Towards a new legal consensus on business and human rights: A 10th anniversary essay

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Abstract
The article takes stock of developments in domestic and international law concerning the regulation of adverse human rights impacts by global business enterprises, one decade after the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles). It discusses these soft-law instruments in the light of long-standing systemic obstacles to holding business enterprises legally accountable for their global human rights impacts. The article argues for a new legal consensus on business and human rights, grounded in the increasing recognition by States that corporate respect for human rights should be brought under the purview of (international) human rights law. This consensus builds on the gradual convergence between the regulatory models that underpin the UNGPs and the Maastricht Principles, such that States’ domestic regulation of business enterprises with extraterritorial effect becomes anchored in international legal obligations towards foreign victims of business-related human rights violations.

Keywords
Business and human rights, CSR, home-state regulation, extraterritorial obligations, UNGPs, Maastricht principles, business and human rights treaty

1. INTRODUCTION

2021 marks the 10th anniversary of two important international soft-law initiatives on business and human rights: the UN Guiding Principles on Business and Human Rights (UNGPs) endorsed by the
Human Rights Council in March 2011;\(^1\) and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) adopted by a group of human rights experts in September of the same year.\(^2\) While neither the UNGPs nor the Maastricht Principles are legally binding, they both draw on international human rights law to close protection gaps that emerged with the exposure of the international State-based order to the human rights impacts of economic globalisation. As such, they represent the most recent wave of responses to a long history of egregious human rights violations involving so-called ‘multi-national’ corporations and their global supply chains – from the Bhopal tragedy of the 1980s and the execution of the Ogoni Nine in the Nigeria of the 1990s to the Rana Plaza building collapse of the 2010s and the present-day adverse human rights impacts of business responses to COVID-19 on workers in the Global South.

The article takes stock of the reception and impact of the UNGPs and the Maastricht Principles one decade after their adoption. It discusses both soft-law instruments in the light of long-standing systemic obstacles to holding business enterprises legally accountable for their global human rights impacts. These obstacles have often been explained in virtue of States retreating from, or losing control over, processes of economic globalisation associated with (neoliberal) policies of trade liberalisation, deregulation, and privatisation.\(^3\) Yet, they are equally consequential of the way State legal orders have institutionalised the relationship between ‘business’ and ‘human rights’, based on the intersecting distinctions between public and private, and between domestic and foreign. The public-private divide has constrained powerful for-profit corporations akin to private individuals whose disembodied ‘human’ rights (private property and sanctity of contracts) require protection against the State; and whose responsibilities towards society are exhausted by maximising shareholder value and engaging in corporate philanthropy.\(^4\) Concurrently, the domestic-foreign divide has propelled a globalisation of the liberal private sphere of ‘free’ market activities, while constraining the scope of public human rights obligations by sovereign territorial borders.\(^5\) This territorialisation of human rights obligations in public international law, together with the segmentation of globally integrated business enterprises into separate legal persons via domestic private law (the ‘corporate veil’), has shielded for-profit corporations from legal human rights accountability.

Against this background, the article argues for a new legal consensus on business and human rights that is grounded in the increasing recognition by States that corporate respect for human rights should be brought under the purview of (international) human rights law. This requires bridging the divide between (private and voluntary) social responsibilities of corporations and (public

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1. Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) A/HRC/17/31.
2. ‘Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, published with extensive commentary in (2012) 34 Human Rights Quarterly 1084.
3. See, respectively, Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy (Cambridge University Press 1996); Saskia Sassen, Losing Control? Sovereignty in the Age of Globalisation (Colombia University Press 1996).
4. From the burgeoning multi-disciplinary literature, see Jessica Whyte, The Morals of the Market (Verso 2019); Steven Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, (2001) 111 Yale Law Journal 443; Anna Grear, ‘Challenging Corporate “Humanity”: Legal Disembodiment, Embodiment and Human Rights’ (2007) 7 Human Rights Law Review 511; Subhabrata Bobby Banerjee, ‘Corporate Social Responsibility: The Good, the Bad and the Ugly’ (2008) 34 Critical Sociology 51.
5. David Kennedy, ‘Law and the Political Economy of the World’ (2013) 26 Leiden Journal of International Law 7; Claire Cutler, Private Power and Global Authority (Cambridge University Press 2003).
and mandatory) human rights obligations of States, as well as addressing its legal ramifications in terms of the segmentation of globally integrated business enterprises into separate legal persons and the concomitant territorialisation of corporate human rights accountability.

The UNGPs and the Maastricht Principles envisage different approaches to ensuring that global business enterprises comply with international human rights standards – differences which have triggered significant debate in academic and policy circles. The UNGPs integrate international human rights law into a polycentric global governance framework whose implementation by States should include domestic regulation of business enterprises with extraterritorial effect. The Maastricht Principles, by contrast, advocate an extraterritorial application of States’ international human rights obligations to prevent and redress business-related human violations outside their borders. The article contends that legal developments over the past decade point towards a gradual convergence between the regulatory models that underpin the UNGPs and the Maastricht Principles, such that the location of business actors and activities within the State’s territorial jurisdiction not only justifies domestic regulation with extraterritorial effect (UNGPs) but also establishes international extraterritorial obligations to prevent and redress business-related human rights violations (Maastricht Principles).

Section two contextualises the UNGPs and the Maastricht Principles in the traditional schism between international human rights law – conceived as imposing legal obligations on public authorities to protect human rights against corporate ‘abuse’ – and corporate social responsibility (CSR) – conceived as internalising societal expectations towards self-regulation by private business enterprises. Section three discusses States’ increasing use of domestic law to impose legal human rights due diligence obligations on business actors and activities within their territorial jurisdiction that reach out into the corporate group and the global value chain. While existing examples of so-called ‘home-State’ regulation still fall short of ensuring legal accountability of business enterprises for their global human rights impacts, they yield a juridification of corporate social responsibilities (to respect human rights) across State borders. Section four discusses complementary developments in international human rights law galvanised by the Maastricht Principles. Different from conventional tests of human rights jurisdiction in public international law, the considered approaches link States’ extraterritorial human rights obligations to the authority, power and control they may exercise over business actors and activities located on their territory. The concluding section briefly elaborates the significance of the envisaged new legal consensus on business and human rights for ensuring corporate human rights accountability under conditions of economic globalisation.

Overall, the article provides an overview of legal developments in business and human rights that ties States’ implementation of the UNGPs’ polycentric global governance framework to transformations in international human rights law. The focus is on developments in Europe, with reference to other jurisdictions in support of the argument. As the article’s main concern is with examining the changing role of the State in ensuring legal accountability of business enterprises for their global human rights impacts, only marginal attention is devoted to civil society organisations as the third ‘estate general’ in the business and human rights domain. Relatedly, foreign

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6. For an overview of the debate following the endorsement of the UNGPs, see Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013).

