Articles of Association for the ReadyMadeGarment (RMG) Sustainability Council (RSC) of 14 January 2020. According to the Transition Agreement Between Accord on Fire and Building Safety in Bangladesh and BGMEA/BKMEA of 14 January 2020, '[t]he governance of the RSC will consist of members from the national RMG Business associations (BGMEA/BKMEA), global brands and global and national trade unions and will be supported by mechanisms that will be developed in collaboration with key national and international engagements if and when needed'.

44 Modern Slavery Act 2015 (c. 30) of 26 March 2015, notably its Section 54: 'Transparency in Supply Chains etc.' See, e.g. Fiona McGaughey, Hinrich Voss, Holly Cullen and Matthew C. Davis, 'Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom', Business and Human Rights Journal 7 (2022), 249-270.

45 *Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions* (last amended 12 October 2021; entered into force 1 July 2022). English version (unofficial translation) <https://lovdata.no/dokument/NLE/lov/2021-06-18-99>.

46 The Dutch Child Labour Due Diligence Law of 24 October 2019 (Staatsblad 2019, 4019) has not entered into force and is likely to be replaced by the pending bill on a *Responsible and Sustainable International Business Conduct Act*. The most recent proposal of November 2022 seeks to align with the proposed EU Corporate Sustainability Due Diligence Directive.

47 *Act to Enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to Amend the Customs Tariff* of 11 May 2023 (Statutes of Canada 2023, c. 9) S-211 (44-1) – LEGISinfo – Parliament of Canada).

of mother companies and 'companies giving instructions' (*Loi de Vigilance*) of 2017 is most noteworthy.[48] The statute amends the commercial code so as to oblige sizeable French corporations to establish a due diligence plan.[49] This plan must foresee 'reasonable' measures to identify human rights risks and prevent 'grave human rights encroachments' arising not only from the activity of the corporation itself but also from corporations 'under its control' and even from subcontractors and suppliers with whom the corporation has an 'established commercial relation, if the activities are linked to this relation.'[50]

Inspired by the French *loi the vigilance*, the German Parliament adopted the Act on Corporate Due Diligence Obligations in supply chains (*Lieferkettensorgfaltspflichtengesetz* / LkSG) in 2021.[51] At the heart of the Act lies the stipulation of due diligence obligations for companies having more than 3000 employees. Section 3 of the Act contains a general clause as well as a list of the various due diligence obligations. With regard to their content, the due diligence requirements for human rights and environmental protection are strongly oriented towards the UN and OECD Guiding Principles. They encompass the establishment of a risk management (§ 4 LkSG),[52] a risk analysis of the corporations' activities (§ 5 LkSG),[53] preventive measures (§ 6 LkSG),[54] the provision of remedial measures in the case of a human rights violation (§ 7 LkSG),[55] the creation of a complaint procedure (§ 8 LkSG),[56]

48 Loi no. 2017-399 of 27 March 2017 *relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (/www.legifrance.gouv.fr/eli/loi/2017/3/27/ECFX1509096L/jo). See for an overview Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Loménie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All', Business and Human Rights Journal 2 (2017), 317-323; Laura Nasse, *Loi de vigilance: Das französische Lieferkettengesetz* (Tübingen: Mohr Siebeck 2022).

49 Corporations with their official seat ('siège social') in French territory are covered only when they have five thousand employees or more. Corporations with their official seat abroad are covered only if they have ten thousand employees (employed within the mother company and direct and indirect subsidiaries together) or more.

50 Art. L.225-102-4 of the French Commercial Code, as amended by law 339 of 27 March 2017 (our translation).

51 *Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten* of 16 July 2021, BGBl 2021 I No. 46 of 22 July 2021; official translation: *Act on Corporate Due Diligence Obligations in Supply Chains* of July 16 2021, <https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3>.

52 See Principle 15 UNGP; Step 1 OECD Guiding Principles.

53 See Principle 18 UNGP; Step 2 OECD Guiding Principles.

54 See Principles 13 (b), 15 (b), 17, 19, 24 UNGP; Step 3 OECD Guiding Principles.

55 See Principle 22 UNGP; Step 6 OECD Guiding Principles.

56 See Principles 25-31 UNGP; part of Step 6 OECD Guiding Principles.

and finally, an obligation to provide documents and to report to competent authorities (§ 10 LkSG).[57]

In contrast to the French *Loi de Vigilance*, the LkSG does not provide for private enforcement (cf. § 3(3) LkSG). Instead, the duties of care stipulated in the LkSG are to be enforced under the German administrative law by the German Federal Office of Export Control (§ 19 LkSG) through administrative measures and orders (§ 15 LkSG) as well as through fines (§ 24 LkSG).

The recent reforms in France and Germany manifest the tendency in Europe to establish binding legal standards in the form of a duty of care whose violation will trigger *corporate liability* – either through private, tort-based enforcement (France) or through public, administrative law-based enforcement (Germany).

3. Criminal Law Parameters

Criminal law enforcement seems to be the second choice among the potential enforcement mechanisms, in a smart mix primarily based on self-regulation, administrative enforcement, and – if need be – torts. Yet, the OEIGWG specifically calls for corporate criminal liability in the first place, leaving the exact contours to the State Parties. Art. 8(3) of the revised draft 2021 reads: 'States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive criminal, civil and/or administrative sanctions where legal or natural persons conducting business activities have caused or contributed to human rights abuses' and proposes in Art. 8(8) that '[s]ubject to their legal principles, States Parties shall ensure that their domestic law provides for the criminal or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offenses […]'.

This rather cautious proposal accounts for the fact that corporate criminal responsibility remains a sort of enigma in traditional theories of criminal justice that were developed with a view to blaming individuals: corporations, as legal entities, cannot meaningfully mimic a human act, nor can they make a conscious choice that would establish *mens rea* as traditionally conceptualised. Instead, it is humans who make decisions and whose conduct, under specific circumstances, is attributed to a corporation and triggers blame. This raises doctrinal problems of attributing criminal liability to the relevant actors as well as jurisdictional issues, especially when the citizenship (nationality) of a corporate group is difficult to locate.

57 See Principle 21 UNGP; Step 4 OECD Guiding Principles.

a) Corporate Criminal Liability

The idea that corporations by their very nature seem technically unable to commit crimes (*societas delinquere non potest*) still lingers in criminal law doctrine in Continental Europe, while criminal responsibility for corporations has been accepted by common law jurisdictions. Despite some differences in the legal approach, corporations are in many national legal systems held accountable for crimes committed by their representatives or due to major organisational deficiencies in the corporation in certain situations.[58] While France[59] and Switzerland[60] enacted provisions on corporate criminal responsibility, Germany remains among the hold-outs reserving criminal responsibility for natural persons. It only allows for the imposition of (administrative-law type) financial sanctions on a corporation.[61] Yet, this approach is changing. The German LkSG has been characterised as 'special corporate criminal law'[62] because it aims at 'blaming and shaming' and because it allows for high fines to be imposed on corporations (while criminal liability of Chief Executive Officers (CEOs) has been dropped in the legislative process). In Europe, France acts as a forerunner on corporate criminal liability for human rights violation along the supply chain. And in the US, the legal basis for a criminal prosecution of corporations has already been settled for some time. In contrast, no international criminal tribunal has been deliberately equipped with jurisdiction over legal entities, although this had been discussed for the International Criminal Court.[63]

Details of the criminal liability of enterprises remain controversial. This includes the question under which conditions corporate groups can be under-

58 Sabine Gless and Sarah Wood, 'General Report on Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues' in: Sabine Gless and Sylwia Emdin (eds), Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues, Rev. Int'l Dr. Pénal 93 (2017), 13-40 (14).

59 Juliette Lelieur, 'French Report on Prosecuting Corporations for Violations of International Criminal Law', Rev. Int'l Dr. Pénal 93 (2017), 179-212 (179-187) with explanations of Art. 121-2 of the French Code pénale and other relevant legislation.

60 Mark Pieth, 'Swiss Report on Prosecuting Corporations for Violations of International Criminal Law', with Explanations of Art. 102 of the Swiss Criminal Code and Other Relevant Legislation, Rev. Int'l Dr. Pénal 93 (2017), 285-305 (288-291).

61 Martin Böse, 'German Report on Prosecuting Corporations for Violations of International Criminal Law', Rev. Int'l Dr. Pénal 93 (2017), 211-233 (211-213).

62 Hans-Georg Kamann and Philipp Irmscher, 'Das Sorgfaltspflichtengesetz – Ein neues Sanktionsrecht für Menschenrechts- und Umweltverstöße in Lieferketten', NZWiSt 10 (2021), 249-256 (250).

