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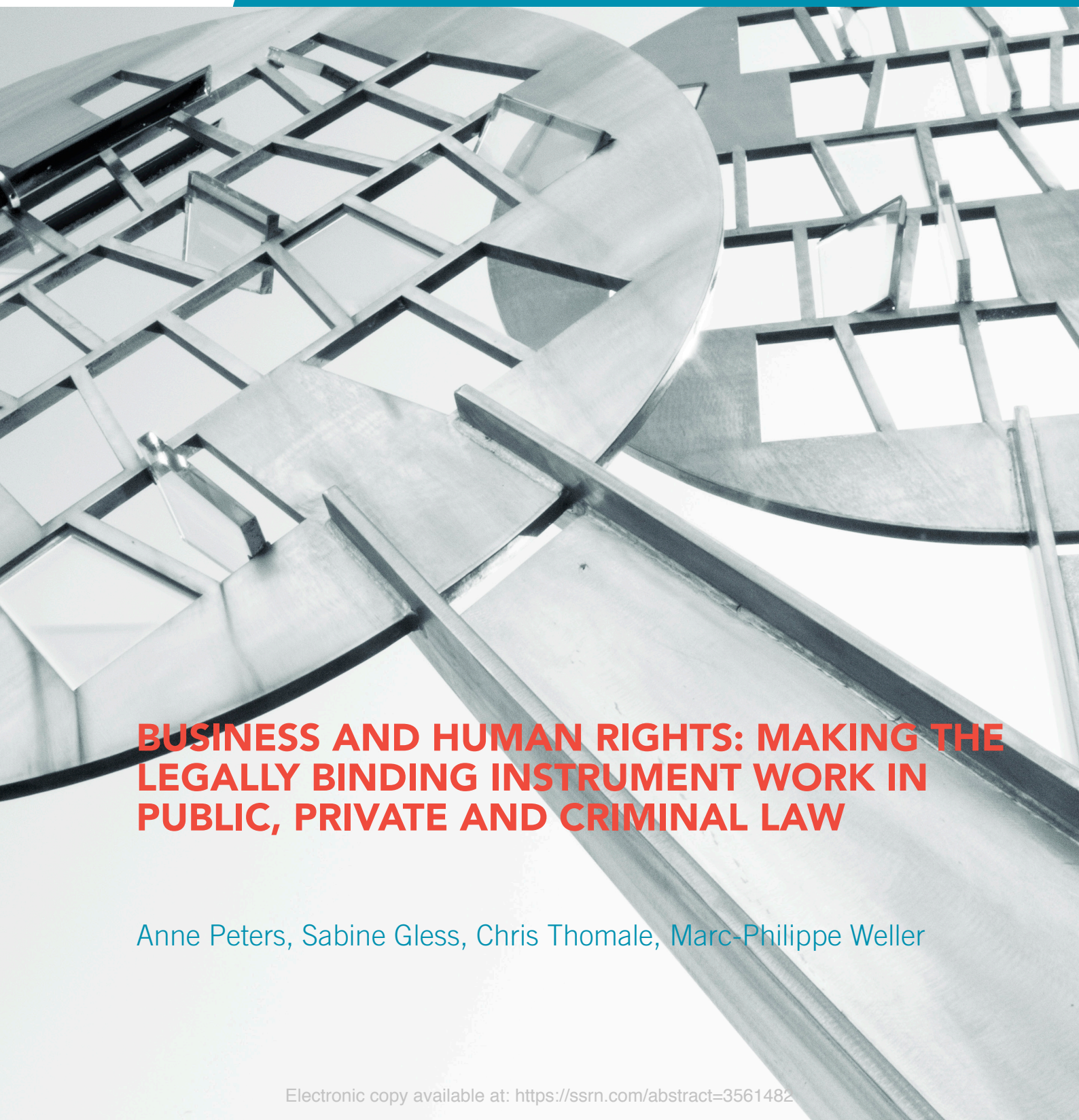

BUSINESS AND HUMAN RIGHTS: MAKING THE LEGALLY BINDING INSTRUMENT WORK IN PUBLIC, PRIVATE AND CRIMINAL LAW

Anne Peters, Sabine Gless, Chris Thomale, Marc-Philippe Weller

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ABSTRACT

The paper's starting point is the United Nations Human Rights Council working group's revised draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises of July 2019. The paper examines the draft treaty's potential to activate and operationalize public law, private law, and criminal law for enforcing human rights. It conceptualizes a complementary approach of these three branches of law in which private and criminal legal enforcement mechanisms stand in the foreground. It argues 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. The combination of public, private, and criminal law allows 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

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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 globalization are human rights abuses in the context of foreign investment and transnational business operations. In a pending 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 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] The Canadian trial court will now have to decide 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. The United Nations are hosting a treaty making process conducted in a working group of the Human Rights Council. The latest draft text of July 2019[4] 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 does 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 cas-

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

[2] Ibid., para 114. The decision is in a preliminary stage. 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).

[3] Ibid., para 110 (citing Clapham, *Human Rights Obligations* (note 5), 58).

[4] Open-ended intergovernmental working group (OEIGWG), Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, revised draft of 16 July 2019.

es, due to a wide-spread reluctance to consistently criminalise the conduct of corporations, to close accountability gaps in corporate groups and to solve jurisdictional issues.

Against this background, this paper examines the draft treaty's potential to activate and operationalise public law, private law and criminal law for enforcing human rights. We conceptualise a complementary approach of these three branches of law in which private and criminal legal enforcement mechanisms stand in the foreground. 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.

First, we briefly sketch out the legal framework on business and human rights, along international, European and comparative law parameters (B.). Secondly, we discuss whether international human rights should be activated against business actors. We conclude that simply extending State-tailored human rights to the sphere of transnational business is not normatively desirable (C.). Therefore, we argue for a linked approach, tying the indeterminate principles of human rights to national rules on corporate liability. This means that the applicable private law of torts (D.) as well as the applicable criminal law (E.) must be interpreted in light of international human rights. Such a combination of public, private and criminal law allows effective enforcement of human rights vis-à-vis global corporations (F.).

II. THE LAW AS IT STANDS: CORPORATE IRRESPONSIBILITY

A. International Law Parameters

The international debate on business actors as potential addressees (duty bearers) of international human rights obligations goes back to the 1980s.[5] 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, simply because these actors are not parties to the relevant conventions.[6] However, it is becoming in-

[5] See from the abundant literature in the field of international law: Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2011); Surya Diva, *Regulating Corporate Human Rights Violations: Humanizing Business* (New York: Routledge, 2012); Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013); Dorothee Baumann-Pauly/Justine Nolan (eds), Business and Human rights: From Principles to Practice (London: Routledge 2016); David Kinley (ed.), *Human Rights and Corporations* (Farnham: Ashgate 2009); Stefanie Khoury and David Whyte, Corporate Human Rights Violations : Global Prospects for Legal Action (London: Routledge 2017); Surya Deva and David Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours (Cambridge: Cambridge University Press 2017); M. Buscemi, N. Lazzerini, L. Magi, D. Russo (eds), Legal Sources in Business & Human Rights: Evolving Dynamics in International and European Law (Brill 2020). The seminal international law literature is 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 Law Journal* 111 (2001), 443-545.

[6] 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), p. 23: „Les sociétés intimées morales de droit privé qui ne sont pas signataires des conventions invoquée, ni destinataires des obligations qui les contiennent, ne sont pas, en conséquence, des sujets de droit international. Dépourvues de la personnalité internationale, *elles ne peuvent se voir opposer les différentes normes dont se prévaut l'appelante."* (emphasis added).

creasingly obvious that 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) are opposable to private actors, due to their absolute character.[7] This is highly relevant for addressing the worst corporate abuses.

1. The Ruggie Framework

In 2011, the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights ("Ruggie Principles").[8] The principles stand on three pillars: Firstly, they require that States meet their duty to protect; secondly, they define corporate responsibility; and thirdly, they require States and business actors to provide effective remedies, i.e., complaint mechanisms. The Council of Europe has called on its member States to implement the Ruggie Framework which it qualifies as the 'current globally agreed baseline' in the matter of business and human rights.[9]

Within the Ruggie Framework, corporate 'responsibility' does not mean responsibility in the sense of the law of international responsibility, i.e., the secondary obligations arising from a violation of international law. Rather, it is linked to the term "corporate social responsibility." It appears to be a code for attenuated standards of conduct that have a political, moral or social rather than a legal basis. The corporate responsibility set out in Ruggie Principles 11 to 24 means that business enterprises – irrespective of positive law – must "respect" the core internationally recognised human rights and the ILO workers' rights.[10] To implement their responsibility, enterprises should carry out human rights due diligence. This includes assessing human rights impacts, integrating and acting upon the findings and communicating externally how impacts are addressed by a given enterprise.[11]

Finally, under the third pillar, which is crucial in practical terms, enterprises should provide for remediation for human rights violations that they have caused or to which they have contributed, or they should contribute to the search for such remediation.[12] The UN

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[7] Canadian S.Ct., Nevsun (note 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), p. 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).

[8] 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).

[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] Relevant human rights encompass at least the International Bill of Human Rights and the ILO Declaration of Fundamental Principles and Rights at Work of 1998 (Ruggie Principles (note 8), Principle 12).

[11] Ruggie Principles (note 8), Principles 17–21.

[12] Ibid., Principle 22 ('remediation').

Human Rights Council fleshed out that third pillar with a *Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse.*[13]

2. National Action Plans

States can discharge their duty to protect human rights through national action plans (NAPs) which aim to translate the UN Principles into practical action at the national level. So far, over 20 States of the world have launched such plans, among them the majority of the EU member States.[14] More than 20 further States are in the process of developing an NAP. The United States have adopted an NAP in 2016, while Russia, China and Brazil so far do not possess one.

The topics of these plans range from children's rights over corruption, forced labour, gender, indigenous peoples, to persons with disabilities. The *forms* of envisaged action are diverse but for the most part weak. For example, the German NAP of 2016, as explained by the German Federal Ministry of Labour and Social Affairs, "formulates the clear expectation that businesses fulfil their obligation to exercise due diligence with regard to human rights and respect human rights in their supply and value chains."[15] The German Federal Government's "clear expectation" is however legally non-binding. Legislative measures are not yet planned.[16] Ultimately, the objective of national action should be an effective legal framework which arguably needs to include "hard" statutory laws on business obligations.

3. The Pending Project of a Legally Binding Instrument (UN Human Rights Council)

Upon initiative of a number of African, Arab and Latin American States under the lead of Ecuador, the UN Human Rights Council in 2014 decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transna-

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[13] See High Commissioner for Human Rights, *Report* on improving Accountability and Access to remedy for victims of business-related human rights abuse, with Annex: *Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse* (UN Doc A/HRC/32/19 of 10 May 2016), with a 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 (UN Doc A/HRC/32/19/Add.1 of 12 May 2016). The explanatory notes contain a *Model Terms of Reference* for a review of the coverage and effectiveness of laws relevant to business-related human rights abuses (para 5). This work was endorsed ('welcomed') by UN Human Rights Council, Business and human rights: improving accountability and access to remedy (UN Doc A/HRC/RES/32/10 of 15 July 2016).

[14] See the list and detailed information compiled by the OHCHR: https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx

[15] See the official information by the German Federal Ministry of Labour and Social Affairs: https://www.csr-in-deutschland.de/EN/Business-Human-Rights/About-the-NAP/about-the-nap.html.

