White Paper 8

business and human rights

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1.

state of the art

Part 1: The state of the art

The following list reflects the current state of international law with respect to Business and Human Rights (BHR). Due to its breadth, it shows the vast reach of BHR rules at the local, national and multi-national levels, across a range of sectors, and involving a variety of stakeholders. This list is organised by theme.

It covers a "smart mix" of mandatory and voluntary measures, which includes legislation enacted by states, principles and guidance designed by multilateral or regional institutions, together with policies, standards and practices emanating from private actors in specific sectors, to promote responsible business. It reveals the fragmentation of the existing regulatory and non-regulatory measures, their lack of coherence and their complexity, which raise challenges that will be addressed in the next Part. Yet, all these measures reflect the diversity of the field, its wide scope and its polycentric governance system.

1. The authoritative framework

- UN Guiding Principles on Business and Human Rights

On 16 June 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs), presented by Professor John Ruggie, special representative of the Secretary-General on human rights and transnational corporations and other business enterprises. This endorsement established the UNGPs as a common global framework for preventing and addressing adverse business-related human rights impacts. Although the UNGPs are not binding, they operate as an authoritative standard – a tool - to galvanise efforts to promote corporate respect for human rights and sustainable development around three pillars (1) the state duty to protect human rights, (2) the corporate responsibility to respect human rights and (3) access to effective and appropriate remedy.

There is also an important addition made by the recommendations of the Working Group on the issue of human rights and transnational corporations and other business enterprises on how to take into account gender dimensions in the UN Guiding Principles on Business and Human Rights, 23 May 2019, UN Doc. A/HRC/41/43 and assure protection and respect of Human Rights Defenders, 22 June 2021, UN Doc. A/HRC/47/39/Add.2.

- OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) provide a set of recommendations that Governments address to multinational enterprises to encourage responsible business conduct in a global context consistent with internationally recognized standards. They cover all key areas of business responsibility, including human rights, labour rights, environment, the fight against corruption, consumer interests, as well as information disclosure, science and technology, competition and taxation.

- ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) is the International Labour Organization (ILO) instrument that provides direct guidance to multinational enterprises on social policy and inclusive, responsible and sustainable working practices for all and on the mitigation and resolution of difficulties that their various operations may raise. Its principles are addressed to multinational enterprises, governments of home and host countries, and employers' and workers' organizations and cover areas, such as employment, training, working conditions, work-life balance, and industrial relations as well as general policies.

- The Corporate Responsibility to Respect Human Rights - An Interpretive Guide

This interpretative guide is intended to provide additional contextual explanation to the UNGPs to ensure that they are fully understood in terms of their meaning and intent. It was developed by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in collaboration with the former United Nations Special Representative. It is designed to support effective business implementation by emphasizing the corporate responsibility to respect human rights.

- OECD Due Diligence Guidance for Responsible Business Conduct

Adopted in 2018 by the OECD, the OECD Due Diligence Guidance for Responsible Business Conduct (OECD due Diligence Guidance) has become the authoritative tool on risk-based due diligence processes to prevent, address and mitigate negative impacts related to business operations, their supply chains and business relationships. Its aim is to provide practical support

to enterprises in the implementation of the OECD Guidelines for Multinational Enterprises, and to promote a common understanding among governments and stakeholders on due diligence for responsible business conduct.

- UNGPs 10+ Roadmap for the Next Decade of Business and Human Rights

16 June 2021 marked the 10th anniversary of the UNGPs. The UNGPs 10+ report is intended as a roadmap for the next decade of business and human rights, or in other words to sustainable development, just transition and responsible recovery through respect for people and the planet. It seeks to promote dissemination and implementation of the UNGPs worldwide and take stock of the first decade of their implementation.

- Children's Rights and Business Principles

In 2012, UNICEF, the UN Global Compact and Save the Children adopted the Children's Rights and Business Principles (CRBP) as a comprehensive set of principles to guide companies to respect and support children's rights in relation to three key areas: workplace, marketplace, and community. Ten years after their adoption, they have become a relevant set of international guidelines that have been referred to by States in 12 National Action Plans on Business and Human Rights and used and promoted by transnational businesses as a benchmark on their inclusion of a child rights' perspective in their activities and business relationships.

- UN Global Compact

It is a call to companies to align their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption, and to take action in support of the UN Sustainable Development Goals (SDGs). Its 2021-2023 strategy seeks to accelerate and scale the global collective impact of business by upholding these ten principles and delivering the SDGs through accountable companies and adaptable ecosystems.

- Transforming Our World: the 2030 Agenda for Sustainable Development (General Assembly) - The Sustainable Development Goals[1], A/RES/70/1

The Sustainable Development Goals (SDGs) were adopted by the UN General Assembly on 25 September 2015; they expand the scope of the Millennium Development Goals. As key global

Note 1 Please see the White Paper on GDGs beyond 2030 also prepared in the context of the 150th anniversary of the ILA.

policy goals structured around 17 goals, their main focus is to promote non-discrimination and the economic, social and environmental dimension of sustainable development in accordance with the SDGs. Goal 17 adds a role for the private sector, calling for its involvement in the achievement of progress around the different SDGs.

2. Business and human rights as part of international and regional human rights law

- International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights (IGWG) - The Third Revised Draft

At the international level, an intergovernmental working group was established in 2014 by the Human Rights Council with the mandate of elaborating an international legally binding instrument, which would require States to implement mandatory human rights due diligence measures, facilitate access to remedy in transnational civil litigation cases, and engage in international cooperation. This initiative led by the Global South has rallied an unprecedented alliance of civil society organizations. However, it has received a mixed response from States participating in the intergovernmental working group. The Third Revised Draft was published in August 2021 prior to the 7th session (25-29 October 2021). Even if differences remain as to the exact form that the legally binding instrument should take, a consensus has gradually emerged on the complementarity between hard and soft law and on the need to fill the persistent gaps by adopting such an instrument at the international level to strengthen the prevention of human rights violations committed in the context of business activities and improve access to justice and redress. The 8th session will take place on 24-28 October 2022. In May 2022, the G7 Labour Ministers announced support for an internationally binding instrument on business and human rights.

- Recommendation CM/Rec(2016) of the Committee of Ministers to member States

The Committee of Ministers of the Council of Europe issued a recommendation in 2016 to its member States regarding business and human rights, asking them to review their national legislation and practices, to disseminate the recommendation among competent authorities and stakeholders, to share examples of good practices, and to share plans on national implementation of the UNGPs, including National Action Plans. In its appendix, the recommendation addresses the State duty to

protect, the actions needed to enable the corporate responsibility to respect human rights, and access to remedy, while highlighting the additional needs for the protection of workers, children, indigenous peoples and human rights defenders.