63 See Art. 25 (1) Rome Statute. The Special Tribunal for Lebanon, however, claimed jurisdiction over a legal person first time in the history of international criminal justice with a corporate accused, Al Jadeed [CO.] S. A. L./NEW T. V. S. A.L. (N. T. V.) and Ms Karma Mohamed Tahsin Al Khayat, STL-14-05/T/CJ, judgment of 18 September 2015, nos 55-72.

stood to form a single entity for the purposes of criminal liability, and when the supply chains are so firmly locked together that they form an 'aggregate'. Within this aggregate, specific duties may arise whose violation may in certain conditions give rise to criminal liability. In any case, the idea of impunity has come to an end, and transnational human rights cases are being litigated in criminal courts.[64] The concept of guilt has been separated from conventional (often religious-based) traditions and doctrines around moral capacity and seems to have given way toward a more pragmatic and functional approach. While this apparently makes criminal law a difficult aspect in a smart enforcement mix, it is increasingly acknowledged that criminal prosecutions unfold a desirable stigmatising effect even when a legal, as opposed to natural, person is prosecuted.

b) Criminal Prosecution

Many lawmakers have embraced the punitive turn by enacting laws that hold corporations liable for certain actions by their employees, based on the assumption that it is gross corporate disobedience of the law which paves the way for such individual conduct. The details, however, vary across domestic criminal justice systems, some of which opt for stronger standards of a due diligence approach, while others attempt to mix different models and some refuse to impose criminal liability at all. France, Switzerland, Germany, and the United States illustrate the different legal approaches.

aa) From Shielding CEOs to Due Diligence ('Devoir de Vigilance'): France

France created criminal liability for legal persons in the 1990s. One of the reasons was to shield CEOs from liability for adequate risk taken for the benefit of their companies.[65] Section 121-2 of the French Penal Code (F-PC) states that '[l]egal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in sections 121-4 to 121-7'. Therefore, the human representatives are not criminally liable.

However, French law, like any other, raises numerous questions of how to attribute responsibility, namely who represents a corporation and what acts trigger corporate (rather than personal) liability. These issues spark deeper questions around intermediated criminal blame. This debate is crucial to French transnational human rights litigation in a number of ways. For

64 See for examples below sections V. 1. b) and c).

65 Lelieur (n. 59), 180.

example, section 121-2, paragraph 1 F-PC, does not require that intermediaries triggering criminal liability be natural persons. If a company has another company as a corporate body (where it is chaired by another company, for instance), criminal responsibility is not excluded.[66] Over the years, the French courts have interpreted who is a 'representative'[67] narrowly and required that the prosecution prove who committed a particular offence.[68] This can significantly hamper prosecution, particularly where the alleged crime took place abroad and law enforcement is unable to access the information necessary to prove a particular crime. However, public debate over the *responsabilité sociale de l'entreprise* gained special significance in France following the 2013 collapse of the Rana Plaza building in which French brands had manufactured clothing. The second landmark case is the *Cour de Cassation*'s decision that the multinational Lafarge group could be prosecuted for complicity in crimes against humanity for the exchange of payments with the Islamic State enabling it to continue its activity in Syria.[69]

The aforementioned French *Loi de Vigilance* of 2017 also covers criminal offences.[70] The law entered into force only after a partly censuring decision of the *Conseil Constitutionnel* which had struck down the provisions on criminal penalties, deemed unconstitutional for lack of specificity and as a violation of the principle of legal certainty and foreseeability.[71]

bb) A Two-Tier Model for Criminalising Corporate Disorganisation: Switzerland

The Swiss Penal Code (CH-PC) relies on two models of criminalising corporate hands-off policies that intentionally create disorganisation and thus provide fertile grounds for staff's wrongdoing.[72] First, Art. 102(1) CH-PC establishes a (theoretically expansive) liability in cases in which a crime was committed in pursuit of the business interests of a company, but where '*it is not possible to attribute this act to any specific natural person due to the*

66 Lelieur (n. 59), 184.

67 *Cour d'appel de Paris*, 7 January 2015, 13 e chambre correctionnelle, no. 12/08695 (bribery case 'Safran'), obs. Solène Clément, AJ Pénal (2017), 252-253.

68 *Cour de cassation, criminelle*, 11 April 2012, no. 10-86.974, *Bulletin Criminelle* No. 94 (commentaries: Jacques-Henri Robert, La semaine juridique, Edition Générale (2012), 740; Jean-Christophe Saint-Pau, Recueil Dalloz (2012), 1381; Yves Mayaud, Revue de science criminelle (2012), 375.

69 Court of Cassation (*Cour de cassation*) of 7 September 2021 (*Pourvoi* no. 19-87.367).

70 See n. 48.

71 French *Conseil Constitutionnel*, decision no. 2017-750 DC of 23 March 2017, paras 5-14.

72 Swiss Penal Code (*Schweizerisches Strafgesetzbuch*) of 21 December 1937 (status as of 1 January 2022), AS 54 757, 57 1328 and BS 3 203; available online <https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en>.

inadequate organisation of the undertaking'. This line of reasoning obviously leads to numerous practical problems, because it is difficult to prove a crime without knowledge of an alleged perpetrator.

Second, a broader due diligence approach is foreseen in Art. 102(2) CH-PC with a 'primary responsibility' on the part of a company (akin to individual liability) for specific crimes enumerated in a list (e.g. money laundering, corruption, financing of terrorism) where the company 'failed to take all the reasonable organisational measures that are required in order to prevent such an offence'. Key violations of human rights, like environmental pollution, negligent homicide, or injury resulting from negligence are not covered under this 'due diligence approach,' nor are certain war crimes.

Overall, the Swiss example demonstrates how corporate criminal responsibility can be established on the books, without much change in practice. One illustration is the *Argor-Heraeus* case in which the Swiss Federal Attorney's Office was informed about allegations that a gold smelter based in Switzerland had acquired several tons of gold from a guerrilla organisation in East Congo known to be involved in genocide. The authorities investigated for participation in plundering as a method of warfare[73] but the case was closed for lack of *mens rea*.[74] Had the allegations been around child labour or other human rights violations rather than about the predicate offence of money laundering (or other crimes specifically listed in Art. 102(2) CH-PC), proceedings would never have been opened.[75] With good reason, Swiss scholars argue that their domestic law is unduly restrictive.[76] After the defeat of the popular initiative 'For responsible businesses', a new statute of 2022 expanded businesses' non-financial reporting obligations, saddled with criminal responsibility under the new provision of Art. 325ter of the Swiss Criminal Code.

73 Art. 264g section 1 lit. c CH-PC. See also Art. 8 section 2 lit. b of the Statute of the International Criminal Court.

74 This is astonishing, because the facts were fully documented by experts on behalf of the United Nations. See the Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo of 16 October 2002 (S/2002/1146); Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC of 23 October 2003 (S/2003/1027); Report of the Group of Experts on the Democratic Republic of the Congo of 26 July 2005 (S/2005/436); Report of the Group of Experts on the DRC of 26 January 2006 (S/2006/53).

75 Art. 305bis and Art. 102 section 2 CH-PC.

76 Mark Pieth, 'Die Reform der strafrechtlichen Unternehmenshaftung in der Schweiz' in: Marianne Johanna Lehmkuhl and Wolfgang Wohlers (eds), *Unternehmensstrafrecht* (Basel: Helbing & Lichtenhahn 2020), 279-295 (289-291).

cc) No Corporate Criminal Liability: Germany

The German Penal Code (GE-PC) makes no provision for corporate criminal liability.[77] The only option for prosecution is via fines allocated through administrative proceedings. The legal basis for this *Verbandsgeldbuße* is the German Regulatory Offences Act of 1968 (GE-ROA).[78] Under § 30(1) GE-ROA, an administrative fine may be imposed on a legal person where an organ, a representative, or a person with functions of control within a company has committed an offence. The limitation of liability to administrative proceedings has enormous consequences, notably because extraterritorial prosecution is not available for regulatory offences. The German Corporate Due Diligence Act stays within this logic of administrative fines (§ 24 and 3(3) LkSG) and its enforcement is in the hands of administrative authorities. Criminal law only kicks in when genuine crime occurs, for instance harm to life and limb as a consequence of violations of due diligence. In that case, prosecutors will face the difficulty to specify the relevant corporate wrongdoing based on the rather loose legal terms used in the law. Again, the added value of a combined and smart mix of regulation becomes apparent: human rights law will be a crucial element when capturing due diligence – and negligence as an element of crime.

dd) Endorsing Corporate Criminal Responsibility (at Home): United States

In the US, corporations can be held criminally liable for the acts of their employees or agents that are committed within the scope of the employment or agency for the benefit of the corporation.[79] Overall, US law addresses the issue pragmatically, using tort law and criminal law side by side,[80] and with help of broad concepts when prosecuting: The relevant *mens rea*, for in-

77 German Penal Code (*Strafgesetzbuch*), Criminal Code in the version published on 13 November 1998 (Federal Law Gazette (*Bundesgesetzblatt*, BGBl 1998 I, 3322), as last amended by Art. 2 of the Act of 19 June 2019, BGBl 2019 I, 844.