[16] Review of the German NAP is foreseen after 2020. See for policy proposals which were however not taken up: Remo Klinger, Markus Krajewski, David Krebs & Constantin Hartmann, Gutachten: Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht (im Auftrag von Amnesty International, Brot für die Welt, Germanwatch e.V., Oxfam Deutschland (Berlin 2016); Robert Grabosch and Christian Scheper, 'Die menschenrechtliche Sorgfaltspflicht von Unternehmen – Politische und rechtliche Gestaltungsansätze' (ed Friedrich-Ebert-Stiftung 2015).

tional corporations and other business enterprises".[17] Most Western States had voted against this resolution and both the US and the EU had initially declared not to support such a treaty. The EU changed its position in 2019 and now officially acknowledges an "added value of any possible legally binding instrument ... to enhance the protection of and respect for human rights as well as to ensure a level playing field for companies globally."[18] The working group has up to now produced two drafts.[19] Importantly, the project does not foresee direct human rights obligations of business but is basically a mediatory instrument: it obliges State parties to adopt and improve their domestic laws in order to hold business actors to account.[20] To that end, State parties must take measures in all fields: in administrative law, civil law and criminal law.

4. Human Rights in International Investment Law

Transnational (human rights) obligations of business actors have also been addressed in international investment law.[21] Initially, the thousands of mostly bilateral international investment agreements did not impose obligations on investor. The new generation of treaties, model treaties,[22] and codes is beginning to contemplate direct[23] or indirect human rights obligations or otherwise soft commitments of investors.[24]

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[17] UN Human Rights Council. *Resolution 26/9 on Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* of 14 July 2014 (UN Doc A/HRC/RES/26/9), para 1.See also UN Human Rights Council *Resolution 26/22 on Human rights and transnational corporations and other business enterprises* of 15 July 2014 (UN Doc A/HRC/RES/26/22)).

[18] European Union, Opening remarks by the European Union in the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 14 October 2019.

[19] The „zero draft" of 16 July 2018 and the „revised draft" of 16 July 2019. The drafting activity has been intensely commented in scholarly literature. See e.g. Pierre Thielbörger and Tobias Ackermann, A Treaty on Enforcing Human Rights against Business: Closing the Loophole or Getting Stuck in a Loop, Indiana Journal of Global Legal Studies 24 (2017), 43-80.

[20] The overall mediating character becomes most obvious in the provision on legal liability, Art. 6(1) of the Revised Draft 2019: „State Parties shall ensure that *their domestic law* provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character." (emphasis added).

[21] Filip Balcerzak, Investor–State Arbitration and Human Rights (Brill/Nijhoff, Leiden Boston 2017); Nitish Monebhurrun, Mapping the Duties of Private Companies in International Investment Law, Brazilian Journal of International Law 14 (2017), 50-72. See also Anil Yilmaz-Vastardis and Rachel Chambers, Overcoming The Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business And Human Rights Treaty? International & Comparative Law Quarterly 67 (2018), 389-423; Martin Jarrett, Contributory Fault and Investor Misconduct in Investment Arbitration (Cambridge: CUP 2019).

[22] Southern African Development Community (SADC), Model Bilateral Investment Treaty Template with Commentary, July 2012, Article 15: "Minimum Standards for Human Rights, Environment and Labour": "1. Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife. 2. Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998. 3. Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher." see for weak pronouncements in the preamble the Norwegian model agreement (Draft Agreement between the Kingdom of Norway and … for the Promotion and Protection of Investments, Draft version 130515, May 2015).

In investor–State arbitration, international law has rarely been applied by arbitral tribunals as a barrier to investor activity.[25] So far, less than a handful of investment-related arbitral award postulates direct human rights obligations of an investor under international law. The award *Aven v Costa Rica* assumed implicit investor obligations under the DR CAFTA (Dominican Republic ─ Central American Free Trade Agreement) with respect to the environmental laws of the host State.[26] However, because Costa Rica's counterclaim was not substantiated enough, the tribunal dismissed it and did not reach its merits.[27] *Bear Creek Mining Corporation v Republic of Peru* accepted the "indirect" obligation of investors to consult the indigenous population under ILO convention 169.[28] The most important case is so far an ICSID-dispute arising out of water privatization in the Argentinian province of Buenos Aires where the Tribunal examined a human-rights based counterclaim filed by a host State on its merits (*Urbaser v Argentina* 2016).[29] The Spanish consortium Urbaser had requested arbitration on the basis of the Spanish − Argentinian BIT and (unsuccessfully) claimed a breach of fair and equitable treatment and expropriation. Argentina had filed a counterclaim for damages on the basis of Urbaser's alleged 'failure to provide the necessary investment into the Con-

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[23] The most straightforward clause is contained in a South-South Agreement which is not yet in force: Art. 18(2) of the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco─Nigeria) of 3 December 2016, still not in force: "Investors and investments shall uphold human rights in the host state."

[24] Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia─Iran), signed 19 January 2016, entered into force 30 August 2017, Art. 10(3): "Investors and investments should apply national, and internationally accepted, *standards of corporate governance* for the sector involved, in particular for transparency and accounting practices. ...."Art. 810 of the Free Trade Agreement between Canada and the Republic of Peru of 29 May 2008, in force since 1 August 2009 on "Corporate Social Responsibility". Still only in draft form: Economic Commission for Africa, Draft Pan-African Investment Code, UN Doc E/ECA/COE/35/18AU/STC/FMEPI/EXP/18(II), of 26 March 2016, Chapter 4 "investor obligations", notably Article 24, "Business Ethics and Human rights": "The following principles should govern compliance by investors with business ethics and human rights: (a) Support and respect the protection of internationally recognized human rights; (b) Ensure that they are not complicit in human rights abuses; (c) Eliminate all forms of forced and compulsory labor, including the effective abolition of child labor; (d) Eliminate discrimination in respect of employment and occupation; and (e) Ensure equitable sharing of wealth incurred from investments."

[25] See on the previous case law on investor obligations Anne Peters, "The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization", International Journal of Constitutional Law (I-CON) 15 (2017), 671-704 at 674-678, with further references.

[26] *David Aven et al v Republic of Costa Rica*, ICSID Case No UNCT/15/3, Final Award (18 September 2018), paras 732-735. Also, the tribunal assumed jurisdiction to decide on the counterclaim against the investor (paras 739-742).

[27] Ibid., paras 745-747.

[28] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, award of 30 November 2017, para 406. See notably partly dissenting opinion of Philippe Sands QC, paras 10-11. Sands argued that "the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them. ... This Tribunal is entitled to take the Convention into account in determining whether the Claimant carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner".

[29] ICSID Award of 8 Dec 2016, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26.

cession, thereby violating its commitments and its obligations under international law based on the human right to water'.[30]

The tribunal ultimately rejected this counterclaim as well 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: "The human right to water entails an obligation of compliance on the part of the State, but it *does not contain an obligation for performance* on part of any company providing the contractually required service."[31] Instead, only the State has the international human rights-based "obligation to perform", as the tribunal calls it, the water service.[32] Such an obligation to perform − says the tribunal − "cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform 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 as its source *domestic* law; it does not find its legal ground in general international law."[33] 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."[34]

Although we deem this finding premature and not covered by other practice and *opinio iuris*, it does reflect an overall tendency in scholarship. Many authors assume that business actors should not be directly saddled with all types of international human rights obligations (respect, protect, fulfil) but should ─ if at all ─ only be obliged to "respect" the international law-based rights.[35]

5. Interim conclusion on public international law

The overview of the public international law-based mechanisms for holding business accountable for human rights abuses has shown that they are very weak. In many regions of the world, however, they may be better than nothing at all. With all due caution against 'Western' impositions of human rights ideas, we note that it would likewise be Eurocentric to simply dismiss international law. As the *Urbaser* arbitration[36] has shown, Argentina, an emerging State of the global south, even requested the application of international human rights law, arguably in order to fill the gap left by weak domestic law and weak judiciaries. Therefore, we should accommodate both perspectives, including those that place hope in in-

[30] Ibid., para 36. The right to water was conceptualised in CESCR, *General Comment No. 15* on The right to water of 20 January 2003 (UN Doc E/C.12/2002/11).

[31] Ibid., para 1207 (emphasis added).

[32] Para 1210.

[33] Para 1210 (emphasis added).

[34] Para 1210.

[35] Ratner (note 5), 517. See for a critical discussion of this idea David Bilchitz, Corporate Obligations and a Treaty on Business and Human Rights: A Constitutional Law Model?, in: Surya Deva and David Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours (Cambridge: Cambridge University Press 2017), 185-215 (197-206).

[36] See above note 29.

ternational law. We therefore advocate for a better combination and inter-locking of the principles and processes available in the various branches and levels of the law.

B. European Law Parameters: Corporate Social Responsibility Directive (2014) and beyond

In the law of the European Union, some steps have been taken in order to improve business accountability. The 'Corporate Social Responsibility (CSR) Directive' of 2014[37] 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 in this case must be realized through certain procedures, namely due diligence processes and impact assessments. The 'sanction' mechanism is a 'comply-or-explain'-scheme. If the firm does not report and pursue the prescribed 'policies' it must (only) give reasons for this passivity.[38] 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.[39] We submit that the requirement of appropriate remedies, the third Ruggie pillar, is not yet fully satisfied by the Directive. It is therefore laudable that revisions are already contemplated.

Moreover, the EU Commission has 'invited' all EU member States to develop and adopt National Action Plans for the implementation of the UN Guiding Principles.[40] Given that the Guiding Principle's third pillar, remedies, is in practical terms crucial, it is good that the European Union Agency for Fundamental Rights is dealing with this topic.[41] Finally, the EU has 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.[42] Overall, the EU's legislative activity is praiseworthy but needs to be stepped up even more.

C. Comparative Law Parameters

1. Corporate Tort Liability?

Until the 19th and even the beginning of the 20th century, the commonplace was that corporations by means of their very corporate nature are technically unable to commit torts. The

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[37] 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 (of 15 November 2014, OJ 2014, L 330/1).

[38] Ibid., 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.'

[39] See, e.g. for Germany, Marc-Philippe Weller, Luca Kaller, and Alix Schulz, 'Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland' (2016) 216 *Archiv für die civilistische Praxis*, 387–420, 413.

[40] European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', 25 Oct. 2011, COM(2011) 681. See on the NAPs above section. II.1.b.

[41] European Union Agency for Fundamental Rights, 'Improving Access to Remedy in the Area of Business and Human Rights at the EU Level', 10 April 2017, Fundamental Rights Agency (FRA) Opinion –1/2017 (B&HR).

[42] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (OJ 2017 L 130 of 19 May 2017, p. 1-20).

Roman authority on this issue since the 3rd century AC was *Domitius Ulpianus*: According to his famous "Eleventh book on the Edict", as corporations could have no mental state of malice (*dolus*), they cannot "do wrong" in any meaningful, i.e. morally or legally relevant sense.[43] It did not take long, however, for the law to find its way around this naturalism through attribution: The principle of *respondeat superior* under which a principal can be held responsible for torts committed by his agents, allowed legal systems to circumvent the alleged tort immunity of corporations through vicarious liability. It was henceforth not the corporation in and of itself, which was deemed to have committed a tort, but rather, torts were committed by corporate representatives that were attributed to the corporation.[44] Since this "attributive turn", which started building up since the late 17th century and was definitively completed around 1900, corporate civil tort liability has been affirmed repeatedly and is deeply enshrined into western civil laws.