7. See further and critically towards such a ‘State-centric’ approach, Larry Catá Backer, ‘Fractured Territories and Abstracted Terrains: Human Rights Governance Regimes Within and Beyond the State’ (2016) 23 Indiana Journal of Global Legal Studies 61.
victims’ attempts to vindicate their human rights through transnational private litigation in the home-State courts of global business enterprises are only considered in the context of legislative developments at the domestic and international level.8

2. FROM CORPORATE SOCIAL RESPONSIBILITY TO BUSINESS AND HUMAN RIGHTS

2.1. CORPORATE SOCIAL RESPONSIBILITIES

In April 2020, European Commissioner for Justice Didier Reynders announced an EU legislative initiative on mandatory supply chain due diligence.9 The new legislation should establish horizontal human rights and environmental due diligence requirements for EU-based companies. It should cover the entire value supply chain and include legal sanctions and effective remedies for victims of business-related human rights violations inside and outside the European Union. The announcement was made on occasion of the presentation of a major EU-sponsored research study on due diligence requirements through the supply chain.10 Building on the UNGPs, the study concluded that the prevailing ‘soft-law’ approach to business and human rights had proven insufficient. It also highlighted increasing stakeholder support for EU legislation that should set a single harmonised standard for business enterprises operating in the internal market. In February 2021, the European Parliament’s Committee on Legal Affairs tabled a motion for a European Parliament Resolution recommending a European Directive on Corporate Due Diligence and Corporate Accountability,11 which the Parliament adopted in a landslide vote on 10 March 2021.12

The new legislative initiative differs decisively from the European Commission’s earlier approach to corporate social responsibility. In a 2001 Green Paper, the Commission had defined CSR as ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis […] not only fulfilling legal expectations, but also going beyond compliance by investing “more” into human capital, the environment and their relations with stakeholders’.13 This definition epitomises the core elements commonly associated with CSR.14 First, granted that ‘corporate citizens’ – as everyone

8. For a complementary analysis from the perspective of private international law see, Horatia Muir Watt, ‘Private International Law Beyond the Schism’ (2011) 2 Transnational Legal Theory 347; on different modalities of civil liability regimes in home-state regulation, see Nicolas Bueno and Claire Bright, ‘Implementing Human Rights Due Diligence Through Corporate Civil Liability’ (2020) 69 International and Comparative Law Quarterly 789.
9. European Parliament Working Group on Responsible Business Conduct, ‘European Commission promises mandatory due diligence legislation in 2021’ (Responsible Business Conduct, 30 April 2020) <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/> accessed 10 November 2021.
10. BIICL, CIVIC Consulting & LSE, ‘Study of Due Diligence Requirements through the Supply Chain’ (European Commission 2020).
11. European Parliament, ‘Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL))’, A9-0018/2021.
12. European Parliament, ‘Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL))’, A9-0018/2021.
13. Commission of the European Communities, ‘Green Paper: Promoting a European Framework for Corporate Social Responsibility’, COM (2001) 366 final, paras 20, 21.
14. Florian Wettstein, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide’ (2012) 22 Business Ethics Quarterly 739.
else within the State’s jurisdiction – are required to abide by the rule of law, corporate responsibilities towards society are considered voluntary in the sense of not being mandated by public regulation and backed up by legal enforcement. Second and related, while the inclusion of social and environmental concerns broadens the scope of these responsibilities from shareholders to (external) stakeholders and thus integrates other-regarding moral principles into business practices driven by economic self-interest,\textsuperscript{15} CSR traditionally does not reference human rights. This not only shapes its normative aspirations – responding to bounded social expectations rather than to universal values. It also, and third, determines its \textit{modus operandi}: corporate responsibility through self-regulation instead of third-party accountability through human rights and remedies.\textsuperscript{16}

From a broader institutional perspective, the traditional schism between CSR and (international) human rights law is rooted in the State-based distinctions between ‘public’ and ‘private’, and between ‘domestic’ and ‘foreign’. As Wettstein argues discussing the evolution of CSR, ‘while a focus on stakeholder relations may correct the overtly narrow perspective of the shareholder value doctrine […] it does not fundamentally challenge the still common perception of the firm as a predominantly private institution’.\textsuperscript{17} This perception of the corporation as a private and a-political ‘network of contracts’ resists easy integration into the public and political universe of human rights.\textsuperscript{18} Early attempts to steer CSR away from shareholder capitalism have tended to condition businesses’ voluntary contribution to implementing public policy objectives upon State commitments to creating a business-friendly environment, including through deregulation. As Buhmann notes in her analysis of the European Commission’s CSR Alliance, coupling private voluntarism with public deregulation inverts the role of States and companies in relation to human rights. While international law identifies States as primary duty-bearers required to protect human rights against corporate abuse, CSR assigns to them a supportive role in promoting companies’ efforts towards responsible business practices.\textsuperscript{19}

Relatedly, while CSR as associated with private and ‘multi-national’ corporations globalises easily, human rights as associated with public politics have long been considered a prerogative of the sovereign State.\textsuperscript{20} The corresponding territorial constrictions imposed upon (domestic/democratic) human rights politics not only materialise in the often-noted imbalance between corporate rights and duties in international law.\textsuperscript{21} They also explain the proliferation of global ‘soft-law’ instruments, most prominently the UN Global Compact, the OECD Guidelines on Multinational Enterprises, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, which helped to root CSR in human rights norms, yet fell short of binding international regulation.\textsuperscript{22}

\textsuperscript{15} Peter Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation’ (2012) 22 Business Ethics Quarterly 145, 162-165.
\textsuperscript{16} Anita Ramasastry, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability’ (2015) 14 Journal of Human Rights 237.
\textsuperscript{17} Wettstein (n 14) 750.
\textsuperscript{18} Jane Dine, \textit{Companies, International Trade and Human Rights} (Cambridge University Press 2005).
\textsuperscript{19} Karin Buhmann, ‘Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case’ (2011) 7 International Journal of Law in Context 139, 162-166; with reference to European Alliance for CSR, ‘Progress Review 2007: Making Europe a Pole of Excellence on CSR’ (Brussels 2008).
\textsuperscript{20} Kennedy (n 5) 13; arguing that ‘at a most primitive level, private rights, understood to lie outside or before politics, travel easily […] Public policies, the stuff of politics, do not travel, except as necessary to support the broader market’.
\textsuperscript{21} Penelope Simons, ‘International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights’ (2012) 3 Journal of Human Rights and the Environment 5.
\textsuperscript{22} Following the endorsement of the UNGPs, all three instruments were revised to include a dedicated focus on business and human rights.
From this broader institutional perspective, the core human rights challenge to CSR is not that the latter encourages companies to ‘go beyond’ compliance with domestic law applicable to private business enterprises. It is, rather, that corporate voluntarism appears ill-suited to close legal protection gaps caused by the exposure of the international State-based order to the human rights impacts of economic globalisation. Without ensuring corporate accountability through a dedicated focus on human rights and remedies, attempts to align CSR with public policy objectives quickly succumb to economic cost-benefit analyses driven by State-sponsored market incentives.

2.2. THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

In 2011, the European Commission put forward a ‘modern’ definition of CSR that abandoned corporate voluntarism. Corporate social responsibility now means ‘the responsibility of enterprises for their impacts on society’, which should be met through ‘a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations’. The new approach reflects core tenets of the corporate responsibility to respect human rights – the second pillar of the UNGPs developed by the UN Special Representative on Business and Human Rights (SRSG) John Ruggie between 2005 and 2011. UN Guiding Principle 11 calls upon business enterprises to ‘avoid infringing on the human rights of others’ and to ‘address the adverse human rights impacts with which they are involved’. Business enterprises should publicly signal their policy commitment to human rights; exercise human rights due diligence (HRDD) to ‘identify, prevent, mitigate and account for how they address their impacts on human rights’; and remedy ‘any adverse human rights impacts they cause or to which they contribute’.