78 German Act on Regulatory Offences (*Ordnungswidrigkeitengesetz)* in the version published on 19 February 1987, Federal Law Gazette (*Bundesgesetzblatt*, BGBl 1987 I, 602), last amended by Art. 31 of the Act of 5 October 2021, BGBl 2021 I, 4607, available online at <https://www.gesetze-im-internet.de/englisch_owig/index.html>.

79 See *N. Y. Cent. & Hudson River R. R. v. United States*, 212 U. S. 481, 494 (1909) which established the first two elements: (1) acts of employees or agents; and (2) committed within the scope of the employment or agency. Subsequent decisions have added 'for the benefit of the corporation' as a way of ensuring that the conduct is within the scope of the employment or agency. See, e.g., *United States v. Potter*, 463 F.3 d 9, 25 (1st Cir. 2006).

80 John C. Coffee Jr., 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models and what can be done about it', Yale L. J. 101 (1992), 1875-1893; from a comparative perspective: Gerhard Wagner, 'Gutachten zur Abteilung Zivilrecht des 66. Deutschen Juristentages', in: Verhandlungen des 66. DJT, Bd. 1 (2006), A 1-A 135 (A 68 ff.).

stance, is based on the mental state of the respective individual employees or agents acting for the corporation, or even on the collective knowledge of the corporate employees or agents.[81]

Enforcement of corporate criminal responsibility in practice, especially for corporate conduct abroad, is, however, another matter. In the US, extraterritorial effect of laws is subject to broad discretionary powers on the side of the competent authorities. It must be established expressly that a particular provision has extraterritorial effect.[82] When this is done, like for the US-American Victims of Trafficking and Violence Protection Act of 2000 (TVPA), the *beneficiary* of illegal action within a supply chain must still be determined as falling under US jurisdiction. With the Supreme Court having dramatically restricted access to US courts in civil cases,[83] it is to be expected that prosecutors will also narrowly interpret criminal jurisdiction over foreign defendants.[84] Criminal litigation for an international supply chain will thus face enormous challenges.

4. Interim Conclusion on the Law as It Stands

Our cursory analysis of exemplary jurisdictions shows that, in the current framework of public international law, domestic tort law and national and international criminal law, the prospects for holding business actors to account for human rights abuses occurring in the context of their transboundary economic activity are quite bleak. The first problem is the lack of generally recognised standards that clearly define the contents of business obligations in relation to human rights: Even assuming that international human rights provide the benchmark, the additional legal parameters for applying these benchmarks to business actors are totally unclear. In international law, no rules on 'jurisdiction', on attribution, on circumstances precluding wrongfulness exist with regard to collective *private* actors.[85] The legal principles governing these aspects would need to be drawn from the domestic

81 *United States v. Bank of New England*, 821 F.2 d 844, 856 (1st Cir. 1987).

82 US S. Ct., *Kiobel v. Royal Dutch Petroleum*, 569 US 108 (2013), slip op. p 13; in scholarship Sara Sun Beale, 'Prosecuting Sexual Exploitation and Trafficking Abroad: Congress, the Courts, and the Constitution', Duke Journal of Gender Law & Policy 27 (2020), 25-43.

83 US S. Ct., *Kiobel* (n. 82); *Jesner* (n. 38); recently confirmed by US S. Ct., *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021).

84 Rachel Chambers and Gerlinde Berger-Walliser, 'The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison', American Business Law Journal 58 (2021), 579-642 (632).

85 Such rules exist only with regard to States and international organisations. Only scarce practice and reflection exists on armed groups.

law as applicable under the choice-of-law-rules. However, in the transboundary scenario, the typical conflict of law-rules that govern[86] – often preclude the application of rules or principles that are helpful for victims.

Finally, enforcement and remedies are a major problem. International fora are scarce because the jurisdiction of regional human rights courts and of investment tribunals is limited. Fora such as the OECD contact points and even the UN Human Rights committees cannot deliver effective remedies.[87] Scholarly proposals for specific businesses – human rights arbitration (the 'Hague rules')[88] or for an international civil justice court to adjudicate cross border mass torts[89] have not been picked up by practice. We therefore need to find new ways for responding to corporate abuses, both by developing and specifying the substantive standards and by improving the access to remedy and reparation.

III. Linking International Law to Domestic Constitutional and Administrative Law

One response might be to consider transnational companies as direct addressees of constitutional fundamental rights and international human rights obligations, besides the traditional duty bearers, the States. *Prima facie*, this approach would both offer clear standards of behaviour and open up access to the domestic constitutional or supreme courts that enforce their domestic constitutional law, and to the international human rights bodies and regional courts that apply international human rights.

The alternative route would be to use international human rights law and domestic constitutional law as a benchmark for expanded and intensified *State* obligations to protect (against business abuses) and as a mere reference point for business obligations that are spelled out in domestic tort and criminal law. In the following section, we briefly recapitulate these two traditional strategies.

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86 See, e.g., Art. 4 para. 1 Rome II-Regulation, designating the law of the (foreign) State where the damage occurs.

87 See Kinnari Bhatt and Gamze Erdem Türkelli, 'OECD National Contact Points as Sites of Effective Remedy: New Expressions of the Role and Rule of Law Within Market Globalization?', Business and Human Rights Journal 6 (2021), 423-448.

88 *Hague Rules on Business and Human Rights Arbitration* (2019), modelled on the UNCITRAL arbitration rules. See Andi Baaij, 'The Potential of Arbitration as Effective Remedy in Business and Human Rights: Will the Hague Rules be Enough?', Business and Human Rights Journal 7 (2022), 271-290.

89 Maya Steinitz, *The Case for an International Court of Civil Justice* (Cambridge: Cambridge University Press 2019).

1. Trends Towards Direct Horizontal Effects of Constitutional Fundamental Rights

In the constitutional law of various States (notably Colombia and South Africa[90]) and of the EU, a trend since the 1990s has been to extend obligations flowing from fundamental rights as enshrined in domestic constitutions (viz. the EU Fundamental Rights Charter), to business actors.[91] Although these guarantees were originally designed as protection against the State, some constitutions or the constitutional case-law in various jurisdictions increasingly impose fundamental rights obligations directly on private economic actors. Most cases concern specific constellations of power asymmetries, for example mighty collectives like sports associations on the one hand, or particularly vulnerable individuals on the other hand, such as children exposed to the authority of a private boarding school. Through this case-law, fundamental constitutional rights increasingly deploy a 'direct' horizontal effect, a direct '*Drittwirkung*'. For example, even the German Federal Constitutional Court, a traditional firm opponent of 'direct' horizontal effects of fundamental rights, in recent times seems to display more sympathy for direct fundamental rights obligations of social media platform owners, pointing to their considerable market power.[92]

The tendency towards a direct horizontal effect of human rights and similar rights is most pronounced in the European Union. The European fundamental rights, codified in the Charter of Fundamental Rights of the European Union (ECFR), can under specific conditions be held directly against private individuals. But many fundamental Charter rights are already implemented by secondary EU law, so that the Charter rights apply only in the second line.[93] Notably the protections against discrimination are spelled

90 See for the constitutional case law David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge: Cambridge University Press 2022), 197-213.

91 See in scholarship in favour of 'direct' constitutional and international fundamental/human rights obligations of business actors: Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon 1993); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press 2006); Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', Yale L.J. 111 (2001), 443-545; David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', Va. J. Int'l L. 44 (2004), 931-1023; Andreas Kulick, *Horizontalwirkung im Vergleich: Ein Plädoyer für die Geltung der Grundrechte zwischen Privaten* (Tübingen: Mohr Siebeck 2020).

92 German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), order of provisional measures of 22 May 2019 – 1 BvQ 42/19.