Only with regard to international torts, i.e. torts based on the violation of norms of conduct provided by public international law, a seemingly contrary development has become apparent. In *Jesner v Arab Bank, PLC*, the US-Supreme Court held that while obligations derived from international law reach beyond States, also extending to individual men and women, that does not necessarily entail corporations: "It does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities. This is confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach."[45]

The exact legal consequences of this new approach to US and international law remain to be seen. At this stage, two points are noteworthy: First, the Court conflated corporate civil and criminal liability. Second, it 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.[46] This assumption poses a serious intellectual threat to corporate tort liability. For a conventional treatment of torts, it is recognized 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 opinion flies in the face of this commonplace. The Court's assertion that public international law would indeed have to provide for a genuinely international law of torts and ─ failing to do so ─ precludes the US-American law of torts to lend itself and precludes that 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) corporate responsibility for human rights which typically manifests itself in civil tort liability.

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[43] Cf. *Dig.* 4, 3, 15, 1 and P.W. Duff, *Personality in Roman Private Law*, CUP 1938, 92 seqq.

[44] Cf. Art. 1384 Code Civil (1804); § 31 German Civil Code (1900). For a general comparative survey that includes common law and continental systems see Hartmut Wicke, *Respondeat superior*, 2000.

[45] *Jesner v Arab Bank, PLC*, 138 S.Ct. 1386, 1400 (U.S. 2018).

[46] See Chris Thomale, 'The forgotten discipline of private international law: lessons from Kiobel v Royal Dutch Petroleum – Part 1' (2016) 7 *Transnational Legal Theory* 155 for an attempt to refute such arguments through disentangling criminal and civil tort liability and making the case for a national reconstruction of so-called "international" torts.

2. *Private Law Based Human Rights Obligations for Corporations*

Private law enforcement is in many contexts the most potent enforcement mechanism a well-developed legal system has to offer. Human rights, just as well as other social, environmental and ethical standards, may be enforced by means of private law. Recent continental European legislative initiatives offer good starting points.[47]

a) France: Devoir de Vigilance

In France, a law on due diligence obligations of mother companies and 'companies giving instructions' was adopted in 2017 (*Loi de Vigilance*).[48] In its final form, the law amends the commercial code so as to oblige sizeable French corporations to establish a due diligence plan. It only applies to sizable corporations.[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]

b) Switzerland: Vicarious group liability

Closely connected to the French legislation, a Swiss proposal advocates a tightening of human rights corporate responsibility under the heading of "*Konzernverantwortung*". Through the vehicle of a popular initiative (*Volksinitative*[51]) launched in 2015 and submitted to the authorities in 2016, with the signatures of over 120.000 Swiss citizens, the citizenry has formulated a legislative proposal that would lead to a constitutional amendment..[52] The gist is that controlling enterprises should be held vicariously liable for any human rights violations committed by their subordinate enterprises.[53] The initiative seeks to establish an obligation to

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[47] Besides the legislation mentioned in the following, important new national frameworks are the UK Modern Slavery Act 2015 (c. 30) of 26 March 2015, notably its Section 54: "Transparency in Supply Chains etc." and the Dutch Child Labour Due Diligence Law (*Wed Zorplicht Kinderarbeid*) of 24 October 2019, not yet in force (Staatsblad 2019, 4019). Its Art. 5 on 'Due diligence' refers *inter alia* to ILO instruments. Details of the statute will have to be worked out through administrative orders, entry into force is expected for 2022.

[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 Lomenie, '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.

[49] With regard to corporations with their official seat ('siège social') in French territory, these 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 by the mother company and direct and indirect subsidiaries) 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] Under Article 139 of the Swiss Constitution, 100 000 citizens may demand a partial revision of the Constitution.

[52] See https://konzern-initiative.ch. Because a citizens' initiative can only be directed at amending the constitution, not at adopting legislation, the proposal foresees a new constitutional provision.

[53] The text of the proposal is: "The Federal Constitution will be amended as follows: Art. 101a Responsibility of business: 1. The Confederation shall take measures to strengthen respect for human rights and the environment

closely monitor, in due diligence procedures, both up- and downstream along a supply chain (*Sorgfaltsprüfungspflicht*). The Swiss Parliament is currently debating about a counter-proposal which is expected to be released in March 2020. Both the text as formulated by the initiative and the text of the counter-proposal will then be submitted to a popular referendum. So far no date for nationwide referendum has been fixed. The exact fate of the proposal is therefore uncertain but it can be predicted that some legislative action tightening business accountability will result.

c) Germany: Reporting Duty

In Germany, Art. 19a of the CSR-Directive[54] of the European Union was implemented in the sections 289b and 289c of the German Commercial Code (*HGB*).[55] According to ss. 289b,

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through business. 2. The law shall regulate the obligations of companies that have their registered office, central administration, or principal place of business in Switzerland according to the following principles: a. Companies must respect internationally recognized human rights and international environmental standards, also abroad; they must ensure that human rights and environmental standards are also respected by companies under their control. Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship. b. Companies are required to carry out appropriate due diligence. This means in particular that they must: identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken. These duties apply to controlled companies as well as to all business relationships. The scope of the due diligence to be carried out depends on the risks to the environment and human rights. In the process of regulating mandatory due diligence, the legislator is to take into account the needs of small and medium-sized companies that have limited risks of this kind. c. Companies are also liable for damage caused by companies under their control where they have, in the course of business, committed violations of internationally recognized human rights or international environmental standards. They are not liable under this provision however if they can prove that they took all due care per paragraph b to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken. d. The provisions based on the principles of paragraphs a – c apply irrespective of the law applicable under private international law."

[54] Note 37.

[55] Section 289b of the Commercial Code:

"(1) A capital company must include in its management report [according to ss. 264, 289 of the Commercial Code] a non-financial statement, if it exhibits the following characteristics:

1. the capital company fulfils the requirements of s. 267 para 3 sen. 1 [i.e. is a large capital company within the meaning of that provision],
2. the capital company is capital market oriented [*kapitalmarktorientiert*; within the meaning s. 264d of the Commercial Code] and
3. the capital company had more on average more than 500 employees during the financial year. […]."

Section 289c of the Commercial Code:

"(1) In the non-financial statement within the meaning of s. 289b, the capital company must elaborate shortly its business model.

(2) The non-financial statement must furthermore include at least the following aspects:

1. environmental issues [...],
2. employee matters, [...] including information on, for example, measures taken to ensure gender equality, […] the respect for the rights of employees to be informed and consulted, [...] the respect for the rights of trade unions [...],
3. social matters [...],
4. the respect for human rights, including information on, for example, the avoidance of human rights violations, and
5. the combat against corruption and bribery [...].

[...]

289c, certain large companies of public interest must include a so-called non-financial statement (*nichtfinanzielle Erklärung*) in their annual accounting report. Some scholars claim that these provisions could cause a "revolution via the law of accounting."[56] A company would no longer be able to exclusively focus on profit-maximisation but would now also have to take non-financial goals into account in its business decisions. It is, however, too early to judge whether such a "revolution" will actually occur.[57]

In summary, with regard to the reforms or reform proposals in France, Germany and Switzerland, we can observe the tendency to establish binding legal standards in the form of a duty to care – the violation of which triggers corporate liability.

3. 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. First of all, the big firms 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.[58]

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 2a) 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.[59] Or, the Swiss-based company Nestlé which draws on suppliers on a global scale, possesses a "Nestlé Responsible

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(4) If a capital company does not pursue a concept in relation to one or more of the aspects named in paragraph 2, it must explicitly declare and elaborate on this in its non-financial statement [...]."

Translation by *Luca Kaller*, cf. *Weller/Hübner/Kaller*, Private International Law for Corporate Social Responsibility, in: *Schmidt-Kessel* (ed.), German National Reports on the 20th International Congress of Comparative Law, Tübingen 2018, p. 239 et seqq.

[56] *Hommelhoff*, Festschrift Bruno Kübler, 2015, p. 291 (296 et seq).

[57] See for sceptical assessments *Fleischer*, AG 2017, 509 (525).; Markus Krajewski/Miriam Saage-Maaß (eds), Die Durchsetzung menschenrechtlicher Sorgfaltspflichten von Unternehmen: zivilrechtliche Haftung und Berichterstattung als Steuerungsinstrumente (Baden-Baden: Nomos 2018).

[58] See for example: Novartis International AG, Code of Conduct, 1 February 2018, available at https://www.novartis.com/sites/www.novartis.com/files/code-of-conduct-english.pdf; Robert Bosch GmbH, Code of Business Conduct, 2019, available at https://assets.bosch.com/media/en/global/sustainability/strategy/vision_and_goals/bosch-code-of-business-conduct.pdf; Thyssen Krupp AG, Code of Conduct 2019, available at https://d13qmi8c46i38w.cloudfront.net/media/UCPthyssenkruppAG/assets.files/media/unternehmen/compliance/code-of-conduct/2019/po-co-cpl-0332-v03-en_code_of_conduct-neu_final.pdf; Deutsche Telekom AG, Code of Conduct, October 2018, available at https://www.telekom.com/de/investor-relations; Otto Group, Verhaltenskodex Dienstleistungen und Nicht-Handelsware, August 2012, available at https://www.ottogroup.com/media/docs/de/CoC/Otto_Group_CoC_Dienstleistungen_Non-HaWa_2012_2.pdf; Lidl, Code of Conduct (no date), available at https://www.lidl.de/de/asset/other/Code_of_Conduct_Version_1_0.pdf; Adidas, Code of conduct for suppliers: 'Workplace Standards', January 2016, available at https://www.adidas-group.com/media/filer_public/23/b4/23b41dce-85ba-45a7-b399-28f5835d326f/adidas_workplace_standards_2017_en.pdf

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

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".[60]

Contractual clauses which incorporate such codes are called 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 standards along the entire supply chain by obliging their contractual partners to enforce those standards vis-à-vis their subcontractors as well.

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.[61] Another example of co-regulation is the "International Code of Conduct for Private Security Service Providers", adopted in 2010 under the auspices of the Swiss government.[62] Or, oil, gas and mining corporations have, in collaboration with NGOs (including Human Rights Watch) and representatives of the United States and UK governments, adopted the "Voluntary Principles on Security and Human Rights" in 2000.[63] Corporate members include firms like BP, Chevron, Glencore, Shell and Texaco.

Business self-regulation of course first of all 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 is not sufficient.

D. Criminal Law Parameters

At the opposite end of the regulatory spectrum lies criminal law. The UN working group on the legally binding instrument, the OEIGWG, indeed calls for corporate criminal liability, while leaving the exact contours to the State parties. Art. 6(7) of the revised draft 2019 runs: "Subject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the following criminal

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[60] Standard, Mandatory, July 2018, pp. 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

[61] 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." The initial instruments were the Joint statement of the Government of Bangladesh, the EU and the ILO, 'Sustainability Compact for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh' of 8 July 2013, and the Accord on Fire and Building Safety in Bangladesh of 13 May 2013 which expired in 2018.

[62] International Code of Conduct Association, International Code of Conduct for Private Security Service Providers of 9 November 2010, available at http://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf.

[63] Available at http://www.voluntaryprinciples.org/wp-content/uploads/2019/12/TheVoluntaryPrinciples.pdf

offences: ...."[64] The draft provision then gives a list of international crimes ranging from genocide to human trafficking.