While the UNGPs barely touch directly on CSR, they have contributed much towards integrating human rights into global corporate governance. The SRSG impressed upon business enterprises that corporate respect for human rights was not voluntary but mandated by their social licence to operate – a ‘global standard of expected conduct’ that ‘exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations’. This global standard of expected conduct applies to all business enterprises regardless of size, sector, operational context, ownership, and structure. It refers to all internationally recognised human rights and is operationalised through corporate human rights due diligence. Next to ‘identifying and managing material risks to the company itself’, HRDD should ‘include risks to rights-holders’, thus integrating a rights-based approach into corporate self-regulation. It ‘should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships’, thus extending business responsibilities for human rights to the global value chain. The UNGPs neither envisage a ‘tier-based’ approach to value chain due diligence (for example, by discriminating between direct and indirect suppliers), nor do they (as the earlier ‘sphere of influence’ approach) delimit corporate human rights responsibilities in virtue of control or leverage that a company (may) exercise over business partners or business activities.

23. European Commission, ‘A renewed EU Strategy 2011-14 for Corporate Social Responsibility’, COM (2011) 681 final 5.
24. UNGPs (n 1) Guiding Principle 11.
25. ibid Guiding Principle 15.
26. ibid Guiding Principle 16 (Commentary).
27. ibid Guiding Principle 14.
28. ibid Guiding Principle 17 (Commentary).
29. ibid Guiding Principle 17(a).
Rather, the decisive criterion for determining the scope of HRDD are the actual and potential adverse human rights impacts associated with a company’s own activities and its business relationships.30 Finally, where business enterprises ‘have caused or contributed to’ adverse human rights impacts, ‘they should provide for or cooperate in their remediation through legitimate processes’.31

The endorsement of the UNGPs by the Human Rights Council in 2011 followed a failed attempt to directly impose human rights obligations on private business enterprises in public international law. The ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (UN Draft Norms), put forward by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003, acknowledged the primacy of State obligations in international human rights law. Yet, they also envisaged corresponding legal obligations for multi-national corporations and other business enterprises within their ‘spheres of activity and influence’.32 Whatever the shortcomings of the UN Draft Norms, an important reason for their eventual failure were the vested interests of powerful corporations and their (Western) home-States not to see corporate responsibility for human rights extended beyond the ‘soft’ model of self-regulation through corporate codes of conduct, corporate social responsibility, and the like.33 A false dichotomy was construed between the UN Draft Norms’ attempt to prevent and redress corporate human rights violations (the UN’s ‘anti-business agenda’)34 and the positive contributions corporations can make to global prosperity, technological innovation, and international development. Yet another dichotomy – that between ‘public’ States and ‘private’ corporations – fuelled concerns that the direct imposition of human rights obligations on corporations would undermine State sovereignty and dilute State responsibility for human rights violations.35

Different from the UN Draft Norms, the UNGPs maintain a clear distinction between State duties to protect human rights against corporate abuse within their territory and/or jurisdiction (first pillar) and corporate responsibilities to respect human rights throughout their global operations (second pillar). While business enterprises are indirectly bound by international human rights law through States’ domestic implementation of their own human rights obligations and must comply with applicable national law wherever they operate, the corporate responsibility to respect responds to social expectations rather than legal requirements: ‘This responsibility is neither based on nor analogises from state-based law. It is rooted in a transnational social norm, not an international legal norm. It serves to meet a company’s social licence to operate, not its legal licence’.36

30. ibid Guiding Principle 17. ‘Leverage’ – the ‘ability to effect change in the wrongful practices of the party that is causing or contributing to the impact’ – only becomes relevant for determining a company’s response to adverse human rights impacts; see Guiding Principle 19.

31. ibid Guiding Principle 22.

32. UN Sub-Commission on the Promotion and Protection of Human Rights, ‘Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) E/CN.4/Sub.2/2003/12.

33. See ‘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’ (2005) E/CN.4/Sub.2/2005/91.

34. ‘Statement of the US Government Delegation to the 61st Session of the UNCHR’ (2005), quoted in David Kinley and Rachel Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) 6 Human Rights Law Review 447, 448.

35. On which, see the discussion in Kinley and Chambers (n 34) 480-481.

36. John Ruggie and John Sherman III, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’ (2017) 28 European Journal of International Law 921, 923-924.
Political prudence and his limited mandate cautioned the SRSG against reviving the debate on international corporate human rights obligations: ‘The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses’. Yet, his justification for discriminating between State duties and corporate responsibilities also remains indebted to the distinction between the public-as-political and the private-as-economic that previously served to insulate CSR from human rights: ‘While corporations may be considered “organs of society”, they are specialised economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not mirror the duties of States’.38

The SRSG’s endeavour to intertwine the UNGPs (‘protect, respect and remedy’) with international human rights law (‘respect, protect and fulfil’) has raised issues concerning the proper scope and operation of the second pillar, including whether the corporate responsibility to respect – akin to the State’s duty to protect – does or should extend beyond a ‘no harm’ requirement to encompass positive obligations;39 and whether corporate human rights due diligence – which borrows from business management and international human rights law – is or should be complemented by strict (no fault) responsibility of business enterprises for their own human rights impacts. At the same time, the SRSG’s approach to distinguishing private human rights responsibilities from public human rights obligations may have contributed to the – by now widely acknowledged – poor implementation of pillar two by a majority of business enterprises.41 Problems range from a limited uptake of the corporate responsibility to respect human rights beyond mere policy commitments; to an unduly narrow approach to HRDD often confined to first-tier suppliers and the use of contractual clauses and codes of conduct; a lack of dedicated focus on human rights in corporate governance and a ‘mismanagement’ of human rights risks; a misalignment between companies’ social human rights commitments and their legal (litigation) strategies; and an undue reliance on the ‘business case’ for human rights that ties their protection to economic performance, reputational risks, and the expectations of investors and consumers. As with the earlier CSR discourse, these problems call into question the capacity of legally non-binding corporate responsibilities to respect human rights to engender a shift towards ‘stakeholder capitalism’ from within the liberal private sphere that should correct the shareholder bias of prevailing business models associated with profit maximisation, risk externalisation, and corporate short-termism.42

3. HOME-STATE REGULATION OF CORPORATIONS

3.1. HOME-STATE REGULATION AND THE UNGPs

The UNGP’s protect, respect and remedy pillars form a complementary whole in which States are duty-bound to ‘translate’ international human rights norms into domestic laws and policies
regulating corporate activities, while corporations respect human rights as globally recognised standards of expected conduct (their ‘social licence to operate’), with both States and corporations ensuring remediation for breaches of these overlapping governance systems within their respective jurisdictions.\(^{43}\) As part of their duty to protect, States have to assume a proactive role in incentivising and where necessary requiring corporate respect for human rights through appropriate policies, legislation, adjudication, and enforcement.\(^{44}\) Institutionalising corporate human rights due diligence is thus not only expected of business enterprises in virtue of their ‘social licence to operate’ but also required of States to comply with their international human rights obligations.