93 See, e.g., CJEU (formerly ECJ) (Grand Chamber), *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, judgment of 17 April 2018, case C-414/16, ECLI:

out in secondary EU law which is explicitly designed to bind private actors such as employers. Nevertheless, the fundamental rights remain relevant. For example, in a controversy about wearing a headscarf at work, the Court of Justice of the European Union (CJEU) balanced an employee's right of free exercise of religion under Art. 9 of the European Convention on Fundamental Rights and Freedoms (ECHR) against her employer's right to conduct a business under Art. 16 ECFR.[94] The same logic is applied to the European fundamental freedoms as enshrined in the Treaties.[95] In other decisions, the CJEU held that the Charter rights must be given more specific expression by provisions of EU law or national law to be opposable to a private actor.[96]

2. Assessment of Direct Fundamental Rights Obligations of Business Actors

The previous section has shown that only very few jurisdictions in the world have accepted direct constitution-based obligations of private actors to respect the fundamental rights of human individuals. However, the worldwide picture is inconclusive and trends of constitutional case law are far from uniform. We therefore need a policy assessment of the merits and pitfalls of 'direct' fundamental rights obligations of business actors. Importantly, such an assessment is also relevant for international treaty-based human rights, because the functions and rationales of domestic, constitution-based fundamental rights, of ECHR guarantees and of the EU's fundamental rights norms and fundamental freedoms are similar. We will in the following discuss both constitution-based fundamental rights and treaty-based human rights in the same breath, using the terms mostly interchangeably.

EU:C:2018:257, esp. para. 49, on the fundamental right to effective judicial protection (Art. 47 ECFR).

94 CJEU (Grand Chamber), *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, judgment of 14 March 2017, case C-157/15, ECLI:EU:C:2017:203, notably paras 38 and 39.

95 CJEU, *Fra.bo v. Deutsche Vereinigung des Gas- und Wasserfaches e.V. (DVGW) – Technisch-Wissenschaftlicher Verein*, judgment of 12 July 2012, case C-171/11: Art. 28 TFEU (freedom of goods) is directly opposable to a private standardisation body.

96 See CJEU (Grand Chamber), *Association de médiation sociale* (*AMS*) *v. Union locale des syndicats CGT*, judgment of 15 January 2014, case C-176/12: on Art. 27 of the EU Charter (workers' right to information and consultation within the undertaking).

a) Pros

Several policy arguments can be made in favour of an imposition of fundamental rights obligations on business. Authors and States demanding that business should be bound by international human rights *de lege ferenda* regularly postulate that the potential power of these actors ultimately poses just as much a threat to human rights and basic rights as that of States, without asking whether that 'private' *economic* power can be equated with the specific 'public' (coercion-backed) power of the State.[97] Or the assumption is that, especially in an age of global supply chains, business actors exercise 'corporate sovereignty'[98] which must be controlled and reined in by concomitant human rights obligations.

Such an imposition of human rights obligations on business would be conceptually possible but it would constitute a paradigm change: fundamental rights have been mainly directed at the State because the State was endowed with specific powers. In a market-based society, economic actors are in a fundamentally different starting position. They do not exercise any 'jurisdiction' in the sense of the human rights covenants. They are not authorised to impose and enforce laws and they do not have a full-blown police and military apparatus. The liberal and indeed neoliberal stance has therefore been – to employ the words of Milton Friedman – that in 'a free economy […] there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits as long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud'.[99]

However, in times of globalisation, a strict separation between the sphere of the market in which private actors act free from human rights-constraints and the 'public' sphere of States which are bound by human rights

97 Seminally David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', AJIL 97 (2003), 901-922 (901). Weissbrodt was the author behind the norms proposed by the former UN Commission on Human Rights (Sub-Commission on the Promotion and Protection of Human Rights) which ultimately failed.

98 Joshua Barkan, *Corporate Sovereignty: Law and Government Under Capitalism* (Minneapolis: University of Minnesota Press 2013); Jay Butler, 'Corporations as Semi-States', Colum. J. Transnat'l L. 57 (2019), 221-282. See for historical accounts: Daniel J. H. Greenwood, 'The Semi-Sovereign Corporation' in: James Charles Smith (ed.), *Property and Sovereignty: Legal and Cultural Perspectives* (Farnham: Ashgate 2013), 267-294; Andrew Philipps and Jason C. Sharman, *Outsourcing Empire: How Company-States Made the Modern World* (Princeton NJ: Princeton University Press 2020).

99 Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press 1962), 133.

is not tenable if it ever was. Many transnational business actors possess more economic power than many States. Ranked on the basis of revenue (for States: mainly their tax income), 69 of the top 100 (and 157 of the top 200) economic entities in 2017 were corporations.[100] Business enterprises may abuse human rights in many different ways, by virtue of the labour conditions, in connection with the extraction of commodities, by buying from abusive suppliers, or finally by benefitting from infrastructure that States have created with the help of practices that violate human rights (such as forced labour). In these ways, businesses deploy a kind of 'societal authority' that escapes the binary distinction between public and private.[101] It is therefore imperative to broaden business accountability in some way – and the key question is how and by which legal techniques this can be achieved.

In the domestic realm, social and humanitarian objectives are usually realised by applying the specific and tailored provisions of civil law, labour law, and criminal law to business actors. These provisions reflect the basic idea of human dignity within the entire legal order and at the same time prevent enterprises from engaging in inhuman and anti-social practices. Most importantly, these laws balance the human-rights concerns against the interests of business actors which are themselves also protected by fundamental rights (property and freedom of contract).

But in a world of transnational supply chains, the enterprises operate globally and are able to escape from undesired strict requirements under national law by changing locations and, hence, by what is usually called 'legal arbitrage': they specifically seek out host States whose national law offers cheap conditions of production.[102] These States of convenience do not necessarily live up to international benchmarks, their national regulation is typically lax and/or is not fully enforced. Therefore – and rightly so –, the social expectation has developed in recent decades that enterprises bear a more extensive responsibility for the welfare of their employees and, alongside with the State, for the common good – in short, a corporate societal responsibility that matches their societal authority.

100 <https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/>. Revenues seem the best indicator of economic power. Economists have preferred this value to the GDP whose measurement is more problematic.

101 Janne Mende, 'Business Authority in Global Governance: Companies Beyond Public and Private Roles', Journal of International Political Theory 19 (2022), 1-21.

102 Marc-Philippe Weller and Laura Nasse, 'Menschenrechtsarbitrage als Gefahrenquelle in Lieferketten', ZGR Sonderheft 22 (2020), 107-140.

b) Cons

The main problem of direct human rights obligations of business actors is not the artificial legal personality of corporations as such. Despite some hick-ups such as the *Jesner* decision by the US Supreme Court,[103] there is no material reason why the tortfeasor's type of legal personality should have any bearing on the issue. Rather, by endorsing the very conception of 'personality' as an umbrella, legal systems subscribe to the equal treatment of natural and legal persons with regard to their legal subjecthood. The stronger theoretical objection against corporate liability for human rights violations thus has little to do with their corporate, but everything to do with the fact that they are not public actors. From a traditional point of view, human rights protect private actors of whatever nature against States. Even under conditions of global governance – and unlike what some scholarship cited above claims – transnational business players have not become quasi-States. We have seen this with regard to the strict COVID-19 measures imposed by States on citizens and on business. It is not immediately evident that human rights should directly burden these private and societal actors even if they are trespassing against another, for several reasons.

First, the international human rights guarantees do not fit because they lack the fine-tuned balancing against property rights, as previously discussed. Secondly, it can hardly be expected that a weak host State would be better able to implement an international norm than its own domestic laws. For this reason, the international rules need to be enforceable, either by international bodies or – more promising – by domestic courts.

Thirdly, States might shirk their responsibility. If reformed international human rights bodies were to deal with human rights violations by enterprises as well, some States would presumably seize the opportunity to divert attention away from themselves.

To conclude, simply expanding the binding nature of State-tailored human rights into the sphere of transnational business is not normatively desirable without modifications. For example, the concept of 'jurisdiction' in which the human rights obligations of states apply needs to be modified when transferring it to business actors.[104] The concept of a 'sphere of influence' of a business actor that was initially suggested as a functional correspondence to

103 Jesner (n. 38).

104 Seminally Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', Yale L.J. 111 (2001), 443-545 (506-511) on a 'nexus requirement'; Bilchitz (n. 90), Part II.

'jurisdiction' appears too vague and broad.[105] Therefore, the newer regulatory attempts revolve around more concrete concepts such as 'actual and potential human rights adverse impact' (Art. 1 CSDDD proposal) and 'risk to human rights' (§ 3(1) German LkSG). For example, under the German statute, the scope of an enterprise's due diligence obligations is determined by four factors that are specifically listed and described in the LkSG. These are the nature and extent of the business activity, the business actor's ability to influence the human rights-related risk, the severity of the violation that can be typically expected, and finally the causal contribution to the risk by the business itself (§ 3(2) LkSG). Other aspects need to be adapted or complemented in a similar manner in order to operationalise human rights in the business realm.