- Business and Human Rights: Inter-American Standards

The Inter-American Commission on Human Rights published its first thematic report on business and human rights in 2019. The report highlights how the UNGPs, as an interpretative standard of existing State human rights obligations, can impact State duties under the American Convention on Human Rights. As a result, the report insists on the need for States to respect and ensure human rights in the context of business activities, to adopt measures –including legislation– to regulate the impact of business activities on human rights, and to ensure access to remedy for victims of business-related human rights violations.

- General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights (Committee on the Rights of the Child)

The Committee on the Rights of the Child adopted its General Comment No. 16 in 2013, where it addresses the obligations and measures that States must take to ensure the respect, protection, and implementation of children's rights, in general and in specific contexts, in particular within the framework of the informal economy, or situations of emergency and conflict, and provide remedies for violations committed in the context of business activities and operations. It nevertheless recognizes that the duties and responsibilities in terms of children's rights also fall on private actors and companies.

- General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (Committee on Economic, Social and Cultural Rights)

The Committee on Economic, Social and Cultural Rights adopted its General Comment No. 24 in 2017, addressing the territorial and extraterritorial obligations of States parties under the Covenant to prevent adverse impacts of business activities on human rights, such as obligations of non-discrimination and obligations to respect, protect and fulfil economic, social, and cultural rights. In exercising their obligation to protect, States parties to the Covenant must create and enforce appropriate regulatory and policy frameworks, including through effective monitoring, investigation and accountability mechanisms to ensure accountability and access to remedies, preferably judicial, for persons who have suffered a violation of their rights under the Covenant in the context of business activities.

3. Business and human rights as part of international environmental law

- The human right to a clean, healthy and sustainable environment (General Assembly), A/RES/76/300

As a follow-up of the 2021 resolution by the Human Rights Council, the UN General Assembly recognized the existence of a universal human right to a clean, healthy and sustainable environment on 28 July 2022. While not legally binding, it sets the stage for further normative and policy developments in relation to this right since it commits States, international organizations, companies, and other actors concerned to take all necessary measures to guarantee a clean, healthy and sustainable environment for all.

- The human right to a clean, healthy and sustainable environment (Human Rights Council), A/HRC/RES/48/13

The Human Rights Council adopted this Resolution on 8 October 2021. It recognises a human right to "*a clean, healthy and sustainable environment*," as an important element in the enjoyment of human rights, or in other words, substantive rights to clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments to live, work, study and play, healthy biodiversity and ecosystems. It affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environment agreements under the principles of international environmental law. Thereafter, the UN High Commissioner for Human Rights "*called on States to take bold actions to give prompt and real effect to the right to a healthy environment*."

- Climate Emergency: Scope of Inter-American Human Rights obligations (Inter-American Commission on Human Rights (IACHR)), Resolution 3/2021

This resolution of 31 December 2021 is framed in the context of mandates received from the General Assembly of the Organization of American States (OAS), which entrusted the IACHR (among other tasks) to contribute "*to efforts to determine the possible existence of a link between the adverse effects of climate change and the full enjoyment of human rights*." The Commission takes note of the provisions of the preamble to the Paris Agreement, which recognizes that in addressing climate change, States "*should respect, promote and take into account their respective human rights obligations*". The purpose of this resolution is to systematise the human rights obligations of States in the context of the climate crisis in order for them to make public policy decisions under a rights-based approach.

- Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law)

The European Climate Law entered into force on 29 July 2021. In Article 1, it establishes a framework for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals regulated in European Union law. This Regulation sets out a binding objective of climate neutrality in the European Union by 2050 in pursuit of the long-term temperature goal set out in the Paris Agreement and provides a framework for achieving progress in pursuit of the global adaptation goal established in the Paris Agreement. This Regulation also sets out a binding European Union target of a net domestic reduction in greenhouse gas emissions for 2030.

- Paris Agreement

The Paris Agreement, which was adopted by 196 Parties at COP 21 on 12 December 2015 and has been effective since 4 November 2016, is a legally binding international treaty on climate change, which aims to strengthen the global response to the threat of climate change, in the context of sustainable development and poverty reduction. It sets out a long-term temperature goal, well below 2C, preferably to 1.5C, compared to pre-industrial levels, and aims to strengthen the global response to the threat of climate change by increasing the ability to adapt to the adverse impacts of climate change and by making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

4. Business and human rights as part of international economic law, international trade and investment agreements

- Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-investor Contract Negotiations - Guidance for Negotiators

As an addendum to the UNGPs, the Principles for Responsible Contracts are a tool to address some of the human rights concerns relating to State-Investor contracts. It identifies 10 key principles to help integrate the management of human rights risks into contract negotiations on investment projects between host State entities and foreign business investors, inter alia the management of potential adverse human rights impacts, stabilization clauses, community engagement, project monitoring and compliance, and grievance mechanisms for harm to third parties.

- Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text (USMCA)

The USMCA entered into force on 1 July 2020. It substituted the 1994 North America Free Trade Agreement (NAFTA). Within its numerous provisions, the USMCA adds several recommendations relating to responsible business conduct or corporate social responsibility. For example, in the chapter on the Environment, Article 24.13 sets forth that while recognizing the importance of promoting CSR and RBC, each Party shall encourage enterprises to adopt and implement voluntary best practices of CSR that are related to the environment. In the chapter on Labour, Article 23.6 sets forth that each Party shall prohibit the importation of goods produced in whole or in part by forced or compulsory labour, including child labour. In the chapter on Investment, Article 14.17 stipulates that parties will encourage companies to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of CSR, including the OECD Guidelines for Multinational Enterprises. In addition, Article 14.16 establishes that nothing shall be construed to prevent a Party from adopting, maintaining or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives. In line with Article 23.6, U.S. Customs and Border Protection has recently issued six new Withhold Release Orders, including three focused on Malaysian producers of disposable gloves, one on a Fijian fishing vessel, one on a Chinese producer of silica-based products, and one on a tomato farm in Mexico.

- 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 Bilateral Investment Treaty)

The Morocco-Nigeria Bilateral Investment Treaty (BIT) was signed on 3 December 2016. It has been considered an example of good practice for the integration of human rights and other non-economic considerations into bilateral investment treaties. In Article 15, the BIT sets forth the recognition by the Parties that it is inappropriate to encourage investment by weakening or reducing domestic legislation, including in relation to labour, public health and safety. The Parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party. Article 23 provides that the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development and other legitimate social and economic policy objectives. In that spirit, Article 24 stipulates that investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices.