To close ‘governance gaps’ at the international level, States should ensure that business enterprises respect human rights throughout their global operations: ‘There are strong policy reasons for home-states to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses’.\(^{45}\) The main extraterritorial instruments envisaged by the UNGPs for this purpose are ‘direct extraterritorial legislation and enforcement’ and ‘domestic measures with extraterritorial implications’.\(^{46}\) As elaborated in an earlier report to the Human Rights Council, this distinction principally turns on whether a State is permitted to exercise jurisdiction over business enterprises because they are considered corporate nationals of that State or because they are domiciled within its territory.\(^{47}\) While the UNGPs do not explicitly call upon States to impose substantive HRDD requirements on corporations throughout their global operations, such home-State regulation follows the model of domestic measures with extraterritorial implications and is encompassed by the ‘smart mix of measures – national and international, mandatory and voluntary –’ required of States to ensure business respect for human rights.\(^{48}\) Home-State regulation plays an important role in the effective implementation of the UNGPs because it renders HRDD legally binding with extraterritorial effect, thus contributing to a ‘hardening’ of the soft-law requirements bound up with the corporate responsibility to respect human rights.\(^{49}\)

The envisaged EU Directive on Corporate Due Diligence and Corporate Accountability follows a trend in various countries, especially in Europe, to impose on business actors and activities within the State’s territory and/or jurisdiction legal HRDD requirements that extend into the corporate group and the global value chain. Existing examples of home-State regulation range from attempts to enhance corporate transparency through disclosure and reporting to the imposition of substantive due diligence obligations on business enterprises to protect human rights and the environment. Apart from the business enterprise’s place of incorporation (‘parent-based’ due diligence legislation), the necessary jurisdictional link can also be established in virtue of products and services placed on the State’s domestic market (‘market-based’ due diligence legislation). On the former
model, a business enterprise domiciled within the State’s jurisdiction is legally required to exercise HRDD in relation to foreign operations by its subsidiaries and suppliers. On the latter model, market access by business enterprises is conditional upon compliance with certain product and process (due diligence) standards protecting human rights and/or the environment abroad. The proposed EU Directive combines both models by imposing HRDD requirements on business enterprises incorporated in the European Union and/or operating in the internal market.50

3.2. FROM TRANSPARENCY TO REMEDY: THE QUEST FOR CORPORATE LEGAL ACCOUNTABILITY

Transparency legislation – such as the EU Non-Financial Reporting Directive (NFRD) or the UK Modern Slavery Act – aims to promote corporate respect for human rights by imposing on business enterprises non-financial reporting requirements about their global value chains. Rather than mandating corporate HRDD, transparency legislation creates market incentives for companies to develop a socially responsible approach to business by enabling investors and consumers to evaluate their human rights and environmental performance. As noted in the NFRD, ‘disclosure of non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection’.51 Desk research and stakeholder interviews conducted during the EU Supply Chain Due Diligence Study have confirmed the limited impact of transparency legislation on sustainable corporate governance.52 A main challenge to date has been the poor quality of company responses, which led to concerns about mere ‘paper compliance’ and a ‘managerialisation’ of human rights reporting.53

While States have begun to address these concerns through legislative amendments and dedicated (sector-specific) reporting guidelines, the reliance of transparency legislation on market incentives also points to an ‘inherent limitation of mandated disclosure as a regulatory strategy, which cannot by itself force changes in conduct and offer reparations for harm’.54 Even where, as with the more recent Australian Modern Slavery Act,55 reporting requirements are mandatory and tailored to human rights risks to third parties, corporate disclosure tends to focus on information about material risks to the company and ex-post measures taken to address them. Even where, as in the case of the EU NFRD, compliance with reporting requirements is subject to State enforcement,56 transparency legislation cannot compel companies to exercise human rights due diligence.

Market-based due diligence legislation conditions market access by business enterprises upon compliance with substantive human rights due diligence requirements that reach out into the

50. European Parliament Resolution (n 12) Article 2.
51. Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (2014) Recital 3.
52. EU Due Diligence Study (n 10) 245-250.
53. See, for example, Alliance for Corporate Transparency, ‘An Analysis of the Sustainability Reports of 1000 Companies pursuant to the EU Non-Financial Reporting Directive’ (2019) <https://www.allianceforcorporatetransparency.org/> accessed 10 November 2021; David Monciardini, Nadia Bernaz and Alexandra Andhov, ‘The Organisational Dynamics of Compliance with the UK Modern Slavery Act in the Food and Tabaco Sector’ (2021) 60 Business and Society 288.
54. Radu Mares, ‘Corporate Transparency Laws: A Hollow Victory?’ (2018) 36 Netherlands Quarterly of Human Rights 189, 201.
55. Australia Modern Slavery Act 2018 (No 153, 2018) Section 16; the Act advances beyond the ‘comply or explain’ approach in section 54(5) of the UK Modern Slavery Act 2015.
56. Directive 2014/95/EU (n 51) Recital 10.
global value chain. Examples in Europe include the EU Timber Regulation (EUTR), the EU Conflict Minerals Regulation, and the Dutch Child Labour Due Diligence Law. EUTR requires operators placing timber (products) on the internal market to develop a due diligence system to identify, assess, and mitigate the risk of illegally lodged timber being sold in the European Union. EU Member States must apply effective, proportionate, and dissuasive penalties in case of non-compliance, which may include fines and trading suspensions. The Dutch Child Labour Due Diligence Law adopted in May 2019 imposes due diligence (gepaste zorgvuldigheid) obligations to prevent child labour in the supply chain on business enterprises selling goods and providing services to Dutch end-users.57 The Act applies to all business enterprises (whether domiciled in the Netherlands or abroad) that supply goods and services to consumers in the Netherlands. Companies must issue a due diligence statement to the effect that they investigate reasonable suspicions of, and implement an action plan to address, instances of child labour in their supply chains. They can also discharge their HRDD obligations by sourcing from (lower tier) companies that have issued a due diligence statement. In either case, due diligence is construed as a one-off exercise, which will limit the effectiveness of the legislation in the longer term. The Act provides for public monitoring and enforcement that combines administrative and criminal sanctions but does not include civil remedies.

While market-based due diligence legislation addresses some of the shortcomings of reporting requirements, existing examples still fall short of the requirements of the UNGPs. Confining the scope of due diligence to specific economic sectors and/or groups of rights holders contravenes the universality and indivisibility of human rights and may disincentivise business enterprises to address other (and potentially more salient) human rights risks. The possibility to ‘pass on’ HRDD requirements to suppliers indirectly introduces a tier-based approach into corporate governance that may hamper the effectiveness of global supply chain due diligence.58 Finally, as the justification of market-based due diligence legislation relies heavily on the protection of domestic consumers, none of the considered examples include civil remedies for victims of business-related human rights violations inside or outside the European Union.