3. Interim Conclusion

Given the problems listed in the previous section, corporate social responsibility should – as a rule – not translate into a simple imposition of international human rights obligations or constitutional fundamental rights on transnationally operating enterprises. The main problem is the indeterminacy of both international human rights and constitutional fundamental rights. The necessarily broad rights are formulated in a general and vague language. It seems impossible to deduce concrete remedies from them. While the principle of *nulla poena sine lege stricta* might not apply outside the realm of criminal law, the overarching principle of legal certainty pervades all branches of law. This principle shields private actors from obligations without a sufficiently clear and precise legal basis, protecting the liberty they enjoy under the rule of law.[106] Concomitantly, the nitty-gritty details of civil liability, such as the measure of damages, standards of negligence, prescription, assignability of claims, and a plethora of further questions require concrete and specific answers. These answers cannot be found in the human rights of victims alone. As David Bilchitz notes: 'Private law […] provides a collective store of human wisdom that cannot simply be replaced with an

105 Human Rights Council, Clarifying the Concepts of 'Sphere of Influence' and 'Complicity', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 15 May 2008, UN Doc. A/HRC/8/16. The CESCR, General Comment No. 24 of 2017 (n. 13), para. 5 still applies this concept.

106 Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press 2009); Anne Peters, *Beyond Human Rights* (Cambridge: Cambridge University Press 2016), 79-110.

injunction to respect fundamental rights even though reasoning relating to these rights may require a reconsideration of aspects of these doctrines.'[107] Therefore, international human rights principles and constitutional fundamental rights catalogues need to be complemented by private law and criminal law in order to provide operative causes of action against international companies. In other words, the human rights-based State obligations to protect human rights from business abuse need to be understood and spelled out in detail.

It is therefore good that the current frameworks (both the UNGPs and the OEIGWG project of a legally binding instrument) and the prevailing human rights case law steer far from direct international law-based human rights obligations of business enterprises.[108]

On a more fundamental level, it is maybe time to overcome the classic dichotomy between 'direct' and 'indirect' human/fundamental rights obligations, as suggested seminally by David Bilchitz.[109] One consideration is that up to now, none of the approaches has fully clarified at what point a business impact on human rights in combination with State behaviour that tolerates or condones such impact amounts to an actual *violation* of human rights.[110] In other words, both the exact contours of the business obligations and the exact contours of the State obligations need to be fleshed out further. This concretisation can, in our view, only be done with the help of domestic law, in all its forms, civil, administrative, and criminal law. In the next sections we will canvass the way forward.

IV. Linking International Law to Domestic Private Law

A joint regulatory scheme merges international human rights, private international law (choice of law), and substantive national private law. The enforcement of international human rights obligations is highly context dependent and, hence, will take different forms in different national legal systems. In the following, we use the German legal system as a prototype.

107 Bilchitz (n. 90), 108.

108 Carlos Lopez, 'Human Rights Legal Liability for Business Enterprises; The Role of an International Treaty' in: Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge: Cambridge University Press 2017), 299-317.

109 His 'multi-factorial' approach seeks to overcome this dichotomy. Bilchitz (n. 90).

110 See on this point also Bilchitz (n. 90), 435.

1. International Jurisdiction

The key set of legal rules bridging the gap between international legal standards and national enforcement are the rules on international jurisdiction. They represent the most important international part of the law on civil procedure. From an individual victim's perspective, these rules define the venues before which applications for injunctions and actions for damages based on harm suffered as a consequence of human rights violations can be brought. From a regulatory point of view, these venues work like 'responsibility nodes' ensuring through private actions that corporations and enterprises of whichever form abide by their international human rights obligations.[111]

In Germany and in the EU, with regard to claims against companies, the Brussels I *bis*-Regulation[112] determines which national court system or, in exceptional settings, which court district enjoys international jurisdiction. This European concept of adjudicatory jurisdiction encompasses both personal and subject matter jurisdiction. If, e.g., the defendant company has its statutory seat, central administration or principal place of business in Germany, German courts enjoy general jurisdiction over that company under Art. 4, 63 Brussels I *bis*-Regulation, no matter where in the world an alleged human rights violation has been committed.

Finally, when suing corporate groups or, more generally speaking, perpetrators acting in concert, joinder jurisdiction under Art. 8 No. 1 Brussels I *bis* Regulation allows plaintiffs in intra-EU-cases to use one company as a jurisdictional anchor for other defendant companies.[113] Alternatively, victims can bring their suits (under Art. 7 s. 2 Brussels I *bis* Regulation) both before the courts where alleged tortious action has taken place and where harm from such action has been suffered.[114] However, this special forum is available only

111 See the Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning the private international law aspects of the future Instrument of the European Union on Corporate Due Diligence and Corporate Accountability, adopted on 8 October 2021, 4.

112 Regulation 2012/1215/EU of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351 20 December 2012, 1-32).

113 See the Recommendation of the GEDIP concerning the Proposal for a directive of 23 February 2022 on Corporate Sustainability Due Diligence (Oslo, 9-11 September 2022). GEDIP recommends the insertion of a provision ensuring the possibility of summoning a co-defendant not domiciled in a Member State of the European Union in the same way as a co-defendant domiciled in a Member State.

114 See ECJ, *Mines de Potasse d'Alsace,* judgment of 30 November 1976, case 21/76, ECR 1976 I-1732-1749.

within the EU. Still, one can think of cases in which a range of venues which follow different procedural rules are available and thus offer victims additional options for seeking relief.

2. Choice of Law

a) Applicable Tort Law (Rome II-Regulation)

Human Rights violations, generally speaking, simultaneously constitute tortious acts. For such acts, before EU Member States' courts, the applicable substantive law is designated by the conflict of laws rules contained in the Rome II-Regulation.[115] For *environmental* torts, the Rome II-Regulation contains a specific rule in Art. 7 for environmental damages. If corporate activity has led to environmental harm, the victim may choose between the *lex loci delicti* or the law of the country in which the event giving rise to the damage occurred.[116] For all *other* torts, Art. 4(1) Rome II-Regulation[117] determines that, in principle, the law of the country in which the damage occurs is applicable (*lex loci damni*). In contrast, the place of the event giving rise to the damage usually is irrelevant.[118] This application of the *lex loci damni* is designed as a privilege to the victim, whose 'home law' typically coincides with the jurisdiction in which he or she has suffered harm. At the same time, it is somewhat more predictable for the alleged tortfeasor than straight-out designating the victim's law of habitual residence.[119]

German tort law will therefore be applicable if the damage occurs in Germany. However, victims of human rights violations that were committed abroad by subsidiaries and independent contractors of a domestic (parent) company will usually have suffered harm abroad so that they are only able to invoke foreign law even if they seize domestic courts with the matter.

Yet, Art. 16 Rome II-Regulation allows for an exception to the rule of *lex loci damni* of Art. 4(1). This exception comes in for so-called 'overriding mandatory provisions' that may always be applied by the forum State. If

115 Regulation 2007/864/EC of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, of 31 July 2007, 40-49).

116 Marc-Philippe Weller and Madeleine Weiner, 'The Event Giving Rise to the Damage Under Art. 7 Rome II-Regulation in CO2-Reduction Claims', Yearbook of Private International Law 24 (2022), 261-280.

117 Article 4 (1) Rome II-Regulation (n. 115).

118 See Recital no. 18 to the Rome II-Regulation (n. 115).

119 See the German Federal Court in Civil Matters (*Bundesgerichtshof*), judgment of 3 March 1983, VI ZR 116/81.

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human rights due diligence obligations in question can be classified – from a conflict of laws perspective – as having such an *overriding mandatory nature*, the court seized will be allowed to apply them, irrespective of the law designated by conflict of laws-provisions.

b) Law Applicable to Human Rights Violations

Against this background, the Groupe Européen de Droit International Privé (GEDIP) has issued a recommendation on the EU-Proposal for a Directive on Corporate Sustainability Due Diligence (CSDD-Directive). The GEDIP recommends that the CSDD-Directive should contain a general provision that requires Member States to ensure that the national laws which transpose the CSDD-Directive into their domestic law shall be characterised as having a mandatory character in the sense of Art. 16 Rome II-Regulation.[120] This would then guarantee that the due diligence provisions of the European States will be applied by courts in Europe.