This cautious proposal ─ which seems to leave it to the State parties whether to activate criminal law (or whether to stick to civil law or administrative law) ─ accounts for the fact that corporate criminal responsibility is a sort of enigma in all jurisdictions. Corporations, as legal entities, cannot meaningfully mimic a human act, nor can they make a conscious choice that would establish *mens rea*, or intent, as traditionally conceptualized. Instead it is humans who make decisions and whose conduct, under specific circumstances, is attributed to a corporation and triggers blame.[65] Further hurdles exist in criminal law enforcement: Even where a corporate's "actus reus" and "mens rea" can be found, the only choice is to impose a fine. Then the question arises what sets the criminal punishment apart from torts.[66]

1. Corporate *Criminal Liability?*

As explained above (III.1.) corporations by means of their very corporate nature have been deemed technically unable to commit crimes. The mentioned principle *Societas Delinquere Non Potest,* dating back to Roman times,[67] is still present in criminal law doctrine in Continental Europe. It is based on the idea that only humans can be truly guilty of a crime because only they are capable of possessing the requisite *mens rea*. However, the endorsement of criminal responsibility for corporations, initially by common law jurisdictions, but more recently in many other national systems, illustrates what could be interpreted as an "attributive turn" also in criminal law, in parallel to the development in civil laws.[68] Hereby corporations are held accountable for crimes committed by their representatives or due to major deficiencies in the corporation in certain situations.[69] While France[70] and Switzerland[71] each enacted provisions on corporate criminal responsibility, Germany remains among the few hold-outs limiting criminal responsibility to natural persons. It does, however, allow for the imposition of financial sanctions on a corporation when one of its officers has acted criminally on behalf of the corporation.[72] By contrast, in common law countries like the United States of America,

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[64] Emphasis added.

[65] Vikramaditya S. Khanna, Corporate Criminal Liability: What Purpose Does it Serve? Harvard Law Review, Vol. 109, No. 7, p. 1477, 1996 , at 1478.

[66] Jennifer Arlen & Marcel Kahan, Corporate Governance Regulation through Nonprosecution, University of Chicago Law Review, 84 (2017), 323–387.

[67] Note 43.

[68] Supra III.1.

[69] Sabine Gless & Sarah Wood, General Report on Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues, in: Sabine Gless & Sylwia Emdin (eds.), Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues, International Review of Penal Law (RIDP) 93 (2017), 13-40, at 14 as well as references to country reports.

[70] Juliette Lelieur, French Report on Prosecuting Corporations for Violations of International Criminal Law, International Review of Penal Law (RIDP) 93 (2017), 179- 212, at 179-187 with explanations of Art. 121-2 of the French Code pénale and other relevant legislation.

[71] 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, International Review of Penal Law (RIDP) 93 (2017), 285-305, at 288-91.

[72] Martin Böse, German Report on Prosecuting Corporations for Violations of International Criminal Law, International Review of Penal Law (RIDP) 93 (2017), 211-233, at 211-3.

the legal basis for prosecuting and punishing corporations developed early and seems settled by now.

Overall, this attributive turn appears to be a partial one. Criminal liability for legal entities, for instance, has not been established in international criminal law[73] and the details of corporate criminal liability remain controversial, including issues of corporate groups as a single entity and supply chains as aggregates.[74] However, the idea of corporate impunity has come to an end and transnational human rights cases are being litigated in criminal courts.[75] Whether this punitive turn will revolutionize transnational prosecutions of human rights violations depends both on the basic idea of what constitutes a crime in substance and on jurisdictional issues. The punitive turn might prevail because the concept of guilt is departing from conventional (often religious) traditions and doctrines around moral capacity and seems to move toward a more pragmatic and functional approach to criminal law.[76] It is increasingly acknowledged that criminal prosecutions unfold a desirable stigmatizing effect even when a legal, not a natural person is prosecuted. Others however opine that consumers, not prosecutors, should hold corporations accountable with their wallets in order to "punish" those brands that do not comply with the required ethical standards and responsibility and that therefore the criminalisation of corporations is not the proper way to go.

2. Criminal Prosecution

Many lawmakers have embraced the attributive turn by enacting laws that hold corporations liable for certain actions by their employees, based on the assumption that gross corporate disobedience of the law paves the way for such conduct.[77] However, the attributive turn translates quite differently 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.

Where criminal prosecution ought to become part of a transnational enforcement of human rights, as the cited Art. 6(7) of the OEIGWG's Revised Draft of a legally binding instrument of 2019 demands, differences in national legislation cause problems. The Revised Draft asks States Parties to "afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial and other proceedings" (Art. 10(1)). But here challenges may arise e.g. with regard to the double criminality requirement, because mutual legal assistance in criminal matters requires an incrimination in

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[73] See Art. 25 (1) Rome Statute; see for further information Kenneth Gallant, Corporate Criminal Responsibility and Human Rights Violations: Jurisdiction and Reparations, International Review of Penal Law 93 (2017), 47-78, at 55; for a historical perspective see Michael J. Kelly, Prosecuting Corporations for Genocide (Oxford: Oxford University Press2016), 31-2.

[74] See Gallant (note 73) at 67-8; Samuel W. Buell, The Responsibility Gap in Corporate Crime, 11 Crim Law and Philos (2018) 12:471–491, at 473; for a detailed discussion from a Swiss perspective see: Katia Villard, LA compétence du juge Pénal suisse à l'égard de l'infraction reprochée à l'enterprise. in International law (Schulthess, Genève 2017) 333-405.

[75] See for examples below sections V.A.2. and 3.

[76] cf. Thomas Weigend, Societas Delinquere Non Potest?: A German Perspective, Journal of International Criminal Justice 6 (2008), 927-945; Elena Maculan and Alicia Gil, The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts, Oxford Journal of Legal Studies (2020), 1-26, at 3.

[77] John C. Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, *Michigan Law Review* 793 (1981), pp. 386-459; Albert Alschuler, "Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand" 71 Boston University Law Review 307 (1991), at 311.

the requesting and the requested country and criminal courts will hand out punishment only if the law of the country where the crime took place provides for the criminal liability of legal persons. As the Revised Draft acknowledges and indeed presupposes, criminal prosecution regularly takes place at the domestic level and is traditionally considered an internal matter, particularly given that criminal justice systems vary widely in terms of substance and procedure. In the past, States largely felt free to use their right to punish, or *ius puniendi*, how they saw fit, including deciding whether and how to establish corporate criminal liability, which has resulted in a variety of approaches.[78] The various lawmakers have solved the problems of establishing the equivalents of an *actus reus* and a *mens rea* for corporations or of defining parameters for jurisdiction in quite a different way.

France, Switzerland and Germany illustrate the different legal approaches providing the range from a – theoretically – well established complex concept of corporate criminal liability to the rejection of any criminal prosecution (instead aiming at administrative procedures).

a) From Shielding CEOs to Due Diligence ("Devoir de Vigilance"): France

France created criminal liability for legal persons in the 1990s. It appears that at that time lawmakers sought to shield CEOs from liability for offenses committed by other employees in the company. Holding CEOs individually liable was considered contrary to the principle of personal liability and inadequate in an industrial society where many employees were taking risks while CEOs were not acting in their own interests but rather for the company's benefit.[79] 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*"[80] and, therefore, the human representatives are not criminally liable.

French law, like any other, raises numerous questions of how to attribute responsibility in a concrete situation, namely who represents a corporation and what acts trigger corporate (rather than personal) liability. These issues spark deeper questions around intermediated criminal blame (for a cooperation that cannot act nor possess criminal intent under the law). This debate is crucial to French transnational human rights litigation in a number of ways. For 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 (for instance, where it is chaired by another company), criminal responsibility is not excluded.[81] Over the years, the French courts interpreted who is a "representative"[82] narrowly and

[78] Sabine Gless & Sarah Wood (note 69), at 14 with references to country reports.

[79] Lelieur (note 70), at 180.

[80] The provision first covered only an enumerative list of offences, but was broadened, giving up the "speciality principle" in 2004, see Section 54 of Law No 2004-204 of 9 March 2004; Marie-Elisabeth Cartier, 'De la suppression du principe de spécialité de la responsabilité pénale des personnes morales. Libres propos', in *Mélanges Bouloc* (Dalloz 2007) 97-126.

[81] Lelieur (note 70), at 184.

[82] Cour d'appel de Paris, 7 January 2015, 13e chambre correctionnelle, n° 12/08695 (bribery case "Safran"), obs. Solène Clément, AJ Pénal (2017) 252-253.

have required that the prosecution prove the representative committed a particular offense.[83] This significantly hampers prosecution, particularly where the alleged crime took place abroad and law enforcement is unable to access the information necessary to prove a particular crime was committed by the corporate representative. However, public debate over "conformité and responsabilité sociale de l'entreprise" (RSE) gained significance in France over the last ten years, especially following the 2013 collapse of the Rana Plaza building in which French brands were produced.

The already mentioned French *Loi de Vigilance* of 2017 also covers criminal offences.[84] 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.[85]

b) A Two-Tier Model for Criminalizing Corporate Disorganization: Switzerland

Switzerland has codified corporate criminal responsibility in its Penal Code (CH-PC).The Code contains two models of criminalizing corporate hands-off policies that purposely create disorganization and thus provide fertile grounds for staff's wrongdoing.[86] 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 no specific individual could be named as the alleged culprit due to disorganization within the corporation. This form of corporate criminal responsibility requires that a crime was actually committed, but that *"it is not possible to attribute this act to any specific natural person due to the 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.[87]

Second, a broader due diligence approach is foreseen in Art. 102(2) CH-PC. This rather narrow provision establishes "independent" or "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. [88]

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[83] Cass. crim., 11 avr. 2012, n° 10-86.974, Bull. crim. n° 94 (commentaries: J.-H. Robert, La semaine juridique, Edition Générale (2012) 740; Jean-Christophe Saint-Pau, Recueil Dalloz (2012) 1381; Emmanuel Dreyer, Gazette du Palais (27 July 2012) 19; Marc Segonds, Droit pénal (2012) chron. 9, n° 2; Yves Mayaud, Revue de science criminelle (2012) 375; Bertrand de Lamy, Revue pénitentiaire (2012) 405).

[84] Note 48. See on the debate in the course of the legislation on criminal liability along the supply chain below text with note 173.

[85] French Conseil constitutionnel, decision no. 2017-750 DC, of 23 March 2017.

[86] Swiss Penal Code (*Schweizerisches Strafgesetzbuch*) of 21 December 1937 (status as of 1 February 2020), AS 54 757, 57 1328 and BS 3 203.

[87] Mark Pieth, 'Plädoyer für die Reform der strafrechtlichen Unternehmenshaftung' [2018] Jusletter 19 February.

[88] See below for the *Argor-Heraeus Case*.

The Swiss law demonstrates how the function of criminal law can be broadened to establish corporate criminal responsibility.[89] However, these new forms of criminalisation have changed very little in practice,[90] and especially not in transnational human rights cases.[91] In recent years it has become clear that the Swiss two-pronged approach unduly restricts criminal liability to particular offences where Switzerland has committed itself to tackle corporate liability, but leaves a huge gap in the human rights area.[92]

This is illustrated by the *Argor-Heraeus* case which highlights the pitfalls of the Swiss "independent corporate criminal liability" structure (although the investigation was halted for other reasons). In this case, 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 organization in East Congo known to be involved in genocide. The authorities investigated the company's representatives for participating in plundering as a method of warfare[93] but the case was closed for lack of *mens rea*.[94] 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 para 2 CH-PC), proceedings would never have been opened.[95] Therefore Swiss scholars argue that the Swiss concept of corporate crime is unduly restrictive, because it does not apply to many human rights violations with corporate implications. [96]

c) No Corporate Criminal Liability: Germany

In contrast to the previous examples, the German Penal Code (GE-PC) makes no provision for corporate criminal prosecution.[97] The only option for corporate liability is via fines allocated through administrative proceedings.[98] The legal basis for this *Verbandsgeldbuße* is the

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[89] Cf. Mark Pieth, *Wirtschaftsstrafrecht* (Basel 2016), 57 et seq.