The Norwegian Transparency Act, the German Law on Corporate Due Diligence in Supply Chains and the French Duty of Vigilance Law are presently the only examples of HRDD legislation that cover all sectors of economic activity and all groups of rights-holders.59 However, these examples of ‘parent-based’ due diligence legislation only apply to comparatively large business enterprises and/or do not cover the entire supply chain. The French Duty of Vigilance Law confines human rights due diligence to ‘established commercial relationships’, which is a narrower standard than the UNGPs’ notion of ‘business relationships’.60 While not necessarily confined to first-tier suppliers, the French standard would appear insufficient to ensure human rights protection in the lower tiers of the value chain –

57. Wet Zorgplicht Kinderarbeid, Kamerdossier 34 506 (2016/2017). The law has not yet entered into force.
58. Similarly, Article 4(3) of the envisaged EU Directive (n 12) exempts business enterprises from establishing and implementing an HRDD strategy if all their direct suppliers perform due diligence in line with the Directive.
59. Norwegian Transparency Act (‘Åpenhetsloven’) (2021); Gesetz ueber die unternehmerischen Sorgfaltspfllichten in Lieferketten (2021); Loi No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (2017). In March 2021, a private members’ bill was introduced into the Dutch Parliament that proposes to replace the Child Labour Due Diligence Law with a cross-sectoral Responsible and Sustainable International Business Conduct Act; see further, https://www.mvoplatform.nl/en/translation-of-the-bill-for-responsible-and-sustainable-international-business-conduct/, accessed 10 November 2021.
60. In French law, an ‘established commercial relationship’ requires a stable and regular relationship with a certain business value; see Stéphane Brahant, Charlotte Michon and Elsa Savourey, ‘The Vigilance Plan. The Cornerstone of the Law on Corporate Duty of Vigilance’ (2017) 50 Revue Internationale de la Compliance et de L’Etique des Affaires, 1, 3-4.
characterised by arms-length supply relationships based on insecure, short-term, and often unwritten contracts. The German Law is more narrowly focussed on direct suppliers, with HREDD further down the supply chain only being required where a company fraudulently circumvents the direct supplier or obtains substantiated knowledge of potential human rights abuses by indirect suppliers. The envisaged EU Directive goes further on both counts: it imposes cross-sectoral HRDD obligations on small and medium-sized undertakings that are publicly listed or that operate in high-risk sectors; and it extends the scope of these obligations to all business partners and value chain relationships.

Civil remedies – and therewith the broader question whether corporate human rights due diligence should translate into a legal standard (duty) of care enforceable by victims through private litigation – remains among the most contentious issues of home-State regulation in Europe. A popular initiative in Switzerland to make human rights and environmental supply chain due diligence mandatory for Swiss-based companies by amending the Swiss constitution was narrowly rejected in a public referendum in late November 2020. The original proposal would have enabled foreign victims of human rights and environmental harm to seek civil redress in Switzerland, with a company’s exercise of adequate due diligence serving as a defence against liability. The counterproposal by the Swiss Council of States eventually adopted narrowly confines HRDD obligations to conflict minerals and child labour and does not contain a civil liability provision. Under the German Law, NGOs and trade unions are empowered to represent victims in civil proceedings before German courts. Following protracted negotiations and persistent pushback from Ministry of Economic Affairs and major business associations, the law no longer includes a dedicated provision on civil liability.64

Only the French Duty of Vigilance Law currently provides for a civil remedy mechanism that enables victims to sue the parent/controlling company in France for violations of human rights in its supply chain. The law establishes parent liability for harm caused by the activities of the company and of those companies it controls, directly or indirectly, as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship. The European Directive envisaged by the EP Resolution would extend the scope of civil liability to the entire supply chain, on the condition that business enterprises within the personal scope of the Directive, and undertakings under their control, have caused or contributed to human rights harm abroad.66 To ensure that the Directive’s HRDD requirements also apply in transnational tort litigations for damages that occurred outside the European Union, Member States are to denominate these requirements as overriding mandatory provisions of the forum.67 A more encompassing

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61. Lieferkettengesetz (n 59), para 9.
62. See, Swiss Coalition for Corporate Justice (SCCJ), ‘The Initiative Text with Explanations’ <https://corporatejustice.ch/about-the-initiative/> accessed 10 November 2021.
63. See, Conseil National, 16.077, Droit de la société anonyme, dépliant Session d’été 2018, 204-213; and further Bueno and Bright (n 8) 804-807.
64. An earlier informal draft by the Federal Ministries of Labour and of Economic Cooperation and Development had included a civil liability mechanism; see Entwurf für Eckpunkte eines Bundesgesetzes über die Stärkung der unternehmerischen Sorgfaltpflichten zur Vermeidung von Menschenrechtsverletzungen in globalen Wertschöpfungsketten (2020).
65. Duty of Vigilance Law (n 59).
66. EP Resolution (n 12) Article 19(2).
67. ibid Article 20. As an exception to the otherwise applicable lex loci delicti rule under Article 4 Rome II Regulation, see Article 16 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. For lack of judicial precedents, it remains unclear whether this also applies in the case of the French Duty of Vigilance Law.
reform of EU private international law envisaged in two Annexes to a previous European Parliament Report was not put to parliamentary vote, and the EP Resolution presently awaits its (dis-)approval by the European Commission’s Regulatory Scrutiny Board.

To date, existing examples of home-State regulation in Europe only offer limited and patchy protection against business-related human rights violations in the lower tiers of global supply chains. Leaving aside transparency legislation that does not include substantive HRDD requirements, the effectiveness of ‘market-based’ due diligence legislation is hampered by its confinement to particular sectors of economic activity and/or to selected groups of rights-holders. ‘Parent-based’ due diligence legislation presently only applies to comparatively large business enterprises and does not cover the entire value chain. As concerns civil remedies, strategic litigation initiated by civil society organisations has brought some relief to victims of corporate human rights abuse in the Global South – in spite of persistent legal and practical barriers to access to justice in European courts. Much of the legislative debate surrounding the human right to remedy, by contrast, still thrives on the old juxtaposition of global yet voluntary/soft corporate social responsibilities (to respect human rights) with mandatory/hard yet territorialised corporate human rights accountability. While, as noted by the UN High Commissioner on Human Rights, ‘the realities of global supply chains, cross-border trade investment, communications and movement of people are placing new demands on domestic legal regimes and those responsible for enforcing them’, many of these regimes ‘focus primarily on within-territory business activities and impacts’, often rendering the quest for foreign victims for corporate human rights accountability ‘elusive’.

These shortcomings notwithstanding, the new prominence of home-State regulation is also evidence of an increasing recognition among (European) States that the adverse human rights impacts of global business operations should be brought under the purview of human rights law. With increasing political momentum, global reporting requirements have been complemented by substantive due diligence obligations; the scope of home-State regulation has expanded to include smaller companies and to reach beyond first-tier suppliers; and there is a discernible preference for general (horizontal) human rights due diligence over the earlier sector-specific approach tailored to specific sectors of economic activity and/or groups of rights-holders.

4. EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS AND GLOBAL BUSINESS OPERATIONS

4.1. HUMAN RIGHTS JURISDICTION IN INTERNATIONAL LAW: A RESTRICTIVE APPROACH

In a much-debated passage, the UNGPs decouple States’ domestic regulation of corporate human rights impacts with extraterritorial effect from their international human rights obligations – with the latter being confined to human rights abuse within the State’s ‘territory and/or jurisdiction’:

68. European Parliament Report (n 11) Annexes I & II.
69. See for example Vedanta Resources Plc and Another v Lungowe and Others [2019] UKSC 20; Okpabi and Others v Royal Dutch Shell Plc and Another [2021] UKSC 3; The Hague Court of Appeal, Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell Plc and Another [2021] ECLI:NL:GHDHA:2021:132 (Oruma), ECLI:NL:GHDHA:2021:133 (Goi) and ECLI:NL:GHDHA:2021:134 (Ikom Ada Udo); and more generally, Axel Marx and others, ‘Access for Victims of Corporate Human Rights Abuses in Third Countries’, Study for the European Parliament (2019) EP/EXPO/B/DROI/FWC/2013-08/Lot4/07.
70. Human Rights Council, ‘Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse’ (2016) A/HRC/32/19, paras 2, 5.
At present States are not generally required under international human rights law to regulate the extra-territorial activities of business domiciled within their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis. Within these parameters, some human rights treaty bodies recommend that home-states take steps to prevent abuse by business enterprises within their jurisdiction.\footnote{UNGP\textsuperscript{s} (n 1) Guiding Principle 2 (Commentary).}

This approach, which re-entrenches the territorialisation of human rights protection at the level of State obligations, is rooted in a restrictive understanding of jurisdiction in international human rights law.

States’ exercise of jurisdiction operates as a threshold criterion for the applicability of international human rights treaties.\footnote{For example, under the European Convention on Human Rights, ‘the exercise of jurisdiction is a necessary condition for a contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention’, see \textit{Al-Skeini and Others v United Kingdom} App no 55721/07 (ECtHR, 7 July 2011), para 130.} Jurisdiction circumscribes the scale and scope of international human rights obligations by predicating them upon a sufficiently concrete normative relation of power, authority, and control between the State \textit{qua} duty-bearer and the individual rights-holder.\footnote{Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25 Leiden Journal of International Law 857. The terminology used by international courts and treaty bodies is not uniform and does not yield an unequivocal distinction between effective control as \textit{de facto} power and control as \textit{de jure} authority, which recognises the difference between the facticity of coercion and the normative command to act in accordance with the law.} At the most general level, two countervailing principles inform the relationship between jurisdiction and extraterritorial human rights obligations.\footnote{See Maarten den Heijer and Rick Lawson, ‘Extraterritorial Human Rights and the Concept of Jurisdiction’ in Malcom Langford and others (eds), \textit{Global Justice, State Duties} (Cambridge University Press 2013) 153-191, distinguishing jurisdiction as State entitlement from jurisdiction as State duty; Daniel Augenstein and David Kinley, ‘Beyond the 100 Acre Wood: ‘When Human Rights “Responsibilities” become “Duties”: The Extraterritorial Obligations of States that bind Corporations’, in Deva and Bilchitz (n 6) 271, distinguishing between a ‘permissive’ and a ‘prescriptive’ conception of jurisdiction.} On the one hand, a State’s exercise of jurisdiction to protect human rights outside its borders should not unduly interfere with the sovereign rights that other States wield over their territory and people therein. This explains why the scope of extraterritorial human rights obligations is commonly delimited by States’ jurisdictional competence, determined in accordance with a recognised basis of jurisdiction in public international law (the territoriality principle; the nationality principle; etc.). On the other hand, a State should not be permitted to circumvent its international human rights obligations by exceeding its jurisdictional competence in public international law. This explains why the decisive criterion for allocating human rights obligations to States is not the international lawfulness of the extraterritorial exercise of State powers but a jurisdictional relationship of authority, power, or control between the State and an individual located outside its borders. According to the Inter-American Commission of Human Rights, for example, jurisdiction ‘turns not on the presumed victim’s nationality [the nationality principle] or presence within a particular geographic area [the territoriality principle], but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control’.\footnote{Coard \textit{v United States} Case 10.951, Report No. 109/99 (IACHR, 29 September 1999), para 37.}
While the text of the major international human rights treaties does not suggest that States’ human rights obligations should be confined to individuals within their borders, concerns with State sovereignty have nevertheless tended international courts towards a ‘primarily territorial’ interpretation of human rights jurisdiction.\textsuperscript{76} In \textit{Al Skeini} – one of the leading cases on the extraterritorial application of the European Convention on Human Rights (ECHR) – the European Court of Human Rights (ECtHR) considered that ‘jurisdiction is presumed to be exercised normally throughout the State’s territory. Conversely, acts of the contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 ECHR only in exceptional circumstances.’\textsuperscript{77} Similarly, the Inter-American Court of Human Rights noted in its \textit{Advisory Opinion on the Environment and Human Rights} that whereas jurisdiction was not confined to territory, the conditions under which extraterritorial State conduct qualifies as an exercise of jurisdiction within the meaning of Article 1 of the Inter-American Convention on Human Rights (IACH) required a restrictive interpretation.\textsuperscript{78}

The two constellations of extraterritorial jurisdiction recognised by the ECtHR in \textit{Al Skeini} – acts ‘performed’ and ‘producing effects’ outside the State’s territory – correspond to a more commonly used distinction between extraterritorial State conduct and the extraterritorial effects of States’ domestic laws and policies. As traditionally framed in the case-law, neither constellation easily lends itself to establishing home-State obligations to prevent and redress business-related human rights violations for the benefit of individuals located outside its borders. Establishing extraterritorial jurisdiction through acts ‘performed’ outside the State’s territory requires State agents to exercise authority, power or control over persons and/or an area located on the territory of another State.\textsuperscript{79} Accordingly, traditional variations of the ‘control over persons’ test (such as the detention or abduction of individuals) and the ‘control over an area’ test (such as military occupation) are premised on the physical presence of home-State agents on foreign soil. In the standard case of home-State regulation, by contrast, the extraterritorial human rights violation is committed by a non-State actor operating in the host State of corporate investment.

The best-known examples of ‘extraterritorial effects’ cases concern the extradition or deportation of an individual to a country where she faces substantial risks of serious human rights violations (\textit{non-refoulement}). The protection of \textit{non-refoulement} extends to threats to human rights caused by private (non-State) actors abroad.\textsuperscript{80} In \textit{Rantsev}, the ECtHR furthermore recognised that States can be under an obligation to regulate private actors on their own territory in order to prevent and redress human rights violations committed outside their borders.\textsuperscript{81} Nevertheless, both in \textit{non-refoulement} cases and in the \textit{Rantsev} scenario, the necessary jurisdictional link is established through the victim’s initial presence on home-State territory. In the standard case of home-State regulation, by contrast, a constituent part of the parent or controlling company will be domiciled within the State’s territorial jurisdiction while the victim is permanently located on the territory of the host State of corporate investment.

\textsuperscript{76} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, Advisory Opinion (ICJ, 9 July 2004) 136, para 109.
\textsuperscript{77} \textit{Al Skeini} (n 72), para 131.
\textsuperscript{78} \textit{Advisory Opinion OC-23/17 requested by the Republic of Colombia: The Environment and Human Rights} (IACtHR, 15 November 2017), para 81.
\textsuperscript{79} \textit{Al Skeini} (n 72), paras 134-138.
\textsuperscript{80} \textit{J.K. and Others v Sweden} App no 59166/12 (ECtHR, 4 June 2015).
\textsuperscript{81} \textit{Rantsev v Cyprus & Russia} App no 25965/04 (ECtHR, 7 January 2010).
There is some case law to suggest that the ECtHR is prepared to recognise extraterritorial human rights obligations absent from effective control over a foreign person or area, and to dispense with the requirement that the applicant in extraterritorial effects cases must be located on the State’s territory. Moreover, foreign victims seeking to vindicate their human rights through private litigation in the domestic courts of the home-State can come under that State’s international human rights jurisdiction. However, this case-law has not yet translated into a robust and coherent approach to international extraterritorial obligations to prevent and redress business-related human rights violations.