- EU-China Comprehensive Agreement on Investment -The Agreement in Principle

In the Agreement in Principle in December 2020, China commits to ensure fairer treatment for EU companies, allowing them to compete on a more level playing field in China. These commitments cover state-owned enterprises, transparency of subsidies, and rules against forced technology transfer. Notably China agrees all of the key elements of the EU approach to sustainable development, including commitments not to lower the standards of labour and environmental protection in order to attract investment, commitments to effectively implement the UN Framework Convention on Climate Change and the Paris Agreement, as well as the ILO Conventions, and commitment to promote the uptake of CSR by business. Both sides undertake to pursue the negotiations on investment protection and investment dispute settlement within 2 years of the signature of the Agreement. In May 2021, the European Commission announced the suspension of this Agreement.

5. Regional and national legal frameworks on business and human rights

4.1. Regional legal frameworks

- Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (version of 23 February 2022)

The draft Directive on Corporate Sustainability Due Diligence (CSDD) aims to foster sustainable and responsible corporate behaviour throughout global value chains. It establishes a corporate sustainability due diligence duty to address adverse human rights consequences of their activities (e.g. child labour and labour exploitation) and environmental impacts (e.g. pollution, loss of biodiversity, etc.). This duty applies to EU companies over a certain threshold in terms of size and business volume, as well as other EU limited liability companies operating in defined high-impact sectors, together with non-EU companies active in the EU, on a similar basis. To comply with the Directive, EU Member States would have to ensure that companies within the scope of the corporate due diligence duty: (i) integrate due diligence into their company policies and have in place a due diligence policy that is updated annually (article 5); (ii) take appropriate measures to identify actual or potential adverse human rights and environmental impacts in their own operations, in their subsidiaries and at the level of their established direct or indirect business relationships in their value chain (article 6); (iii) prevent or mitigate these potential adverse impacts (article 7); (iv) bring to an end or minimise actual adverse impacts (article 8); (v) establish and maintain a means of complaint and redress in the event of legitimate concerns about these actual or potential adverse impacts (Article 9); (vi) monitor the effectiveness of the due diligence policy and measures (article 10); (vii) publicly communicate on due diligence (article 11) and (viii) adopt a plan to ensure the compatibility of their business model and strategy with the transition to a sustainable economy and within the limitation of global warming to 1.5 °C in line with the Paris Agreement (Article 15). Furthermore, the draft Directive makes provision for the monitoring and enforcement of the corporate human rights and environmental due diligence duties to be established via one or more national supervisory authorities (Articles 17 and 18). Member States will lay down rules on effective, dissuasive and proportionate sanctions applicable in the event of infringements of the national provisions adopted pursuant to this directive and ensure their implementation (Article 20).

- Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards Corporate Sustainability Reporting (version of 21 April 2021)

The European Commission adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD) that would amend the existing reporting requirements of the Non-Financial Reporting Directive (NFRD). It extends the scope to all large companies and all companies listed on regulated markets (with the exception of listed micro-enterprises), requires the audit of reported information, introduces more detailed reporting requirements, as well as a requirement to report according to mandatory EU sustainability reporting standards. In that regard, the European Financial Reporting Advisory Group (EFRAG) is, at the time of writing, in the process of consulting the draft European Sustainability Reporting Standards (ESRS), which adoption is expected by October 2022. It was reported on 21 June 2022 that a political agreement had been reached in relation to the new CSRD. As a result, the regulation would apply in three stages: in January 2024 for companies already subject to the NFRD; in January 2025 for large companies not currently subject to the NFRD; and in January 2026 for listed SMEs.

- Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 – The Taxonomy Regulation

The Taxonomy Regulation entered into force on 12 July 2020. It sets out four overarching conditions that an economic activity has to meet in order to qualify as environmentally sustainable for the purpose of determining the degree of environmental sustainability of an investment. It is a transparency tool to help financial market participants or issuers of financial products or corporate bonds to invest in economic activities, which : (1) make a substantive contribution to one of six environmental objectives; (2) do no cause any significant harm to the other five, where relevant; and (3) meet minimum safeguards (e.g. OECD Guidelines on Multinational Enterprises and the UN Guiding Principles on Business and Human Rights).

- Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability related disclosures in the financial services sector - The Sustainable Finance Disclosures Regulation

The Sustainable Finance Disclosures Regulation (SFDR) has been effective since 10 March 2021 with staggered implementation dates. It establishes harmonized rules for financial market participants and financial advisers relating to transparency regarding the full scope of sustainability risks and the consideration of adverse sustainability impacts in their processes. It defines sustainability information for financial products. As the SFDR seeks to improve transparency in the market for sustainable investment products, it aims to prevent greenwashing and increase transparency around sustainability claims made by financial market participants. The Taxonomy Regulation and the SFDR both apply to the same categories of funds and are designed to be complementary.

- 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 – The Conflict Minerals Regulation

The Conflict Minerals Regulation entered into force on 1 January 2021. It aims to ensure that EU importers of tin, tantalum, tungsten, their ores, and gold (3TG) originating from conflict-affected and high-risk areas (Conflict Minerals) respects supply chain due diligence obligations and maintain documentation demonstrating compliance with these obligations. It seeks to promote responsible sourcing of minerals from conflict areas in line with the OECD Due Diligence Guidance and help break the link between armed conflict and the illegal exploitation of minerals and help put an end to the exploitation and abuse of local communities, including mine workers, and support local development. In other words, the Conflict Minerals Regulation establishes a EU system for supply chain due diligence to ensure EU companies import these minerals and metals from responsible and conflict-free sources only.

- 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 – The Non-Financial Reporting Directive

The Non-Financial Reporting Directive (NFRD) came into effect in all member States in 2018. It stipulates that large undertakings shall publish information regarding risks, impacts, measures (including due diligence) and policies related to environmental issues, social issues and human rights. When the business does not pursue policies in relation to one or more of those matters, it shall provide a clear and reasoned explanation for not doing so. Although the NFRD directive has had some positive effect on improving the responsible operation of companies, it has not led most companies to take into account their negative impacts in their value chains.

5.2. National legal frameworks

- Uyghur Forced Labour Prevention Act (also known as UFLPA) (Public Law 117-78 - Dec 23, 2021)

The UFLPA was signed into law by President Biden on 23 December 2021. It restricts the importation of all goods produced in the Xinjiang Uyghur Autonomous Region ("XUAR") or using workers transferred from XUAR to other parts of China under certain circumstances. Notably, the UFLPA introduces a rebuttable presumption, subject to a "clear and convincing" evidence standard, that goods produced in the XUAR or using workers transferred from the XUAR were made with forced labour and are prohibited from entering the United States. This rebuttable presumption went into effect on 21 June 2022.