[90] Günter Stratenwerth, Strafrechtliche Unternehmenshaftung? in Aebersold et al. (eds.), Festschrift für Rudolf Schmitt zum 70. Geburtstag, at 668 et seq.

[91] Pieth, Plädoyer (note 87).

[92] See Mark Pieth, Die strafrechtliche Haftung für Menschenrechtsverletzungen im Ausland, AJP 2017, 1005 at 1014. The Swiss *'Responsible Business Initiative'* (text with note 53) does not ask for changes in criminal law. See for a detailed discussion Pieth, Swiss Report (note 71), at 302.

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

[94] 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 Oct. 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 Oct. 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).

[95] Art. 305bis and Art. 102 section 2 CH-PC.

[96] Mark Pieth, 'Anwendungsprobleme des Verbandsstrafrechts in Theorie und Praxis', [2015] 6 Kölner Schrift zum Wirtschaftsrecht 223, 229.

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

[98] Böse, German Report (note 72), at 211-2.

German Regulatory Offenses Act of 1968 (GE-ROA).[99] Under § 30(1) GE-ROA, an administrative fine may be imposed on a legal person (i.e. a company) where an organ, a representative, or a person with functions of control within the legal person has committed a criminal or a regulatory offense.[100] The decision to limit liability to administrative proceedings has enormous consequences, notably because extraterritorial prosecution is not available for regulatory offenses.

d) Endorsing Corporate Criminal Responsibility (at a Micro Level): United States

The concept of corporate criminal liability has been recognized in the US in the last century:[101] In principle, 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.[102] Where European jurisdictions struggled to fit corporate criminal responsibility within their doctrinal framework, US law addresses such problems pragmatically. A prime example for this is the issue of *mens rea*. The requisite mental state of a corporation is based on the mental state of the respective individual employees or agents acting for the corporation. If no corporate employee or agent possesses the requisite mental state, however, criminal liability may be imposed based on the collective knowledge of the corporate employees or agents.[103]

However, actual enforcement of corporate criminal responsibility, especially for corporate conduct abroad, is subject to broad discretionary powers on the side of the government. Moreover, jurisdictional issues arise, as it must be established that a particular provision has extraterritorial effect.[104] The latter issue has spurred controversy over the meaning of vague legal concepts (e.g. who qualifies as a "person" under a criminal statute[105]). For example, under the US-American Victims of Trafficking and Violence Protection Act of 2000

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[99] German Act on Regulatory Offences (*Ordnungswidrigkeitengesetz)* in the version published on 19 February 1987 (Federal Law Gazette [*Bundesgesetzblatt*, BGBl. 1987 I p. 602), last amended by Article 5 para 15 of the Act of 21 June 2019 (BGBl. 2019 I, p. 846).

[100] Klaus Rogall, '§ 30' in Lothar Senge (ed), *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten* (4th edn, C.H. Beck 2014) para 8.

[101] For a more detailed discussion on criticism of corporate criminal responsibility see David. M. Uhlmann, The Pendulum Swings: Reconsidering Corporate Criminal Prosecution, UC Davis L Rev 49 (2016) 1235, at 1240-58.

[102] 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. For a description of the case, see Sara Sun Beale, 'The Development and Evolution of the US Law of Corporate Criminal Liability and the Yates Memo' (2016) 46 Stetson L Rev 41, 43-49. See, e.g., *United States v Potter*, 463 F.3d 9, 25 (1st Cir. 2006). The employee or agent acts for the benefit of the corporation even if the employee or agent acts for her own benefit, as long as the employee or agent acts at least in part to benefit the corporation. *United States v Automated Med. Labs, Inc.*, 770 F.2d 399, 407 (4th Cir. 1985).

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

[104] Sara Beale, US Report on Prosecuting Corporations for Violations of International Criminal Law, International Review of Penal Law 93 (2017), 307-343, at 317-325.

[105] See e.g. debate in the US after *Jesner v Arab Bank, PLC*, 138 S.Ct. 1386, 1400 (U.S. 2018); for a more detailed discussion regarding issues of the Trafficking Victim Protection Act: Sara Sun Beale, The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?, 50 *Case Western Reserve Journal of International Law* 17-47 (2018) at 37.

(TVPA), the *beneficiary* of illegal action within a supply chain must be determined (see *Doe v Nestlé SA*[106]) despite involvement of many different businesses and numerous transactions with various intermediaries.[107] On the one hand, allowing producers to insulate themselves from liability by introducing intermediaries under the doctrine of *novus actus interveniens* would undercut the goals of human rights law. On the other hand, an unlimited liability would result in overly broad prosecution (i.e. punishing the innocent to deter crime), which is not an acceptable policy in any rational criminal justice system.[108]

To conclude, 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 economic activity are quite bleak. We therefore need to find new ways for responding to abuses.

III. SHOULD INTERNATIONAL HUMAN RIGHTS BE ACTIVATED AS DIRECT ENTITLEMENTS AGAINST BUSINESS ACTORS?

An obvious response might be to consider transnational companies as direct addressees of human rights obligations, besides the traditional duty bearers, the States.[109] Recent decisions (for example the Canadian Supreme Court's *Nevsun* judgment[110]) and ICSID awards (notably *Urbaser*),[111] have been going in that direction, as cited. In this section, we caution against that approach and rather endorse the 'indirect' strategy as espoused by the UN working group and its draft of a legally binding instrument.

A. Current trends towards direct horizontal effects of fundamental rights

In the constitutional law of various States, a new trend is to extend obligations flowing from human rights as enshrined in domestic constitutions, to business actors. 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 in-

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[106] *Doe I v Nestle USA*, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014), *reh's denied*, 788 F.3d 946, 946 (9th Cir. 2015) (affirming earlier circuit precedent finding no legitimate reason for a complete bar on corporate liability under the ATS).

[107] Sara Sun Beale, The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?, 50 *Case Western Reserve Journal of International Law* 17-47 (2018) at 32.

[108] Samuel W. Buell, The Responsibility Gap in Corporate Crime, 11 Crim Law and Philos (2018) 471–491, at 485.

[109] See for this approach in scholarship, e.g. Nicolás Carrillo-Santarelli, A Defence of Direct International Human Rights Obligations of (All) Corporations, in: Jernej Letnar Černič and Nicolás Carrillo-Santarelli (eds), The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty (Cambridge; Antwerp; Portland: Intersentia 2018), 33-61.

[110] See notes 1, 2 and 3.

[111] Note 29.

creasingly deploy a "direct" horizontal effect, a direct "*Drittwirkung*".[112] For example, even the German Federal Constitutional, a firm opponent of "direct" horizontal effects of fundamental rights, in recent times seems to display more sympathy for direct obligations of social media platform owners. In a pending case, the question is whether and under which conditions the private actor may be directly bound by the constitutional guarantee of equal treatment (Art. 3(1) of the German Basic Law; *Grundgesetz*, GG). The Court said that this question is unresolved but highlighted the considerable market power of a privately run social media platform. Relevant factors for deciding on a direct effect of Art. 3(1) GG are the dominance on the market, the orientation of the platform, the degree of dependency of the users on it and interests of the provider and of third parties.[113]

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 EU Fundamental Rights Charter, can under specific conditions be held against 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.[114] Notably the protections against discrimination are spelled out in secondary 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 ECJ balanced an employee's right of free exercise of religion under Art. 9 ECHR against her employer's right to conduct a business under Art. 16 ECFR.[115] The same logic is applied to the European fundamental freedoms as enshrined in the Treaties.[116] In other decisions, the ECJ held that the fundamental Charter rights must be given more specific expression by provisions of EU law or national law to be opposable to the private actor.[117]

With regard to fundamental rights under the European Convention on Human Rights (ECHR), the trend is ambiguous as well. In 1998 still, the 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 between the two" and that "the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals".[118] However, this case had no follow-up. The Court's newer approach is not to bind the

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[112] Katharine G. Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012), 298.

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

[114] See, e.g., ECJ, Case C-414/16, Judgment of the Court (Grand Chamber) of 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (ECLI:EU:C:2018:257), esp. para 49, on the fundamental right to effective judicial protection (Art. 47 ECFR).

[115] ECJ, Case C-157/15, Judgment of the Court (Grand Chamber) of 14 March 2017, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, ECLI:EU:C:2017:203, notably paras 38 and 39.

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

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

[118] ECtHR, *Costello-Roberts v UK*, app. no. 13134/87 of 25 March 1993), para 27.

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.[119]

Given that international human rights norms fulfil the same constitutional function as domestic fundamental rights, the ECHR guarantees and the EU's fundamental rights norms and fundamental freedoms, there is a strong temptation to impose international human rights obligations on business actors, too. It is not out of the question that further arbitral, judicial, or committee practice will build on the trend set by *Urbaser*, *Nevsun* and other cases.

B. Policy arguments in favour of direct human rights obligations of business

Several policy arguments can be made in favour of an imposition of human 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.[120] Or the assumption is that, especially in an age of global supply chains, business actors exercise 'corporate sovereignty'[121] which must be controlled and reigned 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. Human rights were invented as rights against 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."[122]

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 is not tenable if it ever was. Business enterprises may abuse human rights in many different ways, in virtue of the labour conditions, in connection with the extraction of commodities, by buying from abusive suppliers, or finally by ben-

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[119] ECtHR, *Storck v Germany,* app. no 61603/00 of 16 June 2005, paras. 100-108.

[120] David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', (2003) 97 *American Journal of International Law*, 901–922, 901: 'The creators of this ever-larger web of human rights obligations, however, failed to pay sufficient attention to some of the most powerful non-state actors in the world, that is, transnational corporations and other business enterprises. *With power should come responsibility*, and international human rights law needs to focus adequately on these extremely *potent* international non-state actors.' (emphasis added).

[121] Joshua Barkan, *Corporate Sovereignty: Law and Government Under Capitalism* (Minneapolis: University of Minnesota Press, 2013); Daniel J.H. Greenwood, 'The Semi-Sovereign Corporation', in James Charles Smith (ed.), *Property and Sovereignty: Legal and Cultural Perspectives* (Farnham: Ashgate, 2013), pp. 267–294.

[122] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 133.

efitting from infrastructure that States have created with help of practices that violate human rights (such as forced labour). It is therefore imperative to broaden business accountability somehow.[123]

It is true that 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).[124]

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. They specifically seek out host States whose national law offers cheap conditions of production. 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 social responsibility.

C. Policy Considerations against direct human rights obligations of business actors

Corporate social responsibility should however not translate into a simple imposition of human rights obligations on transnationally operating enterprises. It is therefore good that the UN Working Group's project of a legally binding instrument steers far from direct international law-based human rights obligations of business enterprises.

In our view, the main problem here is not the artificial legal personality of corporations as such. Despite some recent hick-ups such as the *Jesner* decision by the US Supreme Court,[125] 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. This is why, unjeopardised by their artificial nature, corporations, generally speaking, enjoy (some) fundamental rights. It would seem ill-founded and indeed bigoted to make corporate legal personality become an issue only because now, rather than profiting from human rights, corporations are held accountable to them. The stronger theoretical objection against corporate liability for human rights violations thus has little to do with their corporate, but everything to do with their private nature. If, from a traditional point of view, human rights are there to protect private actors of whatever nature against States, it is not immediately evident how they should also place *burdens* on one private actor trespassing against another.