4.2. TRANSNATIONAL STATE POWER AND EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS

A guiding assumption behind the restrictive approach to human rights jurisdiction is that perpetrators and victims of business-related human rights violations will reside in the same territorial space and will therefore be subject to the authority, power, and control of a single State. This State-sovereignist approach not only belittles the ‘governance gaps’ created by the exposure of the international State-based order to the human rights impacts of global business operations. It also fails to respond to a core concern in the business and human rights domain, namely human rights obligations of the home-State of the parent or controlling company of ‘multi-national’ corporations to prevent and redress human rights violations committed in the host State of corporate investment.

The Maastricht Principles address this concern by including within the scope of extraterritorial human rights obligations ‘obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside that State’s territory’. Specifically in relation to extraterritorial corporate human rights abuse, this entails that ‘all States must take necessary measures to ensure that non-state actors which they are in a position to regulate [...] such as] transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights’. Similarly to the UNGPs, the Maastricht Principles stipulate that a home-State is in a position to regulate business actors and activities abroad ‘where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned’. Yet, different from the UNGPs, a State’s authority, power, and control over corporate actors and activities within its territorial jurisdiction not only justifies the regulation of business enterprises with extraterritorial effect but also establishes corresponding State obligations to protect foreign victims against business-related human rights violations.

82. Sargsyan v Azerbaijan App no 40167/06 (ECtHR, 16 June 2015).
83. Nada v Switzerland App no 10593/08 (ECtHR, 12 December 2012).
84. Markovic and Others v Italy App no 1398/03 (ECtHR, 14 December 2006).
85. Human Rights Council (n 38), para 3.
86. Maastricht Principles (n 2) Principle 8a.
87. ibid Principle 24.
88. ibid Principle 25c.
89. It has been argued that these constellations of ‘parent-based’ home-State obligations do not involve an exercise of extraterritorial human rights jurisdiction because the corporate perpetrator of human rights abuse is located within the State’s territorial jurisdiction; see Maastricht Principles (Commentary) p. 1141; Cedric Ryngaert, ‘EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations’ (2018) 20 International Community Law Review 314. This interpretation is, however, difficult to square with the distinction between ‘territoriality’ and ‘extraterritoriality’ in international human rights law which, different from private international law, is drawn on the basis of the (extra-)territorial location of the victim of corporate human rights abuse, see further Augenstein and Kinley (n 74).
The Maastricht Principles find support in various ‘transnational’ and ‘functional’ approaches to extra-territorial human rights protection discussed in the literature. They build upon, and are further corroborated by, the interpretation of international extraterritorial obligations endorsed by the UN Treaty Bodies. Alongside general comments on extraterritorial State obligations concerning business activities that impact on the right to water, the right to work, and the right to social security, the UN Committee on Economic, Social and Cultural Rights (CESCR) published a statement in 2011 on human rights and the corporate sector in which it called upon States to ‘take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant’.91

In its General Comment No. 24 on State Obligations in the Context of Business Activities, CESC considered that ‘the extraterritorial obligation to protect requires States Parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective’.92

Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration, or principal place of business on their national territory.93

States should further require business enterprises domiciled within their territory and/or jurisdiction ‘to act with due diligence to identify, prevent and address abuses to Covenant rights by their subsidiaries and business partners, wherever they may be located’.94

The other UN Treaty Bodies have expressed similar views. In a 2017 Communication concerning Canada’s responsibility for human rights violations involving Canadian building companies in the occupied Palestinian territories, the Human Rights Committee noted that ‘there are situations where a State Party has an obligation to ensure that rights under the [International Covenant on Civil and Political Rights] are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction’.95 According to the Concurring Opinion of two Committee Members, the necessary jurisdictional link between the State and third-country victims could be established on the basis of ‘(a) the effective capacity of the State to regulate the activities of the businesses

90. From the extensive literature, see Tilmann Altwicker, ‘Transnationalising Rights: International Human Rights Law in Cross-Border Contexts’ (2018) 29 European Journal of International Law 581; Sigrun Skogly and Mark Gibney, ‘Transnational Human Rights Obligations’ (2002) 24 Human Rights Quarterly 781; Yuval Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7 The Law and Ethics of Human Rights 47.
91. UN Committee on Economic, Social and Cultural Rights, ‘Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights’, E/C.12/2011/1 (2011).
92. UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’, E/C.12/GC/24 (2017), para 30.
93. ibid, para 31.
94. ibid, para 33.
95. Basem Ahmed Issa Yassin et al. v Canada, Communication No. 2285/2013, CCPR/c/120/D/2285/2013 (HRC, 26 July 2017).
concerned and (b) the actual knowledge that the State had of those activities and their necessary and foreseeable consequences in terms of violations of human rights recognised in the Covenant’.  

An important doctrinal justification for this transnationalisation of extraterritorial obligations is the prohibition in customary international law, initially recognised in the context of transboundary pollution, for a State to use or permit the use of its territory such that it causes injury to another State or persons therein. In the Corfu Channel Case, the International Court of Justice derived from ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’ duties to prevent such harmful acts from occurring or continuing. In its Advisory Opinion on the Environment and Human Rights, the Inter-American Court of Human Rights linked State obligations to prevent transboundary environmental harm to the human rights entitlements of third-country victims. According to the Court, the required jurisdictional link (Article 1 IACHR) could be established in virtue of a ‘causal relationship’ between the polluting activities within the State’s borders and extraterritorial human rights violations, provided the State exercised ‘effective control’ over the relevant activities and was in a position to prevent the harm from occurring:

In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage.

As with the considered examples of home-State regulation that juridify the corporate responsibility to respect human rights across State borders, extraterritorial State obligations to prevent and redress business-related human rights violations remain contested terrain. The present contribution does not aspire to resolve all doctrinal issues thrown up by the debate – ranging from causation to attribution and State responsibility. Yet, the previous discussion suggests a significant shift in the interpretation of human rights jurisdiction towards an approach more attuned to the realities of transnational State power wielded through and against global business enterprises. Different from traditional variations of the ‘effective control’ test, the required jurisdictional link between the State and foreign victims is established virtue of power and authority that States (may) exercise over business actors and activities located on their territory or that are otherwise within their legal capacity to control. Consequently, States are not merely permitted (UNGPs) but also required (Maastricht Principles) to regulate the adverse human rights impacts of business enterprises within their territory and/or jurisdiction with extraterritorial effect, including through ensuring access to justice and effective remedies for foreign victims of business-related human rights violations.

4.3. TOWARDS AN INTERNATIONAL BUSINESS AND HUMAN RIGHTS TREATY

International extraterritorial obligations are also at the heart of the draft international business and human rights treaty currently under negotiation. In June 2014, the UN Human Rights Council

96. ibid Concurring Opinion of Committee Members Olivier de Frouville and Yadh Ben Achour, para 10.
97. Corfu Channel Case (United Kingdom v Albania), ICJ Rep 4 (ICJ, 9 April 1949) 4, 22.
98. Advisory Opinion (n 78), paras 102-103.
adopted Resolution 26/9 that established an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG), with a mandate to ‘elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’. In August 2021, the OEIGWG Chairmanship published a third revised draft treaty text.