- Swiss Conflict Minerals and Child Labour Due Diligence and Transparency Ordinance (Section Eight: Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (Art 964j-964l of the Swiss Code of Obligations))

The Swiss Conflict Minerals and child Labour Due Diligence and Transparency Ordinance was passed on 3 December 2021 and entered into force on 1 January 2022 but is subject to a one-year transition. It imposes due diligence and reporting obligations

relating to tin, tantalum, tungsten, or gold containing minerals or metals from conflict-affected or high-risk areas (Conflict Minerals) and child labour on undertakings with a registered office, central administration or principal place of business in Switzerland which (i) import or process Conflict Minerals or (ii) offer products or services when there is a justified suspicion that they were manufactured or provided using child labour. Companies subject to the due diligence obligations are required to have an adequate control system to address risks associated with Conflict Minerals and child labour, including a supply chain policy and a system for tracking the supply chain. The implementation of due diligence measures in the area of Conflict Minerals has to be audited by an independent expert. Companies that comply with an internationally equivalent regulation or instrument – such as the OECD Due Diligence Guidance or the EU Conflict Minerals Regulation – are exempt from the requirements under the Swiss law, which largely mirror the EU Conflict Minerals Regulation. Companies subject to the due diligence obligations will have to issue an annual report on compliance with these measures. Criminal sanctions and a new liability regime may apply if the company fails to comply with these obligations.

- German Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz, LkSG)

The German Supply Chain Due Diligence Act (GSCA) was passed on 11 June 2021 and will enter into force on 1 January 2023, with staggered implementation dates depending on the size of relevant entities: the Act will apply to undertakings employing more than 3,000 employees in Germany until 31 December 2023, and then from 1 January 2024 onward, to companies with 1,000 or more employees. Its goal is to bind these undertakings, regardless of their legal form, with footage in Germany, including head office, main establishment, administrative headquarters or statutory seat or a branch office in Germany, to comply with due diligence obligations to ensure or improve compliance with human rights and environmental standards in their supply chain. To this end, the GSCA requires these companies to set up processes to identify, assess, prevent and remedy human rights and environmental risks and impacts in their supply chains and in their own operations. These due diligence obligations must be respected by companies in their own operations as well as with regard to their direct suppliers. Indirect suppliers are involved when the company has substantiated knowledge of human rights violations at this level. Companies must publish

an annual report outlining preventive and corrective measures. The GSCA requires the German Federal Office for Economic Affairs and Export Control to monitor the implementation of the due diligence obligations, review companies' reports, issue the necessary orders and/or measures, and conduct onsite inspections at companies. If a company fails to comply with these due diligence obligations, the GSCA imposes a range of sanctions, non-compliant companies facing the risk of being excluded from public contracts for up to three years and fines of up to 2% of their global annual turnover.

- Norwegian Act on Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions *(Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven))* (Transparency Act)

The Transparency Act was passed on 10 June 2021 and entered into force on 1 July 2022. It imposes human rights due diligence and transparency obligations and decent working conditions on companies across their supply chain, both on their internal operations and those of their suppliers and subcontractors (direct and indirect) in accordance with the UNGPs and the OECD Guidelines for Multinational Enterprises. All large companies domiciled in Norway, as well as large foreign companies selling products and services in Norway, are covered. The Act is unique in that it requires companies to respond to information request about how they address potential or actual impacts on human rights and decent working conditions in their operations and related due diligence activities. Companies subject to the law must publish a report of the due diligence assessments, at the latest by June 30 of each year, on their website. The Norwegian Consumer Authority is responsible for upholding and enforcing the Transparency Act and companies that do not comply with these new legal requirements may be subject to fines or injunctions that will limit their business activity in the country. There is no reference to civil liability.

- Dutch Child Labour Due Diligence Act (Wet Zorgplicht Kinderarbeid)

The Child Labour Due Diligence Act (CLDD) was passed on 14 May 2019 but has yet to take effect due to delays in the passage of required regulations. It introduces an obligation for all companies, regardless of their place of registration, selling goods and services on the Dutch market to conduct due diligence with a view to preventing the use of child labour in the production of those goods and services. The CLDD Act requires these companies to issue a declaration to that effect and to devise a plan to prevent child labour in their supply chains if they find

it. There are significant administrative fines and criminal penalties for non-compliance.

- French Act No 2017-399 of 27 March 2017 on the Duty of Vigilance of Parent and Outsourcing Compagnies (Loi No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre) (Articles L. 225-102-4 & L. 225-102-5 of the Commercial Code)

The Corporate Duty of Vigilance Act, which has been in force since 2017, was the first national measure to legislate corporate human rights due diligence across sectors and issues. It applies to French companies with at least 5,000 employees in France or 10,000 worldwide, either directly or in their subsidiaries, by the end of two consecutive financial years. The Act requires these companies to establish and implement a publicly available vigilance plan for which they can be held accountable (Art L. 225-102-4). The vigilance plan must include "*due diligence measures such as to identify risks and forestall serious infringements of or harm to human rights and fundamental freedoms, personal health and safety and the environment*." It covers the operations of the company, its direct or indirect subsidiaries, and subcontractors and suppliers with which it maintains an established business relationship, insofar as those activities are linked to that relationship. The vigilance plan is intended to be developed in association with the company's stakeholders. It must include a risk mapping, regular evaluation procedures, appropriate actions to mitigate risks or prevent severe infringements or harm, and an alert and complaint mechanism that collects reporting of existing or actual risks. The vigilance plan and the report on its effective implementation are made public and included in the company's report. In addition, the Act sets up a formal monitoring mechanism to order the company to comply with its vigilance obligations or improve its vigilance measures under the threat of penalty for each day of non-compliance. The Act also provides for civil liability where damages are due to the company's failure to comply with its vigilance obligations and requires to compensate for the damage, where compliance would have prevented the harm (Art L. 225-102-5). Any person with a legitimate interest may bring an action.

- The UK Modern Slavery Act 2015, and the current Modern Slavery (Amendment) Bill

The UK Modern Slavery Act 2015 (MSA), which was passed on 26 March 2015, sets out the legal requirements for how commercial organisations must address and report on modern slavery. This law applies to any company doing business in the UK with an annual turnover of £36 million or more. Pursuant

to the MSA, these companies are required to take action to identify, prevent and mitigate modern slavery in their operations and supply chains and publish an annual statement to report on these actions. The current Modern Slavery (Amendment) Bill, which was introduced to the House of Lords on 15 June 2021, aims to prohibit the falsification of slavery and human trafficking statements, establish minimum standards of transparency in supply chains in relation to modern slavery and human trafficking, and prohibit companies using supply chains which fail to demonstrate minimum standards of transparency. Many of the new requirements will be mandatory once the amendments to the MSA have been approved by the UK Parliament.