Should the GEDIP-proposal of making human rights due diligence obligations 'mandatory' not find a majority in the legislative process, we alternatively propose a judge-made rule that victims of human rights violations should be free to choose as the tort law applicable to their case either the law of the country in which the damage occurred, Art. 4(1) Rome II-Regulation, or the law of the country in which the event giving rise to the damage occurred (place of the harmful act or omission, *lex loci delicti commissi*). This right to choose, in our view, might be based on Art. 4(3) Rome II-Regulation.[121] This approach would pay regard to the fact that the tortious event may not only occur in the foreign State of the subsidiary or subcontractor. It may – in addition – occur in the State of the parent company. The tort of the parent company is generally constituted by an omission, when the parent company does not take the necessary preventive organisational measures required by its tortious duty of care that is extended to the activities of its subsidiaries and subcontractors. If the event (omission) giving rise to the damage were the connecting factor, the tort law of the domestic (parent) company would be applicable.

The underlying policy argument for granting a choice to the victim is, first, that Art. 4(1) Rome II-Regulation was designed to protect the victim. However, when *forum* and *ius* do not coincide, victims are forced to argue foreign

120 See GEDIP recommendation 2022 (n. 113).

121 Marc-Philippe Weller and Chris Thomale, 'Menschenrechtsklagen gegen deutsche Unternehmen', ZGR 2017, 509-526.

law before a given court. This can be prohibitively onerous, so that the protective privilege would be turned against victims. Second, even if victims were to choose the *lex loci delicti commissi,* this would not constitute any hardship to the defendant company. The reason is that the chosen law would typically be that company's 'home law'. Therefore, the victim must be allowed to choose as a connecting factor either the tortious event (the omission by the company) or the damage as materialised.

3. National Tort Law: The German Example

National tort law, that is the substantive rules of torts provided by a given jurisdiction, can constitute a significant impediment to the private enforcement of human rights. In the following, we use German law of torts as an example of a particularly restrictive approach.[122]

In Germany, victims of human rights violations may claim reparation or other compensation from the tortfeasor pursuant to § 823(1) of the German Civil Code.[123] When the tort is committed by a company, the legal person itself is liable.[124] Unlike contractual duties that are owed only to the contracting parties, tortious duties are owed to everyone (*neminem laedere*-principle). Liability in German tort law arises under the following conditions:

First, only *erga omnes* rights are protected under § 823(1) of the German Civil Code, including life, body, health, or property. This limited protection – and thus the limited risk of liability – in essence protects the freedom of action of companies. Hence, human rights violations only give rights to damages if they coincide with a violation of the abovementioned *erga omnes* rights. This will not always be the case. For example, inhuman working conditions as such do not necessarily damage health. However, once humans

122 For a comparative assessment, see Gerhard Wagner, 'Comparative Tort Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford: Oxford University Press 2019) 1004-1029.

123 Section 823 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB; official translation):

'(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.'

Accessible at <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0726> (last retrieved: 24/07/17).

124 Liable under the law of tort is the company itself, not its managing body.

are in fact physically injured, damages under § 823(1) Civil Code may be granted.

Second, liability under § 823(2) of the Civil Code requires a breach of a *statutory* duty. German courts, however, have effectively disregarded the 'statutory' element. Instead, they are in principle ready to derive a *breach of a tortious duty of care* (*Verkehrspflicht*) from other sources, including mere practice, public expectation or good faith.

Such tortious duties of care are incumbent upon those who create risks, dangers or hazards; the duties then oblige them to take reasonable measures to protect third parties from harm.[125] Therefore, if a company creates a particular danger in the process of sourcing raw materials or when manufacturing a product, that company, has to take reasonable preventive measures in order to avoid accidents, prevent fire outbreaks or contact with hazardous substances/machinery.

However, this tortious duty of care is generally not thought to apply along the whole supply chain – neither in the case of subsidiaries nor in the case of independent contractors:[126] tortious liability of the parent company for actions of subsidiary companies is considered to be barred by the subsidiary's corporate veil (*konzernrechtliches Trennungsprinzip*). This principle of separation appears even more appropriate for independent legal entities like subcontractors or suppliers.[127] As a result, the only recognised way to argue for parent liability in such cases is to hold the parent accountable for *not using its influence* on its subsidiary or sub-contractor such as to induce these subsidiaries or sub-contractors to comply with human rights obligations. The conditions under which such omitted influence can amount to a tort and result in damages owed to the subsidiary's or sub-contractor's victims are still unclear. This issue would therefore benefit from a legislative intervention. Such intervention may arise under the forthcoming CSDD-Directive, to which we turn now.

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125 German Federal Court in Civil Matters, judgment of 23 October 1975, III ZR 108/73, BGHZ 65, 221.

126 The question of duties of care applying across legal persons must be distinguished from the cases in which someone has already created a danger, or had delegated its control to a third party while the selection or supervision of that third party was deficient (*Delegationsfälle*). In those cases, liability is imposed based on the idea that a party may not free itself from its duties by delegating them to a third party without ensuring that the third party will take the appropriate measures to prevent harm to others.

127 See Marc-Philippe Weller, Luca Kaller and Alix Schulz, 'Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland', Archiv für die civilistische Praxis 216 (2016), 387-420 (413).

4. EU Law: From Corporate Social Responsibility (2014) to Sustainability Due Diligence (2023)

In the law of the European Union, some steps have been taken in order to improve business accountability.[128] The starting point was the 'Non-Financial Reporting Directive (NFRD)' of 2014.[129] This directive prescribes non-financial reporting on environmental, social, and employee matters, respect for human rights, anti-corruption, and bribery matters for 'public interest entities' (such as stock corporations) with more than 500 employees. Corporate social responsibility is realised here through due diligence processes and impact assessments. The 'sanction' mechanism is merely a 'comply-or-explain'-scheme: if the firm does not report and pursue the prescribed 'policies' it must (only) give reasons for this passivity.[130] In contrast, under the domestic laws of the various EU Member States, breaches of the reporting obligations can normally *not* function as a basis of legal claims of outsiders, e.g. of human rights victims.[131] The requirement of appropriate remedies, the third UNGP pillar, was not yet satisfied by the Directive.

Therefore, it was and is time to step up. In 2017, the EU adopted a regulation 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.[132] This was only a sectorial and thus marginal approach to implement a human rights due diligence for businesses.[133]

It is thus laudable that the European Commission in February 2022 proposed a Corporate Sustainability Due Diligence Directive (the 'CSDDD proposal').[134] According to the Commission, the EU shall prioritise a high

128 See notably Martina Buscemi, Nicole Lazzerini, Laura Magi and Deborah Russo (eds), *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law* (Leiden: Brill Nijhoff 2020).

129 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (OJ 2014, L 330/1).

130 Directive 2014/95/EU (n. 129), Art. 19a section 1 lit. e): 'Where the undertaking does not pursue policies in relation to one or more of those matters, the non-financial statement shall provide a clear and reasoned explanation for not doing so.'

131 See, e.g., for Germany, Weller, Kaller and Schulz (n. 127), 413.

132 Regulation 2017/821/EU 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 (OJ 2017 L 130 of 19 May 2017, 1-20).

133 See Elisabeth Kraft, *Die EU-Konfliktmineralienverordnung* (2023) (forthcoming Nomos 2023).

134 CSDDD proposal (n. 5). See Christopher Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment', Business and Human Rights Journal 7 (2022), 291-297.

level of human rights and environmental protection; the EU Action Plan on Human Rights and Democracy 2020-2024 and the European Green Deal bear witness to this.[135] The Commission argues that the proposal's goal of 'sustainability' cannot be achieved by states alone but needs participation of the private sector, especially companies.[136] Involving them across all economic sectors is the 'key to success'.[137]

The proposal acknowledges that the nudging approach of the NFRD Directive (2014) in the form of sustainability reporting was not sufficient,[138] and that therefore, companies, especially those that rely on global supply chains, should now be subjected to 'hard' human rights and environmental *due diligence obligations*.[139] One aim of the proposal is to make companies more accountable for adverse impacts in both areas.[140] The Preamble of the Commission's draft text pays lip service to the above-mentioned international standards,[141] specifically to the UNGPs[142] and the relevant OECD Guidelines.[143] The commentary also cites the OEIGWG draft in a footnote.[144] Arguably, the projected EU CSDD-Directive should be fully aligned in substance to the international standards that the draft text references, notably to the UNGPs.