For its sponsors in the Global South, a business and human rights treaty is necessary to close protection gaps in international law left untouched by the UNGPs’ polycentric global governance framework:

We are mindful that soft law instruments such as the Guiding Principles […] are only a partial answer to the pressing issues relating to human rights abuses by transnational corporations. These principles and mechanisms fall short of addressing properly the problem of lack of accountability regarding transnational corporations worldwide and the absence of adequate legal remedies for victims.

Early reactions to the international treaty initiative by the European Union and other States in the Global North were complacent if not defensive. There was a widely held perception that attempts at international legal reform would prove unfeasible or ineffective, jeopardising the global consensus built around the UNGPs in 2011. Discussions of previous drafts by States, business enterprises, and civil society organisations were accordingly protracted and conflict-ridden. Meanwhile, there is at least a growing recognition of the complementarity between the two processes, with the more recent draft treaty texts clearly referencing the UNGPs’ notion of corporate human rights due diligence. The treaty negotiations have somewhat revived arguments to include corporate ‘responsibilities’ alongside State ‘duties’ in international law (the public-private divide). Yet overall, the debate now gravitates towards extending the purview of international human rights law to global business operations through an extraterritorial application of international human rights norms (the domestic-foreign divide) – with similar regulatory effects.

Regarding prevention, Article 6 of the 2021 draft provides that ‘States Parties shall regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control’ to ensure that these business enterprises ‘respect all internationally recognised human rights and prevent and mitigate human rights abuses throughout their operations’.

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99. Human Rights Council, ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ (2014) A/HRC/ Res. 26/9.

100. OEIGWG Chairmanship, ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (3rd Revised Draft, 2021).

101. Government of Ecuador, ‘Statement on Behalf of a Group of Countries at the 24th Session of the Human Rights Council: “Transnational Corporations and Human Rights”’ (2013) <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx> accessed 10 November 2021.

102. See European Union, ‘Submission to the First Session of the Intergovernmental Working Group (6-10 July 2015) <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Sessions1.aspx> accessed 10 November 2021; and further, Jens Martens and Karolin Seitz, ‘The Struggle for a UN Treaty: Towards Global Regulation on Business and Human Rights’ (Rosa Luxemburg Stiftung & Global Policy Forum, 2016).

103. John Ruggie, ‘A UN Business and Human Rights Treaty’ (2014), and John Ruggie, ‘A UN Business and Human Rights Treaty Update’ (2014) <https://www.business-humanrights.org/> accessed 10 November 2021.

104. See, for example, 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 (Cambridge University Press 2017) 185-215.
comply with their international extraterritorial obligations, ‘States Parties shall require business enterprises to undertake human rights due diligence’ concerning their own business activities and their business relationships with third parties. Regarding redress, Article 7 requires States Parties to endow their domestic courts ‘with the necessary jurisdiction […] to enable victims’ access to adequate, timely and effective remedy’. This includes ensuring civil liability of business enterprises for their failure to prevent human rights abuse in their global supply chains, provided they controlled, managed or supervised the entity causing or contributing to the abuse, or should have foreseen risks of such abuse in the conduct of their business activities.\footnote{OEIGWG Draft (n 100) Article 8(6).} As an exception to the otherwise applicable \textit{lex loci delicti} rule, Article 11 provides that, upon request of the victim, the applicable law in transnational tort litigations shall be the domestic law of the home-State court.

If adopted, the international business and human rights treaty would ensure greater consistency between the UNGPs’ corporate responsibility to respect human rights and States’ imposition of corporate human rights due diligence requirements on business enterprises as a legal standard (duty) of care. It would also further consolidate States’ international extraterritorial obligations to prevent and redress business-related human rights violations, as envisaged by the Maastricht Principles.\footnote{Olivier De Schutter ‘Towards a New Treaty on Business and Human Rights’ (2015) 1 Business and Human Rights Journal 41.} This could contribute to rectifying present shortcomings of home-State regulation in Europe, both concerning the limited reach of legal HRDD requirements in the global value chain and concerning the misalignment between corporate duties to prevent and to remedy adverse human rights impacts that they cause or to which they contribute.

\section{5. CONCLUSION}

Looking back at the UN Draft Norms in 2007, John Ruggie noted that the desire to impose international human rights obligations on corporations was driven by the limited capacity of the ‘States system’ to regulate and adjudicate harmful activities by globally operating business entities:

Currently, at the domestic level some governments may be unable to take effective action on their own, whether or not the requisite will is present. And in the international arena States may compete for access to markets and investments, as a result of which collective action problems may restrict or impede their serving as the international community’s “public authority”\footnote{Ruggie (n 38) 838.}.

Ten years after the endorsement of the UNGPs by the UN Human Rights Council, Ruggie’s attempt to compensate for the exposure of the international State-based order to economic globalisation by integrating international human rights law into a polycentric global governance framework leaves the business and human rights domain with a regulatory dilemma. On the one hand, it is now widely recognised (including by the authors of the UNGPs),\footnote{Ruggie, Rees and Davis (n 42).} that without extraterritorial legal regulation of adverse corporate human rights impacts by States, the envisaged transition from shareholder to stakeholder capitalism through mainstreaming corporate human rights due diligence in a globalised liberal private sphere is unlikely to succeed. On the
other hand, the weakness of existing examples of home-State regulation – specifically regarding their limited reach into the lower tiers of global supply chains and their faint attempts to ensure access to justice and effective remedies for foreign victims of corporate human rights abuse – confronts Europe with its darker legacies of economic imperialism and market hegemony.\textsuperscript{109} Put crudely, unilaterally imposing legal human rights due diligence requirements on global business enterprises may not simply be a response to governance gaps created by economic globalisation. It may equally be a governance technique through which States in the Global North externalise their regulatory preferences on the back of global market actors to protect their national industries.

To mitigate these concerns, while also addressing long-standing systemic obstacles to holding business enterprises legally accountable for their global human rights impacts, the article argued for a new legal consensus on business and human rights. This consensus should build on the gradual convergence between the regulatory models that underpin the UNGPs and the Maastricht Principles, such that States’ domestic regulation of business enterprises with extraterritorial effect becomes anchored in international legal obligations to prevent and redress business-related human rights violations outside their borders. The transformation of international human rights law pioneered by the Maastricht Principles and the UN Treaty Bodies would root States’ domestic regulation of business enterprises with extraterritorial effect in international human rights obligations towards foreign victims of corporate human rights abuse, enforceable in home-State courts \textit{via} transnational tort litigation. Concomitantly, the adoption of an international human rights treaty would place the unilateral imposition of HRDD requirements on business actors and activities linked to the European market on a secure multilateral legal footing, while also reinforcing the primacy of State obligations to respect, protect and fulfil human rights in the context of global business operations.

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\textsuperscript{109} See, generally, Quinn Slobodian, \textit{Globalists: The End of Empire and the Birth of Neoliberalism} (Harvard University Press 2016); and specifically on home-State regulation, Sara Seck, ‘Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?’ (2008) 46 Osgoode Hall Law Journal 565.