- The California Transparency in Supply Chains Act 2010 (Section 1714.43 of the California Civil Code)

The California Transparency in Supply Chains Act of 2010 (CTSCA) was one of the first key pieces of legislation on modern slavery and human trafficking in supply chains. It was passed in 2010 and became effective on 1 January 2012. It requires large retailers and manufacturers to disclose their efforts to keep supply chains free from slavery and human trafficking by reporting risks and explaining how suppliers are expected to comply. Companies subject to this Ac must disclose information about the verification, audits, certification, internal accountability and training relating to risks of slavery and human trafficking in their product supply chain. The Act applies to retailers or manufacturers doing business in California with annual gross receipts over 100 million US dollars.

- U.S. Dodd Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, Section 1502 (conflict minerals provision)

Section 1502 of U.S. Dodd Frank Act, which was signed into law on 21 July 2010, requires U.S. listed companies to disclose whether they use tin, tungsten, tantalum and gold in their supply chains and whether these minerals originate in the Democratic Republic of the Congo (DRC) or an adjoining country. In such a case, issuers must submit a Conflict Minerals Report describing the measures taken to exercise due diligence, the description of the products that are not DRC conflict free, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity. This report is filed with the U.S. Securities and exchange Commission (SEC).

6. Non-judicial dispute settlement mechanisms relating to business and human rights

- National Contact Points for Responsible Business Conduct

All 51 governments adhering to the OECD Guidelines have the legal obligation to set up a National Contact Point (NCP). The main role of the NCPs is to further the effectiveness of the OECD Guidelines by undertaking promotional activities, handling enquiries, and dealing with claims against companies for the alleged non-observance of the Guidelines in specific instances. NCPs assist businesses and their stakeholders to take appropriate measures aligned with the OECD Guidelines and provide a mediation and conciliation platform for resolving issues relating to the implementation of the Guidelines. Practically, there are significant differences between countries in terms of the effectiveness of remedy provided by the NCPs.

- The Hague Rules on Business and Human Rights Arbitration

The Hague Rules on Business and Human Rights Arbitration were finalized on 12 December 2019. They provide a set of rules for the arbitration of disputes related to the impact of business activities on human rights. They are based on the Arbitration Rules of the United Nations Commission on International Trade Law, modified to the context of business and human rights disputes. These Rules are meant as a grievance mechanism under the UNGPs, and not a substitute for State-based judicial or non-judicial mechanisms. They intend to provide both a means for access to remedy for rights-holders affected by business activities and a human rights compliance and risk management strategy for businesses themselves. Business and human rights arbitration could be relied upon by businesses to enforce contractual human rights commitments against their business partners (e.g., in supply chains and development projects), or as the final port of call under its grievance mechanism. Parties may incorporate arbitration under the Hague Rules into project or project finance documentation, industry codes of conduct, agreements or other instruments.

7. Business and human rights initiatives in the mining sector

- National Alternative Employment and Livelihood Programme (NAELP) in Ghana

The NAELP is a national programme designed to assist communities affected by the Government's efforts to sanitise the mining industry from illegal mining activities. It includes six pillars: land reclamation and reforestation; the development of

agriculture and agro-processing activities; apprenticeships, skills training and entrepreneurship; sustainable small-scale community mining; sector support services; and community development. In addition, the Community Mining Scheme is an initiative of the Government to enable the youth in mining areas to engage in the small-scale mining business. Pursuant to the country's mining laws, the initiative is tailored only for Ghanaians with the objective of empowering them to invest in the mining sector. As of November 2021, the government had approved five Community Mining Schemes with a combined 20 concessions, which have the potential to support the livelihood of 26,300 people.

- Guidelines for Social Responsibility in Chinese Outbound Mining Investment by the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters

The purpose of the Guidelines is to regulate Chinese mining investments and operations, and to guide Chinese companies in improving CSR and sustainability strategies, as well as management systems.

- International Council on Mining and Metals (ICMM)'s Mining Principles

The ICMM's Mining Principles define the good practice environmental, social and governance requirements of company members through a comprehensive set of 38 Performance Expectations and eight related position statements on a number of critical industry challenges. Implementation of the Mining Principles support progress towards the global targets of the UN Sustainable Development Goals and the Paris Agreement on climate change. Incorporating robust site-level validation of performance expectations and credible assurance of corporate sustainability reports, ICMM's Mining Principles seek to maximise the industry's benefits to host communities, while minimising negative impacts to effectively manage issues of concern to society.

8. Business and human rights initiatives in the garment industry

- The Californian Garment Workers Protection Act

The Californian Garment Workers Protection Act (GWPA), which was signed into law on 27 September 2021 and took effect on 1 January 2022, is intended to result in fair wages and improved working conditions for garment workers. It aims to strengthen current law in three ways: 1) by expanding liability, ensuring that retailers cannot use layers of contracting to avoid liability; 2) prohibiting the use of paying garment workers by the "piece,"

thereby eliminating a significant obstacle to workers being paid minimum wage and also protecting their health and safety, and 3) authorising the Labor Commissioner's Bureau of Field Enforcement to investigate wage theft.

- The International Accord for Health and Safety in the Textile and Garment Industry

The International Accord for Health and Safety in the Textile and Garment Industry is a legally binding agreement between apparel brands and trade unions to make ready-made garment (RMG) factories safe. It came into effect on 1 September 2021. It succeeds the Bangladesh Accord on Fire and Building Safety, which was signed in the aftermath of the Rana Plaza building collapse in 2013, between workers, factory managers and apparel companies to work towards a safe and healthy garment and textile industry in Bangladesh. The International Accord maintains the main elements of the Bangladesh Accord and expands it so that it covers a broader array of health and safety issues, extends to factories in the textile sector, and will expand to at least one additional country by October 2023. It entails inspections, remediation monitoring, safety committee training and a worker complaints mechanism, all implemented by the RMG Sustainability Council in Bangladesh.

9. Business and human rights initiatives in the financial sector

- South Africa's Green Finance Taxonomy

On 1 April 2022, the Taxonomy Working Group launched South Africa's first national Green Finance Taxonomy, as part of South Africa's Sustainable Finance Initiative. The Taxonomy is a classification system that establishes a list of assets, projects, activities and sectors, eligible to be defined as "green" in line with international best practice and South Africa's national priorities. Investors, issuers, and other financial sector participants to track, monitor, and demonstrate the credentials of their green investments can use the classification for their own needs. Together with the EU Taxonomy Regulation, they mandate compliance with the OECD Guidelines as minimum social safeguards.