In its substance, the CSDDD proposal follows the French *Loi de Vigilance* which provides for civil tort liability of parent companies. The idea is warranted by the fact that the other Member State's relevant statutes not only do not include, but expressly *exclude* the enforcement of human rights abuses by means of private law. An example is § 3(3) of the German LkSG of 2021 which states: 'A breach of the obligations under this Act shall *not* give rise to civil liability. Any civil liability established independently of this Act shall remain unaffected.'[145]

This current shortcoming of German and many other EU Member States' laws might be cured by the envisaged CSDD-Directive. Art. 22(1) of the CSDDD proposal obliges the Member States to provide for liability for

135 See recitals 1, 2, 9 and 12 of the CSDDD proposal (n. 5).

136 Recital 2 CSDDD proposal (n. 5).

137 See recital 4 of the CSDDD proposal (n. 5).

138 See *Explanatory memorandum* p. 3-4 in CSDDD proposal (n. 5).

139 See Marc-Philippe Weller and Tim Fischer, 'ESG-Geschäftsleitungspflichten', ZIP 43 (2022), 2253-2265.

140 Weller and Fischer (n. 139).

141 Recital 5, 6 CSDDD proposal (n. 5).

142 See n. 10.

143 See n. 11.

144 Commission's *Explanatory memorandum* to the CSDDD proposal (n. 5), fn. 57. See for the OEIGWG n. 6.

145 LkSG (n. 51); emphasis added.

damages for breaches of the 'cardinal' duties of care (prevention and remedial action, Arts 7 and 8 of the CSDDD proposal): 'Member States shall ensure that companies are liable for damages if: (a) they failed to comply with the obligations laid down in Articles 7 and 8 and; (b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage.'

In the EU proposal, private enforcement complements public enforcement in a so-called 'two-pillar enforcement system' that builds on administrative sanctions *and* civil tort liability.[146] This seems to be the short-term future of human rights enforcement, using both branches to the best of their abilities. In an environment in which enforcement is still so abysmally weak that any additional layer of enforcement is welcome, this is acceptable. In the long run, however, the accumulation of regulation and enforcement options needs to be carefully evaluated, because over-deterrence may become a problem.

V. Linking International Law to Domestic Criminal Law

The OEIGWG's 2021 Draft of a Legally Binding Instrument obliges State Parties, as already mentioned, to activate their domestic criminal law or functional equivalents (Arts 8(3) and (8)). The core question then becomes whether international human rights, or the UNGPs, or the potential legally binding instrument itself establish a relevant 'guarantor's obligation' whose violation may lead to criminal liability, filling the gap in loose domestic legal terms. Here two specific issues surface: the need to bridge gaps in criminal liability within a supply chain and jurisdictional problems. As Germany does not recognise corporate criminal liability, Switzerland and France will serve as the two prime examples.

1. Bridging Gaps in Criminal Liability Within a Supply Chain

From a criminal law perspective, gaps in criminal liability for alleged violations of human rights abroad linked to investments or business operations by domestic companies need to be bridged. The core question here is how to establish criminal responsibility in a corporate group or along a supply chain that, doing business as an entity, has not been incorporated into

146 COM (2022) 71 final (n. 5), 23.

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a legal person.[147] Such a legal concept must capture penal liability and conceptualise guilt for a concerted action between cooperating entities.[148] This is the legal lacuna the above-mentioned French *Loi de Vigilance* seeks to address.

a) Breach of a Criminal Law Duty of Care: Commission by Omission by a Guarantor

Criminal liability in various criminal justice systems can be based on 'commission-by-omission'. According to this universal idea (that is controversial in its details), criminal liability can arise if a so-called guarantor does not comply with a legal obligation to act that is incumbent on him or her, and which can be established in any field of law.[149]

Again, the importance of a human-rights based duty of care emerges, because a criminal-law-type duty of care imposed on a guarantor could be based on due diligence laws. The liability created would be a 'vicarious liability' or rather a liability for not properly reacting to someone else's acts in the supply chain. But what are the requirements for a duty to act (guarantor's position) and the relevant *actus reus*?

The most obvious duty within a corporate supply chain is the parent company's obligation to monitor all intermediaries along a supply chain for violations of the law. When devising for such a guarantor's duty, care must be taken to meet criminal justice requirements in the respective jurisdictions.[150] One concern is that companies are punished for just doing business (within socially accepted risk-taking) or for the crimes of others ('*Lehre vom Regressverbot*' or 'doctrine of *novus actus interveniens*') or cannot be convicted because of evidentiary issues, and that criminal law will lose its weight and authority if corporations are prosecuted but cannot be found guilty in the end.

147 See however Kenneth S. Gallant, 'Corporate Criminal Responsibility and Human Rights Violations: Jurisdiction and Reparations', Rev. Int'l Dr. Pénal 93 (2017), 47-78 (67-68).

148 Similar issues arise when conduct connected to internet platforms gives rise to a suspicion of crimes.

149 Arguing for a broad approach in US law: Todd S. Aagaard, 'A Fresh Look at the Responsible Relation Doctrine', The Journal of Criminal Law and Criminology 96 (2006) 1245-1291 (1281-1287); see however Samuel W. Buell, 'The Responsibility Gap in Corporate Crime', Criminal Law and Philosophy 12 (2018), 471-491 (476-477).

150 Petra Wittig, 'Corporate Responsibility for Transnational Human Rights Violations Under German Criminal Law – Review and Outlook', European Criminal Law Review 10 (2020), 395-409 (405).

b) The *Lafarge* Case (Syria/France)

The *Lafarge* case demonstrates the problem of 'business logic' and of responsibility in a corporate group. Lafarge officials allegedly made payments to terrorist organisations to secure its supply chain and allow for the free movement of its employees. Lafarge was found guilty of financing terrorism and being complicit in other crimes. Lafarge denies that payments were deliberately made to a terrorist organisation, arguing that the funds were given to intermediaries without management's awareness of their final destination. But the Investigation Chamber of the Paris Court of Appeals (*Chambre d'Instruction de la Cour d'Appel de Paris*) confirmed the charges for deliberately endangering the lives of Lafarge's Syrian subsidiary workers and for financing terrorism in 2019 (revoking, however, the indictment for complicity in crimes against humanity). In 2021, the Court of Cassation, France's highest judicial court, partly overturned this decision and referred the matter back to the Court of Appeal.[151] In May 2022, the Paris *Cour d'Appel* decided that charges can be brought in the *Lafarge* case[152] and the proceedings continue.[153] The process is celebrated as a milestone in the fight against corporate impunity. The current and ongoing reconceptualisation of corporate responsibility in Switzerland (within groups of companies or along a supply chain) gives rise to hope that the legal gaps will eventually be closed.

c) The *Nestlé* Case (Columbia/Switzerland)

The difficulty in establishing criminal intent for commission-by-omission in an international corporate group is at the core of the *Nestlé* case, in which a trade unionist, human rights activist and former Nestlé-subsidiary employee was kidnapped, tortured, and murdered by members of a paramilitary group in Colombia in 2005. The risk of murder linked to his union activity had been reported both to the Colombian subsidiary and to Nestlé in Switzerland, but neither took any precautionary measures. In fact, local managers reportedly participated in the spreading of libellous reports against unionists.

In 2012, Non-Governmental Organisations (NGOs) filed a criminal complaint against Nestlé and some of its top managers with the Swiss prosecution

151 *Court of Cassation* (n. 69).

152 Court of Appeals (*Cour d'appel de Paris*) *arrêt* of 18 May 2022 (concerning *Cour de cassation* (n. 69)).

153 See Court of Cassation (*Cour de cassation*) of 14 March 2023 (*Pourvoi* no. 22-83.681).

authorities. The complaint accused Nestlé managers of being in breach of their obligations by failing to adequately protect unionists linked to their businesses. Due to the passage of time, the Swiss Federal Tribunal confirmed that criminal prosecution for the alleged wrongdoing was statute-barred in 2014.[154] The ECtHR refused to examine whether the Swiss judiciary had adequately investigated Nestlé's responsibility, missing the chance to analyse the substance of corporate criminal liability for the conduct of company subsidiaries abroad.[155]

2. Jurisdictional Issues in Prosecuting Corporations

The potential extension of corporate criminal liability along supply chains and across borders in cases of alleged human rights abuses abroad linked to investments or business operations in criminal law especially raises jurisdictional issues pertaining to the applicability of the laws of one State (both domestic criminal law and the underlying regulations that define due diligence) to events that (at least in part) take place in another State, on foreign soil.

a) The Principle of Territoriality

Jurisdiction in penal matters is generally connected to territoriality: States prosecute criminal offences alleged to have been committed within their domain. However, *where* a crime is determined to have happened is not only a geographical question, but also a legal one. Many States use a broad concept of territoriality whereby not all components of a crime are required to have taken place inside the State's borders,[156] and many States have a wide array of extraterritorial jurisdictions, especially regarding the personality principle. It is controversial whether the broadening of jurisdiction leads to a jumble of uncoordinated jurisdictional spheres that actually strengthens powerful States,[157] or whether the jurisdictional overlap has

154 Swiss Federal Tribunal (*Bundesgericht*), *X. v. Ministère public central du canton de Vaud*, judgment of 21 July 2014, BGer 6B_7/2014.