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[123] Cf. Janne Mende, Die Entwicklung unternehmerischer Verantwortung für Menschenrechte: Privatisierung oder Diffusion? Politische Vierteljahresschrift, Sonderheft 52 (2017), 409-435, diagnosing a productive complementarity of governmental and private accountability, bridging the private and the public sphere, and thereby transforming and spreading the concept of accountability itself (esp. at 428-430).

[124] Thorsten Kingreen, Das Verfassungsrecht der Zwischenschicht: Die juristische Person zwischen grundrechtsgeschützter Freiheit und grundrechtsgebundener Macht, Jahrbuch des öffentlichen Rechts der Gegenwart 65 (2017), 6-39.

[125] Note 45.

First, human rights do not fit, because they lack the fine-tuned balancing against property rights, as just discussed. A related problem is the difficulty of identifying and circumscribing a *sphere* of obligations of a concrete business actor which would be functionally equivalent to the sphere of jurisdiction of a State in which the human rights obligations apply. The concept of a 'sphere of influence' of a business actor[126] mostly suggested as a functional correspondence to 'jurisdiction' appears too vague and broad. Also, the public interest-grounds which normally justify the curtailment of human rights cannot be transferred to analyse the encroachments on human rights performed by business in its private, profit-oriented interest.

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 would have to be enforceable by international bodies. But the existing bodies for the protection of human rights are not suited for this purpose.

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.[127]

To conclude, simply expanding the binding nature of State-tailored human rights into the sphere of transnational business is not normatively desirable without modifications.[128] The main problem is the indeterminacy of human rights. The necessarily broad human rights principles 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* does not apply outside the realm of criminal law, the overarching principle of legality pervades all branches of law. The principle of legality shields private actors from obligations without a sufficiently clear and precise legal basis, because anything else would impinge on the liberty they enjoy under the rule of law. The nitty-gritty details of civil liability, such as the measure

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[126] See, e.g. UN Committee on Economic, Social and Cultural Rights (CESCR), *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), para 5. 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).

[127] See in this sense also John Ruggie, 'Business and Human Rights' (2007) 101 *American Journal of International Law*, 819–840, 826.

[128] See already UN Commission on Human Rights, Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, 15 February 2005, UN Doc E/CN.4/2005/91, para 27: "In considering the responsibilities of business with regard to human rights, it is important to reiterate that States are the primary duty bearers of human rights. While business can affect the enjoyment of human rights significantly, business plays a distinct role in society, holds different objectives, and influences human rights differently to States. The responsibilities of States cannot therefore simply be transferred to business; the responsibilities of the latter must be defined separately, in proportion to its nature and activities." See out of the recent case law, e.g., District Court of the Hague, *Akpan:* Applying Nigerian tort law, the District Court of the Hague ordered a Nigerian subsidiary of Royal Dutch Shell, the Shell Petroleum Development Company of Nigeria Ltd., to compensate the local Nigerian farmer and fisherman Akpan for the damage caused as a result of third-party sabotage of an exploration well operated by the Nigerian subsidiary SPDC. SPDC could only be blamed for negligence: "Although this is also reprehensible and constitutes a tort of negligence in this specific case, the District Court is of the opinion that in so-called horizontal relationships like the one at issue, this cannot be designated as an infringement of a human right." (District Court of the Hague, *Akpan v Royal Dutch Shell PLC*, Judgement of 30 January 2013 (Case No. C/09/337050/HA ZA 09-1580), para 4.56).

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.[129] Therefore, international human rights principles need to be complemented by private law and criminal law in order to provide operative causes of action against international companies. The OEIGWG draft therefore goes in the right direction, but the question is how to operationalise it. In the next sections, we will canvass the way forward.

IV LINKING INTERNATIONAL LAW TO DOMESTIC PRIVATE LAW

In this section we explain how the legally binding instrument can be applied concretely by harnessing domestic private law. The 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.

A. International Jurisdiction

The key set of legal rules bridging the gap between international legal standards and national enforcement are the rules on international jurisdiction. These are also the most important international part of the law on civil procedure. From an individual victim's perspectives, 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.

In Germany and in the EU as a whole, with regard to claims against companies, the Brussels I bis-Regulation[130] determines whether a court system enjoys international jurisdiction or not. If, e.g., the defendant company has its statutory seat, central administration or principal place of business in Germany, according to Art. 4, 63 Brussels I bis-Regulation, German courts enjoy general jurisdiction over that company, no matter where in the world an alleged human rights violation has been committed.

Plus, when suing corporate groups or, more generally speaking, perpetrators acting in concert, joinder jurisdiction under Art. 8 No 1 Brussels I bis-Regulation allows to use one company as a jurisdictional anchor for the others. Alternatively, victims can (under Art. 7 s. 2 Brussels I bis-Regulation) bring their suits, both, before the courts where alleged tortious action has been taken and where harm from such action has been suffered.[131] This special forum is available only inside the EU. Still, one can think of cases in which the availability of a range of venues with differing procedural rules gives victims an important additional option to seek relief.

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[129] *Weller/Thomale*, ZGR 2017, 509, 515 et seq.

[130] Council Regulation (EU) No. 1215/2012 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 Dec. 2012, pp. 1-32).

[131] See ECJ, Case 21/76, *Mines de Potasse d'Alsace,* ECR 1976 I-1732-1749.

B. Choice of Law[132]

1. Applicable Tort Law (Rome II-Regulation)

Human Rights violations in general constitute tortious acts. For such acts, the courts of the Member States of the European Union determine the applicable law pursuant to the Rome II-Regulation.[133]

For environmental torts, the Rome II Regulation contains a specific rule in Art. 7.[134] If corporate activity has led to an environmental damage, 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.

For all other torts, Art. 4 (1) Rome II-Regulation[135] determines that, in principle, the law of the country in which the damage occurs is applicable (*lex loci damni*). In contrast, where the *event* giving rise to the damage occurred takes place is normally irrelevant.[136] The application of the *lex loci damni* protects the victim's interest in claiming compensation according to the predictable law of his or her surroundings.[137]

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.

Two exceptions apply to the rule of *lex loci damni* according to Art. 4 (1): Firstly, if the person inflicting the harm and the person harmed have their habitual residence in the same country, the law of that country will be applicable (Art. 4 (2) Rome II Regulation). Secondly, if there is a *manifestly closer connection* with a country than that indicated by para. 1 or para. 2, the law of that other country will be applicable (Art. 4 (3) Rome II Regulation). These two exceptions cater for overriding interest in applying those other laws.

2. Applicable Law to Human Rights Violations

We argue that victims of human rights violations should be free to choose the tort law applicable to their case between 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). This right to choose can be justified relying on Art. 4 (3) Rome II Regulation.

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[132] Cf. for the following Weller/Thomale, ZGR 2017, 509 et seq. and Weller/Hübner/Kaller, Private International Law for Corporate Social Responsibility, in: Schmidt-Kessel (ed.), German National Reports on the 20th International Congress of Comparative Law, Tübingen 2018, p. 239 et seq.

133 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, of 31 July 2007, pp. 40-49).

134 Article 7 Rome II Regulation (note 133) (Environmental damage).

[135] Article 4 (1) Rome II Regulation (note 133).

[136] Cf. Recital no. 18 to the Rome II Regulation (note 133).

[137] Cf. the German Federal Court in Civil Matters (*Bundesgerichtshof*), judgment of 3 March 1983, VI ZR 116/81.

This view pays 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, if the parent company does not take the necessary preventive organizational 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 argument for the giving the victim the choice is obvious. The current connecting factors in the Rome II-Regulation were established *to protect* the victim. However, it may, in some cases, turn out to be more favourable for the victim to apply the law of the country of the tortious event. Therefore the victim must be allowed to choose as a connecting factor either the tortious event (omission) or the damage as materialised.

C. National Tort Law: Liability Rules[138]

In Germany, victims of human rights violations may claim reparation or other compensation from the tortfeasor pursuant to Section 823 (1) of the German Civil Code[139]. When the tort is committed by a company, the legal person itself is liable.[140] Unlike contractual duties that are owed only to the contracting parties, tortious duties are owed to everyone (*neminem laedere*-principle). Liability under German tort law arises under the following conditions:

1. Protected Rights

First, only *erga* omnes rights are protected under Section 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.[141]

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

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[138] Cf. for the following *Weller/Thomale*, ZGR 2017, 509 et seqq.; *Weller/Hübner/Kaller*, Private International Law for Corporate Social Responsibility, in: *Schmidt-Kessel* (ed.), German National Reports on the 20th International Congress of Comparative Law, Tübingen 2018, p. 239 et seqq.

[139] 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).

[140] Liable under the law of tort is the company itself, not its managing body, cf. MünchKommBGB/*Wagner*, 6th ed. 2013, § 823, para 85.

[141] *Kötz/Wagner*, Deliktsrecht, 12th ed. 2013, para 94 et seq; *Weller*, FS Hoffmann-Becking, 2013, pp. 1341 et seq.

2. Breach of a tortious duty of care

Second, liability under Section 823 (1) of the Civil Code requires a *breach of duty*. Within the law on contracts, the duties of each party are determined, defined and limited by the agreement. Such contractual determination is not possible within the law of tort. Nor is there a general duty to protect other people from harm.[142] What is required is a *breach of a tortious duty of care* (*Verkehrspflicht*).

Such tortious duties of care are incumbent upon those who create risks, dangers or hazards; the duties then oblige to take reasonable measures to protect third parties from harm.[143] 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 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[144]: Tortious liability of the parent company for actions of subsidiary companies shall hereafter be barred by the corporate veil (*konzernrechtliches Trennungsprinzip*).[145] The same is considered all the more appropriate for independent legal entities like subcontractors or suppliers.

However, this view proves unconvincing. First, one may find a company liable across the value chain if the rationale of the English case of *Chandler v Cape*[146] were applied in Germany. In that case, a duty of care resulted from an assumption of responsibility of the company vis-à-vis the employees of its subsidiary.

Alternatively, German courts could generally extend the tortious duty of care of the parent company to its subsidiaries and subcontractors whenever the parent company has "decisive influence" on the management, especially within the risky business of those legal entities.[147] The parameters of what constitutes a "decisive influence" would however have to be fleshed out.

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[142] Staudinger/*Hager*, BGB, 2009, § 823, E 25.

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

[144] The question of duties of care applying across legal subjects must be distinguished from the cases in which someone has already created a danger, or had delegated its control onto 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 onto a third party without ensuring that the third party will take the appropriate measures to prevent harm to others. Cf. Prütting/Wegen/Weinreich/Schaub, BGB, 9th ed. 2014, § 823, para 129; Jauernig/*Teichmann*, 15th ed. 2014, § 823, para 33, 36.

[145] Cf. MünchKommAktG/*Heider*, 3rd ed. 2008, § 1, para 46; BeckOGK/*Wilhelmi*, GmbHG, as of 15 Aug. 2015, § 13, para 2 et seq; *Mühlhens*, Der sogenannte Haftungsdurchgriff im deutschen und englischen Recht, 2006, p. 23 et seq.; but see *Weller/Thomale*, ZGR 2017, 509, 522 et seq.

[146] *Chandler v Cape* [2016] EWCA Civ 525. The scope of this case was, however, subsequently limited in *Thompson v The Renwick Group* [2014] P.I.Q.R P18.