- United Nations Environment Programme Finance Initiative

The UNEP Finance Initiative (UNEP FI) aims to mobilise action across the financial system to align economies with sustainable development. UNEP FI brings the UN together with banks, insurers and investors globally to shape the sustainable finance agenda and develop practical approaches to setting and imple-

menting targets for the transition to a sustainable and inclusive economy. Founded in 1992, UNEP FI was the first organisation to engage the financial sector on sustainability, and now advance sustainable market practice with more than 400 financial institutions, headquartered in over 85 countries.

- Principles for Responsible Investment

The Principles for Responsible Investment (PRI) were established in 2006 by the UNEP FI and the UN Global Compact and are now applied by half the world's institutional investors. They consist of six Principles relating to environmental, social and corporate governance (ESG) issues relating to investment practices. By applying these Principles, institutional investors commit to aligning their interests to the broader objectives of society and developing a sustainable financial system.

- Principles for Responsible Banking

The Principles for Responsible Banking (PRB) were created in 2019 through a partnership between founding banks and the UNEP FI and are now signed by some 300 banks representing over 45% of global banking assts. The PRB set a framework for ensuring that the signatory banks' strategies and practice align with the SDG and the Paris Agreement and relevant regional and national frameworks. The signatory banks commit to embedding six Principles across all business areas, at the strategic, portfolio and transactional levels to achieve sustainable finance.

- Global Financial Alliance for Net-Zero

The UNEP FI convenes three finance sector 'net-zero' alliances forming together the Global Financial Alliance for Net-Zero (GFANZ). The GFANZ comprises

(1) the Net-Zero Asset Owner Alliance (AOA) launched in 2019, now signed by more than 70 institutional asset owners;

(2) the Net-Zero Banking Alliance (NZBA), launched in 2021, now with over 100 banks and about 40% of global banking assets; and

(3) the Net-Zero Insurance Alliance (NZIA), launched in 2021 representing about 12% of world premium.

These alliances help members align their portfolios with net-zero greenhouse gas emissions by 2050 through intermediate targets. They support the implementation of decarbonisation strategies and provide an internationally coherent framework and guidelines.

- Sustainable Stock Exchanges Initiative

The PRI, UNEP FI, UNCTAD and UN Global Compact launched the Sustainable Stock Exchange (SSE) Initiative in 2012, which now involves more than 100 SSE partner exchanges accounting for almost all publicly listed capital markets. The SSE provides a global platform to build the capacity of stock exchanges and securities market regulators to promote responsible investment in sustainable development and advance corporate performance on environmental, social and governance issues. It sets an integrated programme of conducting evidence-based policy analysis, facilitating a network and forum for multi-stakeholder consensus-building, and providing technical assistance and advisory services.

- International Sustainability Standards Board (ISSB)

As the new standard-setting board, its aim is to deliver a comprehensive global baseline of sustainability-related disclosure standards that provide investors with information about companies' sustainability-related risks and opportunities to help them make informed decisions. It has published the *Climate-related Disclosures* and the *General Requirements for Disclosure of Sustainability-related Financial Information* for consultation.

- Task Force on Climate-related Financial Disclosures

The Financial Stability Board designed the Task Force on Climate-related Financial Disclosures (TCFD) to develop recommendations on the types of information that companies should disclose to support investors, lenders and insurance underwriters in appropriately assessing and pricing a specific set of risks related to climate change.

- Task Force on Nature-related Financial Disclosures

The Taskforce on Nature-related Financial Disclosures (TNFD) was formally launched in 2021. The G7 Finance Ministers and G20 Sustainable Finance Roadmap have endorsed the TNFD. It is a global, market-led initiative with the mission to develop and deliver a risk management and disclosure framework for organisations to report and act on evolving nature-related risks and opportunities. Its goal consists of driving global financial flows toward nature-positive outcomes. Its members include financial institutions, corporates and market service providers.

- Equator Principles

The Equator Principles (EP) are intended to serve as a common baseline and risk management framework for financial institutions to identify, assess and manage environmental and social risks when financing projects. They consist of ten Principles implemented by the Equator Principles Financial Institutions to ensure that the projects they finance are developed in a socially responsible manner and reflect sound environmental management practices.

- International Finance Corporation (IFC) Sustainability Framework

The IFC's Sustainability Framework promotes environmental and social practices, in an effort to integrate sustainability into risk management. It includes the Policy on Environmental and Social Sustainability, the Performance Standards (which define the IFC's clients' environmental and social risks management responsibilities), and the Access to Information Policy.

- Global Reporting Initiative (GRI) Standards

The Global Reporting Initiative (GRI) Standards are a modular system of interconnected standards to report publicly on economic, environmental and social impacts. They are divided in three series: the universal standards, applicable to all companies; the sector standards, applicable to specific sectors; and the topic standards, which are relevant to a particular topic. They include a series of human rights-related issues, including occupational health and safety, the rights of indigenous peoples, diversity and equal opportunity, employment, non-discrimination, forced and child labour, among others.

2.

challenges

Meeting the challenges of business and human rights means first understanding the world in which these rights must be protected. It is a world in a state of crisis shaken by armed conflicts, poverty, migration flows, shrinking civic spaces, populism and corruption. The socio-economic crisis resulting from the COVID-19 pandemic has further laid bare and amplified existing inequalities and injustices, including abuse of human rights and pervasive gender and racial discrimination. Yet it is also an ever-interconnected world driven by new political momenta and a social conscience relying ever more on civil society. In this context, never has it been more important to engage with these challenges and hear the voice of all the stakeholders to find solutions and build a fairer and more inclusive society.

The following section addresses six relevant challenges for business and human rights: the uncertain evolution of the regulatory space; global and regional supply chains; the unresolved quest for domestic and international accountability; the perennial discussion on international legal personality; the complex challenge of ensuring environmental protection and fighting against climate change; and the question of norms, practice and the redefinition of the purpose of business. While this list of challenges does not intend to cover all of the existing and future issues in the field of business and human rights, it provides some reflections on key aspects that international law must address to contribute to securing more responsible business conduct in the decades ahead.

1. The evolution of the regulatory space

This challenge touches upon the evolution of the regulatory space as the insufficiency of voluntary measures to address the adverse impact of businesses on human rights, labour exploitation, the climate and biodiversity crisis, and increasing levels of inequality is now well-established. A decade after the endorsement of the UNGPs by the Human Rights Council, only a low percentage of companies have taken adequate measures to undertake human rights due diligence processes in line with international responsible business conduct standards. The regulatory space must therefore change and focus on comprehensive mandatory measures to foster sustainable and responsible corporate behaviour that leads to the protection of the most vulnerable and adversely affected rights holders. It must regulate all the actors engaged in commercial activities or associated economic functions in their diversity.