155 *Mendoza Mejia v. Switzerland*, app. no. 78675/14 of 26 February 2015.

156 See, for instance, case law from the Netherlands: judgments of the Hooge Rat: HR 14 September 1981, ECLI:NL:1981:AC3699, ro 4; HR 2 February 2010, ECLI:NL:HR:2010:BK6328, ro 2.4. See for Austria: OGH: 12 Os 111/06 z; 12 Os 120/91; 10 Os 16/69; EvBl 1969/245; 13 Os 29/72, JBl 1972, 623.

157 Nico Krisch, 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance', EJIL 33 (2022), 481-514 (512-513).

little effect.[158] In criminal law, possible conflicts of State jurisdictions have been held at bay by two constraints in particular: first, extraterritorial jurisdiction often requires so-called double criminality (conduct giving rise to an accusation must constitute a crime according to the foreign law, too) (see *infra* b)). Secondly, States are reluctant to identify a company incorporated under its domestic laws or having its headquarters in their territory as 'citizens' for prosecution based on the active personality principle (see *infra* c)).

b) Extraterritorial Jurisdiction and Double Criminality

The problem of double criminality is inextricably linked with the issue of corporate criminal liability. As explained above, some States (such as Germany) refrain from using criminal law at all, while others incriminate the lack of a sufficient organisation (like Switzerland), and other States (like France) take a broad approach to corporate criminal liability but limit it in certain cases. Given these divergencies, the concept of double criminality needs to be recast. The French are now discussing whether the application of the principle of double criminality in the prosecution of misdemeanours would allow for punishment of French corporations alleged to have committed crimes in countries where the law does not recognise corporate criminal liability. This shows the inadequacy of simply applying the traditional principle.[159]

c) The Active Personality Principle: A Solution?

At first glance, the active personality principle appears to help because it allows a State to prosecute its corporate citizens at home for alleged crimes committed abroad. However, the principle also raises problems. While nationality is a well-established basis for jurisdiction with regard to natural persons who, as a biological entity, are born into a nationality, using the active personality principle for prosecuting legal persons is new.

The traditional rationale underpinning the use of personality principles of jurisdiction is to avoid negative conflicts of jurisdiction, and also to protect

158 Roger O'Keefe, 'Cooperative National Regulation to Secure Transnational Public Goods: A Reply to Nico Krisch', EJIL 33 (2022), 515-526 (525).

159 Bernard Bouloc, 'La responsabilité des entreprises en droit français', R.I.D.C. 46 (1994), 669-681, esp. 673.

one's citizens and residents from extradition and prosecution abroad.[160] Because a company cannot be extradited, the prosecution of corporations based on the active personality principle is in itself controversial.

Already in a judgment of 2004, the French *Cour de cassation* implicitly accepted the possibility of a French company being criminally liable for concealment of spoliated property in Germany under the regime of the National Socialists, although the prosecution was later barred for different reasons.[161] The issues arise again in the *Lafarge* case.

In Switzerland, however, the use of the active personality principle has been met with greater doubt.[162] And in Germany, the active personality principle cannot serve as a basis for jurisdiction over corporations.[163] If one agrees that the active personality principle applies in the prosecution of corporations, one must overcome the problem that corporations are not formally naturalised in any one specific country. Thus, corporate nationality must be based on other criteria such as State of residence, place of incorporation, primary place of business, or physical seat of the corporation. But these criteria that are not equally recognised and not applied evenly by States.

VI. Conclusion: The Complementary and Cooperative Relationship Between International Human Rights and their National Enforcement

The Canadian Supreme Court's bold decision on the human rights of the slave-like labourers in the Eritrean smelter had called international human rights the phoenix rising out of the ashes.[164] This phoenix currently risks flying too high and burning itself under the 'withering sun of globalisation'.[165] A gap in human rights protection has emerged through globalisation which has opened up loopholes for business to escape strict national regulation. In this climate, it is crucial that human rights guarantees are not side-

160 Sabine Gless, *Internationales Strafrecht, Grundriss für Studium und Praxis* (2nd edn, Basel: Helbing Lichtenhahn 2015), 142.

161 *Cour de cassation, criminelle*, 9 November 2004, *petition* no. 04-81742, *Bulletin Criminelle* no. 274.

162 Art. 36 sections 2 and 3 of the Swiss Code of Criminal Procedure indirectly acknowledges this by offering a forum against companies domiciled in Switzerland. Anna Petrig, 'The Expansion of Swiss Criminal Jurisdiction in Light of International Law', Utrecht Law Review 9 (2013), 34-55.

163 Böse (n. 61), 219, 224.

164 Nevsun Resources (n. 1).

165 Ulrich Beck, *What is Globalization?* (Cambridge: Polity Press 2000), 1.

stepped and rendered meaningless by overwhelming global corporate power. So the question is not whether but rather in which specific situations which and whose international human rights can be invoked against business and – crucially – how and where they can be enforced.

Importantly, simply extending international human rights *tels quels* against corporations would not work because the economic power of business is in many respects qualitatively distinct from State power. Neither international nor constitution-based human or fundamental rights fit well.[166] Therefore, a mindless application of international human rights (or criminal law) to corporate actors would confuse ethical and moral principles with legal obligations and risks to create only a 'public illusion'.[167] In this legal situation, States and other actors must provide a smart, mixed, regulatory approach to target violations in a reasoned, principle-based, and socially acceptable fashion.

Scholars, activists, and politicians often call for national laws, notably administrative, civil, and criminal laws, to fill the gaps both in application and enforcement of international human rights law. But even in most proposals for gap filling, international human rights and national laws are treated as distinct and discrete realms. The main function of national law seems to be, at best, to stop jeopardising international legal obligations. Consequently, many legislative and scholarly proposals for national enforcement combine and accumulate the tools: the more the better.

Our study offers a different perspective. We do not conceive international human rights as a monolithical block, but as a porous and spongy body of law that not only needs exogenous enforcement, but which is open to being complemented in substance by national laws. For example, international human rights embody obligations of conduct to which the national rules on administrative, civil, and criminal liability can be tied, including on corporate liability. Likewise, a compromise between granting effective enforcement of international human rights law on the one hand and giving deference to State sovereignty on the other hand can be struck by providing a *forum* abroad, and allowing for the trial of human rights violations under the auspices of the domestic law at the place of the violation (*locus delicti commissi*). In such instances, national law does not only enforce international human rights, but also complements their substance. Conversely, international law can identify

166 See above section III.

167 Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge: Cambridge University Press 2019), 26-39 (39); see also Anne Vestergaard and Michael Etter, 'Business and Human Rights: Exploring the Limits of an Expanding Agenda on Corporate Responsibility', in: Alison Brysk and Michael Stohl (eds), *Contracting Human Rights: Crisis, Accountability, and Opportunity* (London: Edward Elgar Publishing 2019), 211-231 (229).

and define standards of behaviour that the laws of various States still have to recognise, using concepts such as the duty of care as an interface. This strategy, too, should not be seen as an intrusion of international law into domestic law, but as a welcome contribution that will allow national laws to respond adequately to internationalised fact patterns and trans-boundary disputes.

As this cooperation between international law and domestic law develops, legal policy arguments have to move beyond simply crying for enforcement as such. Policy considerations need to ask which kind and which degree of enforcement is most suitable for a given regulatory question. A more nuanced and better-informed approach that treats international law and national laws as being intimately intertwined and mutually complementing each other is needed. This will allow to develop a fine-tuned enforcement mix for human rights obligations of business actors.

Many open issues remain, ranging from the question which administrative agencies should be competent inside States up to the resolution of normative conflicts arising from the multiplicity of frameworks that cannot be harmonised through interpretation alone. Answering these questions and elaborating the proper regulatory mix requires intra- and interdisciplinary efforts of all legal and also economic disciplines. The objective must be to avoid underdeterrence as much as over-deterrence, and to create a consistent legal framework in which business is reasonably and hence sustainably held accountable for human rights abuses.