[147] In more detail *Weller/Thomale*, ZGR 2017, 509, 520 et seq.

3. *Standard of the Duty of Care*

Yet another question associated with establishing tortious liability in international cases is whether *duties of care apply across borders* and, if they do, which standard – domestic or foreign – should govern the legal entity (subsidiary or subcontractor) doing business abroad. Under Art. 17 Rome II Regulation, the standard applicable at the place of the harmful act is determinative.[148] However, in the case of human rights standards – which seek to apply universally (leaving only a circumscribed margin of appreciation to countries) – this appears problematic. We therefore argue for a human rights standard with worldwide similar minimum requirements concerning the tortious duty of care of companies.

D. *Recent Litigation*

1. *The KiK Case*

One of the most notable recent CSR cases is one against the German textile discounter KiK before the regional court Dortmund/Germany.[149] In this case, surviving victims and relatives of workers killed in the devastating fire in a textile factory in Karachi, Pakistan, in 2012 claimed reparations from KiK. KiK neither runs the factory itself nor does it own a share in the subcontracting company (Ali Enterprises Limited/Pakistan) that ran the factory. However, the claimants argued that KiK, being the main customer of Ali Enterprises, was able to notably influence the business practices and the production process and was, accordingly, under an obligation to ensure the safety of the employees of Ali Enterprises. According to the claimants, KiK breached this obligation.

In the meantime, the case has been dismissed. However, the regional court Dortmund granted legal aid to the claimants, implying some prima facie merits to the actions brought forward. Eventually, the technicality of prescription brought the landmark case to an unfortunate end: Plaintiffs and the defendant had concluded a non-prescription agreement, which, due to the applicability of Pakistani law, had been declared invalid by the court, reactivating the defendant's *exceptio prescriptionis*.

2. *The RWE Case*

Another notable case is pending before the higher regional court Hamm/Germany at the appeal stage.[150] A Peruvian farmer living beneath a glacier next to the city Huaraz asserts that the German-based energy company RWE is, alongside many others, responsible for global warming. Because of the glacial melting it causes, the glacier lake just above the city of Huaraz is about to overflow and flood Huaraz. It threatens the people living there and may destroy their livelihoods. The claimant, therefore, demands that RWE pays for measures

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[148] Cf. generally German Federal Court in Civil Matters, judgment of 2 October 2012,VI ZR 311/11, BGHZ 195, 30; *Jauernig/Teichmann*, BGB, 15th ed. 2014, § 823, para 36; *Kötz/Wagner*, Deliktsrecht, 12th ed. 2013, para 183 et seq. With regard to duties of care of tour operators, cf. MünchKommBGB/*Tonner*, 6th ed. 2012, § 651f, para 21.

[149] *Landgericht* (LG) Dortmund – Az. 7 O 95/15.

[150] *Oberlandesgericht* (OLG) Hamm, *Lliuya v Rheinisch-Westfälisches Elektrizitätswerk* (RWE), - I-5 U 15/17. The court of first instance (*Landgericht*, LG) had rejected the claim as partly inadmissible and partly on the merits since the claimant was not able to establish a sufficient causal relationship between the defendant's conduct (production of greenhouse gases) and the potential risk of flooding Huaraz (LG Essen (2. Zivilkammer), judgment of 15 Dec. 2016, 2 O 285/15, BeckRS 2016, 114262).

needed to protect the city, the contribution being proportionate to RWE's share in causing global warming. The OLG court found the case to be admissible and will proceed to take evidence.[151]

V. LINKING INTERNATIONAL LAW TO DOMESTIC CRIMINAL LAW

The OEIGWG's Revised Draft of a Legally Binding Instrument of 2019 obliges State Parties, as already mentioned, to activate their domestic criminal law (Art. 6(7)). The core question then becomes whether international human rights, or the Ruggie Principles, or the potential legally binding instrument itself establish a relevant "guarantor's obligation" whose violation may lead to criminal liability. Here two issues surface routinely: the need to bridge gaps in criminal liability within a supply chain (section 1.), and, jurisdictional problems (section 2.). As Germany does not recognize corporate *criminal* liability, Switzerland and France will serve as two prime examples.

A. Bridging Gaps in Criminal Liability within a Supply Chain

In order to bridge gaps in criminal liability around alleged violations of human rights abroad linked to investments or business operations by domestic companies, criminal justice systems must address numerous problems resulting from the disparities in domestic corporate criminal liability. One question is how to establish criminal responsibility in a corporate group or along a supply chain that, as an entity, has not been incorporated into a legal person.[152] It is unclear whether any legal concept exists in criminal law that can both capture penal liability and conceptualize guilt for a concerted action between cooperating entities that are *not* incorporated as a legal person.[153] This is the legal lacuna the above-mentioned French *Loi de Vigilance* and the Swiss *Konzernverantwortungsinitiative* seek to address.

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

The most promising legal concept for closing the criminal liability gap in various criminal justice systems is the concept of a breach of criminal law rules by omission (commission-by-omission). According to an old (and controversial) idea, 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.[154]

The question thus arises whether a criminal-law-type duty of care of a guarantor could arise from the EU Corporate Social Responsibility Directive of 2014[155] or from the German "*CSR-Richtlinie-Umsetzungsgesetz*"[156] (as part of the specific administrative prosecution) or

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[151] OLG Hamm, - I-5 U 15/17-, order of 30 November 2017.

[152] See however Gallant (note 73) at 67-8

[153] Similar issues arise when conduct connected to internet platforms gives rise to suspicion of crimes.

[154] Arguing for a broad approach in US law: Todd S. Aagaard, A Fresh Look at the Responsible Relation Doctrine, 96 J. CRIM. LAW & CRIMINOLOGY 1245 (2006), at 1281–7, see however Samuel W. Buell, The Responsibility Gap in Corporate Crime, 11 Crim Law and Philos (2018) 471–491, at 476-7.

[155] Note 37.

[156] Statutory Act of 11 April, Federal Law Gazette (*Bundesgesetzblatt*) I p. 802; see also draft of the government, Bundestags-Druckssache 18/9982 of 17 October 2016.

the French *Loi de Vigilance*[157] or – possibly in the future - the Swiss constitution as amended by the *Konzernverantwortungsinitiative*.[158] If these laws do create criminal law type duties of care, whether these apply across (national and corporate) borders, eventually initiating a new attributive turn. The consequence would be that one company held responsible for wrongdoing committed by someone else in the supply chain. This would then circumvent the traditional corporate group immunity. The liability thus created would be a "vicarious liability" or rather a liability for not properly reacting to someone else's acts. The following discussion highlights the requirements for a duty to act (guarantee'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 human rights violations. It is however difficult to establish such a duty (see supra B.IV). Additionally, we need to proceed with caution in order to garner support for the establishment of a threat of criminal punishment based on an omission to act. Care must be taken to meet the criminal justice theories of retribution and utilitarianism in each jurisdiction. It might also be feared that criminal law will lose its weight and authority if corporations are prosecuted but cannot be found guilty because of evidentiary issues in transnational cases. A similar problem would emerge if companies were punished for the crimes of others ("*Lehre vom Regressverbot*" or "doctrine of novus actus interveniens"). The difficulties in bridging gaps in criminal liability along a supply chain with structures that have the potential to diffuse responsibility for violations of human rights can be illustrated by recent high-profile criminal cases in France and Switzerland.

2. The Lafarge Case (Syria/France)

The *Lafarge* case demonstrates the problem of "business logic" and of responsibility in a corporate group. Lafarge officials used intermediaries to negotiate arrangements with local armed groups in an emerging civil war and allegedly made payments to terrorist organizations to secure Lafarge's supply chain and allow for the free movement of its employees.[159] Lafarge was accused of financing terrorism and being complicit in war crimes and crimes against humanity. Lafarge denies that payments were deliberately made to a terrorist organization, arguing that the funds were given to intermediaries without local management's awareness of their final destination.[160]

The Investigation Chamber of the Paris Court of Appeals (*Chambre d'Instruction de la Cour d'Appel de Paris*) revoked the indictment for complicity in crimes against humanity in 2019 but confirmed the charges for deliberately endangering the lives of Lafarge's Syrian subsidiary workers and for financing terrorism (in relation to apparently approx. 13 million

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[157] Note 48.

[158] See above text with note 53.

[159] Such a crime can be punished by a maximum of ten years imprisonment and 225.000 Euros for natural persons, and a maximum of 1.125 million Euros for corporations; and risk of death or injury caused to another person, for which natural persons incur a maximum of one year imprisonment and a fine of 15.000 Euros and legal persons face a maximum of 75.000 Euros. Obviously, the confiscation of criminal assets will be a consideration in this case.

[160] The internal investigation apparently found that the local company provided funds to third parties to work out arrangements with a number of these armed groups, including sanctioned parties, in order to maintain operations and ensure safe passage of employees and supplies to and from the plant. But the investigation could not establish with certainty the ultimate recipients of funds beyond those third parties, see https://www.lafargeholcim.com/summary-syria-investigation-findings, accessed 8 April 2018.

Euros transfers allegedly made to the Islamic State). The judicial inquiry against eight former Lafarge executives is ongoing. The Lafarge case has first been celebrated as a milestone in the fight against corporate impunity, but it remains to be seen whether French courts will (for the first time) elaborate criminal corporate liability for activities abroad.

3. The Nestlé Case (Columbia/Switzerland)

The difficulty in establishing knowledge and specifically, criminal intent, in an international corporate group with no legal obligation to look up- or downstream is at the core of the *Nestlé* case. The trade unionist, human rights activist and former Nestlé-Cicolac employee Luciano Romero was kidnapped, tortured and murdered by members of a paramilitary group. His murder came after a number of death threats linked to his union activity. The risk of murder had been reported both to the Colombian Nestlé subsidiary and to the parent company in Switzerland. Without taking any precautionary measures, local managers reportedly participated in the spreading of libellous reports that Romero and his colleagues were members of a left-wing guerrilla, rumours which put these individuals in grave danger. The parent company, Nestlé Switzerland, did not take any action to protect the exposed individual. Criminal proceedings were launched in Colombia resulting in the conviction of the direct perpetrators of the murder of Romero. In this verdict, Nestlé's role in the crime was of particular relevance and the judge wanted an investigation to look into the matter in more detail. However, to date, the Colombian prosecutory authorities have failed to take up the issue.

NGOs filed a criminal complaint against Nestlé and some of its top managers with the Swiss prosecution authorities. The complaint accuses Nestlé managers of being in breach of their obligations by failing to prevent crimes of the Colombian paramilitary groups and failing to adequately protect trade unionists from these crimes. The Swiss Federal Tribunal confirmed that criminal prosecution for the alleged wrongdoing was statute-barred in 2014,[161] and the ECtHR refused to examine whether the Swiss judiciary had adequately investigated Nestlé's responsibility. Once more, courts missed the chance to analyse the substance of corporate criminal liability for conduct of company subsidiaries outside the country.

B. 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 also raises jurisdictional issues. We are here dealing with "jurisdiction" in the sense of the applicability of the domestic criminal law of one State to events that (at least in part) take place abroad, on foreign soil.