The onus is on States to design *effective* laws to mandate respect of human rights in its broader sense. In the words of Heidi Hautala, Vice-President of the European Parliament, "*(the) effectiveness (of these mandatory corporate governance rules) in promoting human rights and environmental regeneration in business operations and in companies' global value chains depends greatly on their design and on their implementation.*"[2] Is there the political will to do so at the national and international level?

The adoption and endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council in 2011 shifted the discourse and momentum on the responsibilities of business enterprises with respect to human rights. Through the corporate responsibility to respect human rights, notably through human rights impact assessments and risk management processes, the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises managed to persuade businesses –at least on paper– to engage proactively in the human rights field. Furthermore, the update of the OECD Guidelines for Multinational Enterprises contributed to achieve a swifter shift in the approach of businesses towards human rights due diligence *lato sensu*.

This momentum, while expanding in different directions, has recently found a very clear expression of support in Europe, through the adoption of different legislations expressly addressing human rights due diligence.[3] Through issue-specific legislation or regulations (i.e. modern slavery, conflict minerals, non-financial reporting), subject-specific norms (child labour) or general human rights due diligence measures (duty of vigilance, supply chain risk management), such legislations have translated the 'expectation of business conduct' as stipulated in the UNGPs into actual legislative requirements. The discussion of a draft Directive on corporate sustainability due diligence (CSDD Directive),[4] presented by the European Commission in February 2022, has the potential to push forward the momentum on establishing regional rules that focus both on prevention and remedy for businesses and their supply chains, depending

Note 2 Hautala, Heidi, "Foreword" in Know The Chain & Business & Human Rights Resource Centre, *Closing the Gap: Evidence for Effective Human Rights Due Diligence from Five Years Measuring Company Efforts to Address Forced Labour*, 2022.

Note 3 See Part 1 for a description of legislative initiatives regarding mandatory due diligence obligations.

Note 4 See Part 1 for a description of the draft CSDD Directive.

on how the EU Member States decide to transpose it within their national legal frameworks. While the text has not yet been adopted, the first draft of the CSDD Directive has been criticized on different fronts, from its narrow scope of application[5] to the cherry-picking approach to human rights issues, or the departure from basic elements included in the UNGPs, such as stakeholder engagement.

Furthermore, the Human Rights Council has been debating the need for and contours of a business and human rights treaty since 2014, which has become another arena for legal, political and economic discussions regarding the issue of business and human rights. The text that was discussed in October 2021 by the Open-Ended Intergovernmental Working Group (OEIGWG) –as its previous versions– focuses on addressing transnational business activities, through preventive measures (namely human rights due diligence processes that would need to be legislated domestically) and actions to enhance access to justice in transnational civil litigation cases. While the discussions around the treaty process (by academia, civil society and business associations) have contributed greatly to facilitate a much-needed dialogue regarding the interaction of different international legal regimes, political engagement within the OEIGWG has not yet been sufficient to facilitate consensus on the provisions of the draft treaty text, nor to achieve a cross-cutting political support around it.

Moving forward, an important aspect to consider is whether the regulatory space can become more precise, and particularly more inclusive, considering the different socioeconomic realities of different regions of the world, and how that should be considered when defining rules regarding prevention and accountability for business-related human rights impacts. Norms tend to live in silos underpinned by different narratives, often with a lack of resources and an absence of practical tailored tools. Existing human rights and environmental due diligence laws contradict or overlap each other, displaying inconsistencies and ambiguities and undermining their own effectiveness.

Should the regulatory models strive for homogeneity, or should the focus be on heterogeneous models that address the specific national and regional differences? An ideal model would aim for normative homogeneity, which would translate into a general set of rules, both at the international and domestic levels, that impose a common preventive obligation on all bu-

Note 5 Shift, *The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive: Shift's Analysis*, 2022.

siness enterprises across sectors and jurisdictions –a *true* level-playing field with global implications. However, a more realistic model would see a heterogeneous approach to regulation, where home States design specific rules around the legal concepts of due diligence or vigilance of parent companies, and where host States enact legislation addressing business and human rights through the logic and specificity of their position within global and regional supply chains. These two models should be accompanied by international rules that provide a normative framework on State obligations to respect and ensure respect of human rights in the context of business activities. In this regard, whereas home States could develop general preventive norms, host States could instead focus on reinforcing the protection of specific rights through industry- or subject-specific rules (i.e., Protection of women, children or indigenous peoples, or addressing specific issues in certain high-risk industries present in their jurisdiction). Within this scenario, public policies and other administrative or regulatory actions would contribute to generate a better understanding of the business and human rights field within the public, private and social sectors, and to a situation where law and policy jointly contribute towards a common goal.

Moreover, regarding the specificity of the regulatory space, a promising scenario would imply building up the normative framework on the basis of the UNGPs, while also completing those existing gaps that were not adequately covered in 2011 by the UN Framework. This would entail rethinking the relationship between human rights and private international law, as well as with international economic law, focusing on addressing the jurisdictional, applicable law and enforcement challenges that currently exist. It would also mean that international organizations (WTO, UNCITRAL, etc.) fully integrate human rights standards and considerations into their areas of work, while States refer to and include human rights considerations within their practice in the negotiation of trade and investment agreements, including clauses that generate a better balance between protection of human rights and investment protection, in a manner that is sensitive to the needs of the communities where investment and development projects take place.

A worst-case scenario, on the other hand, would see the continuity of an international normative vacuum on business and human rights, where economic and political interests fail to take into account the situation of people adversely affected by business activities, combined with the absence of enforcement of existing norms. Such a scenario would imply the repetition of

well-acknowledged mistakes regarding the lack of regulation of corporate activities, which would in turn have negative effects for both people and planet. In addition, it would cause the impossibility of moving forward, that is, not being able to advance the different elements of the UNGPs into law, policy and State and corporate practice, or failing to ensure that there is meaningful engagement by States and businesses to comply with their corresponding duties and responsibilities.

2. The global and regional supply chains

The adequate regulation of supply chains is an issue that has been on the agenda since the rise and consolidation of globalization. Supply chains imply the consolidation of transnational production, distribution and commercialization methods and networks that contribute to the reduction of costs for parent companies, while in principle generating employment and other economic and social benefits in those countries where the links of the supply chain are established. However, as a result of the competition among countries to attract foreign investment, environmental and social regulations have regularly been significantly reduced, in what has been known as a "race to the bottom". This has been exacerbated by the global structures of international economic law,[6] which have traditionally focused on economic incentives and protection of foreign investors, to the detriment of other international obligations for States and rights of peoples and protection of the environment. Such a situation has produced a well-known adverse corporate impact on the protection of human rights and the environment, without a clear avenue for redress and accountability for those persons and communities in the Global South whose rights have been affected.