1. The Principle of Territoriality

International jurisdiction in criminal law is generally connected to territoriality: a State can prosecute criminal offences alleged to have been committed within its 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, but rather only a part of an

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

offense need be committed on domestic grounds.[162] Furthermore, many States have a wide array of extra-territorial jurisdiction. That said, with regard to the extension of State jurisdiction two problems emerge. First, extra-territorial jurisdiction often requires so-called double criminality (conduct giving rise to an accusation must constitute a crime according to the foreign as well as the domestic law) (see infra 2). Secondly, many States are reluctant to prosecute a company incorporated under its domestic laws or having its headquarters in the State while conducting business abroad although this would be possible based on the so-called active personality (or nationality) principle, because these States tend to reject the idea that a legal entity possesses a nationality in the first place (see infra 3).

2. Extra-Territorial Jurisdiction and Double Criminality

The problem of double criminality is inextricably intertwined with the issue of how to shape corporate criminal liability as discussed above. If some States (such as Germany) refrain from using criminal law at all, while others incriminate the lack of a sufficient organization (like Switzerland) and others (like France), take a broad approach to corporate criminal liability (even if just in principle), but limit it in certain cases, double criminality needs a new conceptualization. This shows in the French discussion around whether or not 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 recognize corporate criminal liability.[163]

3. The Active Personality Principle: A Solution?

At first glance, the active personality principle appears to offer recourse in that a State may prosecute its corporate citizens at home for alleged crimes committed abroad. However, it 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 'Volksgemeinschaft' or nationality, the active personality principle may not be as useful in prosecuting legal persons.

The traditional rationale underpinning the use of personality principles of jurisdiction is to avoid negative conflicts of jurisdiction, but also to protect one's citizens and residents from extradition and prosecution abroad.[164] Because a company cannot be extradited, the prosecution of corporations based on the active personality principle is controversial.

French scholars appear to be open to the idea, even if the relevant provision did not originally address legal entities.[165] In a judgement of 2004, the *Cour de cassation* implicitly accepted the possibility of a French company being criminally liable for concealment of spo-

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[162] 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 111/06z; 12 Os 120/91; 10 Os 16/69; EvBl 1969/245; 13 Os 29/72, JBl 1972, 623.

[163] Bernard Bouloc, 'La responsabilité des entreprises en droit français' (1994) Revue internationale de droit comparé 669 et seq., esp. 673.

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

[165] Bernard Bouloc, Droit pénal général (Paris, Dalloz, Précis, 24th edn, 2015) n° 330. But see David Chilstein, Droit pénal international et lois de police. Essai sur l'application dans l'espace du droit pénal accessoire (Dalloz, Nouvelle bibliothèque des thèses, vol. 24, 2003) n° 365 et seq.

liated property in Germany under the regime of the National Socialists although the prosecution was later barred for different reasons.[166]

In Switzerland, however, the use of the active personality principle has been met with greater doubt.[167] And in Germany, the active personality principle cannot serve as a basis for jurisdiction over corporations.[168] If one agrees that the active personality principle applies in the prosecution of corporations, one must overcome the problem that corporations are not formally naturalized in any one specific country. Thus, corporate nationality must be based on other criteria not yet determined (e.g., State of residence, place of incorporation, primary place of business, physical seat).

C. Policy Considerations for Criminal Liability Along the Supply Chain

1. France

In France, after years of increased demand for compliance and corporate social responsibility (*conformité and responsabilité sociale de l'entreprise – RSE*),[169] the Rana Plaza Catastrophe in 2013 triggered a broad public debate about the responsibility of French companies for violations of human rights abroad.

In 2017, the Ministry of Foreign Affairs published its National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights[170] in addition to the already mentioned *Loi de vigilance*.[171] In its first draft, the Bill contained not only a civil fine mechanism that would apply when corporations were in breach of their obligations under the new duty of vigilance,[172] but also a criminal law amendment. This would have added the breach of a duty of vigilance to the grounds for involuntary offences set down in the Penal Code.[173] Under this provision, the failure to establish, publish or implement the annual vigilance plan would have triggered companies' criminal liability if persons died or were injured in an accident that could have been prevented through the implementation of the plan. But this provision was removed in the parliamentary debates. This wiped out the chance of building a link between the vigilance obligation of a company and its criminal responsibility.[174]

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[166] Cass. crim. 9 November 2004, petition n° 04-81742, Bull. crim. n° 274.

[167] Article 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), pp. 34–55.

[168] Böse, German Report (note 72), at 219 and 224.

[169] In 2012 the '*Plateforme RSE*' has been established as a forum for public debate etc. <www.strategie.gouv.fr/chantiers/plateforme-rse>.

[170] <http://www.diplomatie.gouv.fr/IMG/pdf/tableaudhe_09052017_version_finale_cle8ce9e7.pdf>.

[171] Note 48.

[172] The fine went up to 10 million Euros when companies failed to establish or publish a vigilance plan and up to 30 million Euros when this failure resulted in damages that would otherwise have been preventable.

[173] Section 3 of the Proposition of Law of 6 November 2013: 'Au troisième alinéa de l'article 121-3 du code pénal, les mots: "ou de sécurité" sont remplacés par les mots: "de sécurité ou de vigilance".'

[174] For a detailed discussion, see Lelieur (note 70) at 207.

2. Switzerland

In Switzerland, the mentioned Responsible Business Initiative (*Konzernverantwortungsinitiative*)[175] does not call for any changes in criminal law and instead focuses on civil tort law. It still remains unclear whether serious violations of human rights that are not currently covered by Swiss criminal law (such as illegal buying of gold from warlords and illegal logging) could be included. Nevertheless, scholars agree that the proposed due diligence will eventually have an impact on criminal prosecutions.

3. Germany

In Germany, the most debated criminal legal reform in recent years is the proposal of the German *Land* North Rhine-Westphalia for a *Verbandsstrafgesetzbuch*.[176] The proposal, which has not yet formally entered the legislative process, aims, at least in part, to close the gap produced by use of the active personality principle. That is, companies seated in Germany shall be prosecuted based on the nationality principle.[177] It is however controversial how to determine "nationality", because there is the risk of unfair discrimination of companies.[178] The abovementioned German NAP of 2016[179] is essentially based on a self-regulatory model that is the heart of German politics.[180]

VI. CONCLUSION: TOWARDS A FINE-TUNED TRANSNATIONAL LAW HOLDING BUSINESS ACCOUNTABLE

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.[181] This phoenix currently risks to fly too high and burn itself under the 'withering sun of globalization'.[182] In this climate, it is crucial that human rights guarantees are not sidestepped and rendered meaningless by overwhelming global corporate power. However, 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 and human rights do not fit well.[183]

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[175] Notes 52-53.

[176] <https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMI16-127.pdf;jsessionid=D0677105F78500D343535E3C085B1663.ifxworker> accessed 11 September 2017.

[177] See also explanatory memorandum, p. 48 <https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMI16-127.pdf;jsessionid=D0677105F78500D343535E3C085B1663.ifxworker> accessed 11 September 2017.

[178] Anne Schneider, 'Der transnationale Geltungsbereich des deutschen Verbandsstrafrechts – de lege lata und de lege ferenda' [2013] Zeitschrift für Internationale Strafrechtsdogmatik 488, 494–495, referring to ECJ, Case C–167/01 *Inspire Art* [2003] ECR I-10155.

[179] See above text with note 15.

[180] Not even the NGO-sponsored alternative policy proposals (note 16) foresee criminal law prosecution.

[181] Note 1.

[182] Ulrich Beck, *What is Globalization?* (Cambridge: Polity Press 2000), p. 1.

[183] See above section III.

A simple extension would be especially problematic because international human rights are currently under heavy fire from both sides of the political spectrum. Critics in the 'left' camp have announced the 'end' of human rights,[184] both from a neo-Marxist[185] and a post-colonialist perspective.[186] At the other end of the spectrum, more conservative and mainstream voices deplore a human rights 'proliferation',[187] a 'twilight' of human rights,[188] and have envisaged a 'post-human rights era'.[189] A manifestation of the attempts to cut back human rights to their roots is the establishment by the US American Secretary of State of a 'Commission on Unalienable Rights' in 2019 whose mandate is to provide 'advice and recommendations on human rights to the Secretary of State, grounded in [the United States'] founding principles and the 1948 Universal Declaration of Human Rights ... for the promotion of individual liberty, human equality and democracy through U.S. foreign policy.'[190]

In the middle of such deep controversy over international human rights, their mindless application of international human rights to corporate actors would immediately provoke the reproach of a human rights overreach and would backfire. Recalling that human rights are first of all guarantees against States does not amount to reifying a purely inter-State international legal order. Quite to the contrary. Human rights are owned by individuals who are the proper rights-holders. However, their extension to corporate obligors is warranted only where the corporations pose a real threat exactly for these guarantees. And indeed, a gap in protection has emerged through globalisation which has opened up loopholes for business to escape strict national regulation. In this context, the question is not whether but rather in which specific constellations which and whose international human rights can be held against business and ─ crucially ─ where they can be enforced. For example, peremptory norms such as the prohibition of forced labour should fully bind private actors.[191] Similarly, the prohibitions of discrimination lend themselves easily for direct application in the semi-public and employment sphere.[192]

Any acknowledgment of new human rights obligations must respect the principle of legality which is a key element of the international rule of law. Mere progressive interpretation of the extant international human rights treaties risks being unforeseeable and illegitimate. A codification of new obligations in a formal treaty is therefore preferable to erratic case-law. That said, national courts, international arbitration and regional human rights courts

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[184] Costas Douzinas, The End of Human Rights: Critical Legal Thought at the Turn of the Century, Hart 2000).

[185] Paul O'Connell, On the Human Rights Question, Human Rights Quarterly 40 (2018), 962-988.

[186] Makau Mutua, Is the Age of Human Rights Over?, in Sophia A. McClennen and Alexandra Schulthesis Moore (eds.), The Routledge Companion to Literature and Human Rights (London: Routledge 2016), 450-458.

[187] Jacob Mchangama & Guglielmo Verdirame, *When Defending Liberty, Less Is More: The Danger of Human Rights* Proliferation, FOREIGN AFFAIRS (24 July, 2013).

[188] Eric Posner, The Twilight of Human Rights Law (OUP 2014).

[189] Ingrid Wuerth, International Law in the Post-Human Rights Era, *Texas Law Review* 96 (2017), 279-349.

[190] Art. 1 of the Commission's Charter of 26 June 2019, approved by Brian J. Bulatao, Under Secretary of State for Management.

[191] See note 7.

[192] See, e.g., ECJ, Case C-193/17, Judgment of the Court (Grand Chamber) of 22 January 2019, *Cresco Investigation GmbH v Markus Achatzi*, ECLI:EU:C:2019:43, paras 76-89 on the right to be free from discrimination on religious grounds as codified in the EU Fundamental Rights Charter.

can and should continue to pave the way for such a codification. The currently pending Legally Binding Instrument, building on the Ruggie Principles, is a good strategy. Its approach to strengthen the *indirect* imposition of the obligation to respect human rights on enterprises by intensifying the duties of the State to protect is promising and tailored to the qualitative difference between States and enterprises.

The key task now is to properly align and combine the various regulatory levels. We need novel forms of co-regulation, with domestic law oriented at international law-based guidelines and properly linking to international hard law. In other words, we need a tighter web of transnational law (composed of labour law, social rights and environmental law), to be fully implemented by domestic private law and criminal law, with criminal law being only the last resort. The ultimate objective is to realise a genuine corporate social responsibility which includes a responsibility for internationally recognised human rights, enforceable in domestic courts, across State boundaries.

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

"Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute's mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice.... The depicted sculpture...[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts ... [represent] the individual states .... [The division] of the figure ... into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable.... The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds." [transl. by S. Less]

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