Supply chain regulation has recently become a dominant trend within the business and human rights field, with some important legislative initiatives appearing in the Global North in that regard. The French Law on the Duty of Vigilance, for example, establishes the duty of large companies in France to establish vigilance plans for their global supply chains, and to monitor their effec-

Note 6 See generally General Assembly, *Human rights-compatible international investment agreements. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/76/238 (27 July 2021); see also Prieto Ríos, Enrique, *Systemic Violence of the Law: Colonialism and International Investment*, Lanham, Rowman & Littlefield, 2021; Perrone, Nicolás, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules*, Oxford, Oxford University Press, 2021.

tiveness.[7] The German Supply Chains Act establishes a similar duty to engage in human rights risk management, reporting and remediation for certain enterprises that have their central administration, principal place of business, administrative headquarters or statutory seat in Germany and their direct suppliers, and in some limited circumstances in relation to indirect suppliers.[8] In Switzerland, the reform of Chapter VII of the Code of Obligations introduced a duty to respect due diligence in supply chains and report on their performance for companies, which import or process minerals originating from conflict-affected or high-risk zones, or whenever there is suspicion that child labour was involved in the production of goods or offer of services.[9] In Norway, the Transparency Act sets forth the obligation to carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises regarding actual and potential adverse impacts that enterprises covered by the scope of the legislation cause or contribute to, or that are directly linked with the enterprise's operations, products or services via the supply chain or business partners.[10] As it can be observed from these legislative developments, the focus of these instruments revolves around top-down managerial practices, establishing duties for parent or large companies to oversee how their (sub-) contractors and supply chains implement risk management systems to prevent adverse human rights impacts.

However, several key issues appear in this regard that point to the direction in which supply chain regulation should be headed in the future. First, without a smart mix of measures in host States (whether incentives, mandatory requirements, or a mix of them), it will be particularly difficult to expect behavioural change in business enterprises, particularly in the lower tiers of supply chains. This obeys several reasons: first, while top-down approaches –such as parent companies imposing performance requirements on their subsidiaries or supply chains– are fairly accepted in the current trend of supply chain regulation, there is little or no consideration of the local culture

Note 7 See Part 1 for a description of the French Duty of Vigilance Act.

Note 8 See Part 1 for a description of the German Supply Chain Due Diligence Act.

Note 9 Contre-projet indirect à l'initiative populaire « Entreprises responsables – pour protéger l'être humain et l'environnement », 19 June 2020. See Part 1 for a description of the Swiss Conflict Minerals and Child Labour Due Diligence Ordinance.

Note 10 See Part 1 for a description of the Norwegian Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act).

where other links in the supply chain operate, including the legal culture. The difference in the legal systems and local cultures may become an important obstacle while trying to export expectations of business conduct, as foreign impositions of conduct to local businesses may clash with well-established local practices or business customs. This may as well entail "normative clashes", that is, differences in the understanding or acceptance of the content of human rights obligations, including in relation to what is understood as international human rights law. This could result from the mere fact of the uneven ratification of different international human rights instruments, which would imply a complex legal landscape for both States and businesses –for the former, in terms of laying down or being imposed rules that would not necessarily be commonly accepted in other countries, and for the latter in terms of clarity regarding the legal basis upon which to base its conduct. This could furthermore give visibility to the limits of leverage, a notion advanced by the UNGPs, particularly when too few suppliers exist in a given field or region, which would then render difficult the possibility for a parent company to exercise influence towards its supply chain. These challenges, of a more practical than legal nature, need to be considered and addressed when designing regulations that will have extraterritorial effects. In addition, it is important that efforts continue to be undertaken to not just regulate, but also incentivize responsible business conduct in host States.

Second, despite the need for incentives to mobilize businesses towards responsible business conduct and risk-based due diligence, without normative requirements –including in the Global South–, enterprises will rarely change their behaviour. This is an issue that has been clearly diagnosed in the business and human rights field, and which calls for a serious analysis of the different normative needs in the different regions of the world. For example, while it is largely believed that most businesses with transnational activities are primarily based in Western Europe and North America, there are many based in Asia or Latin America that have transnational activities and presence, including in the Global North. This highlights the need for homogeneity in regulatory approaches to transnational business activities regardless of where they are from. This also points to the need to consider how to address smaller and medium undertakings that constitute most of the global supply chains. This relates to a third consideration on the role of small and medium-sized enterprises in the field of business and human rights. While the UNGPs highlight that all companies, regardless of their size, should undertake human rights due diligence, in

practice many of them do not have the capacity or resources to oversee the actual or potential adverse impacts they cause, and even less those that they contribute to or are linked to. The lack of clarity regarding how SMEs can undertake human rights due diligence processes given their resource situation calls for a renewed approach to this issue, where defining minimum compliance with specific human rights standards and allowing risk prioritization could contribute to the simplification and ease of understanding of their role within the business and human rights realm. As part of their own human rights due diligence obligations, large enterprises should also support SMEs with whom they work to respect human rights in their operations while meeting their contractual commitments. Considering the economic relevance of SMEs for global supply chains, having a clear strategy to reinforce their capacity and understanding of the issue would facilitate the development of a business culture centered around respect for human rights and the environment.

Finally, these challenges can only be met and overcome through intensive capacity-building and collective and cooperative efforts that consider the geographic and cultural differences where businesses of all sizes operate, as well as the need for tailored approaches to responsible business conduct that take into account the differences in the size of companies and the specificities of the different industries and circumstances at issue. These are imperatives to be able to build a more resilient and human-centered global economic society.

3. Domestic and international accountability

The UNGPs have positioned accountability as a central element of the State duty to protect and the business responsibility to respect human rights by emphasizing that greater access to effective judicial mechanisms, with non-judicial and non-State based mechanisms as complements, are "*at the core of ensuring access to remedy*". While they did not make a substantive contribution to the understanding of remedy per se, the focus on a "*bouquet of preventive, redressive and deterrent remedies*"[11] has led to interesting developments regarding the role that different mechanisms can play for victims of business-related human rights abuses. Indeed, one of the early conclusions is that for any system of remedies to be effective, there need to be diffe-

Note 11 General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/72/162 (18 July 2017), par. 81.

rent avenues available for victims at the national, regional and international levels.

The starting point, of course, is and will continue to be domestic courts. As interpreters of domestic and international law, and as contributors to the definition of the contours of domestic and international law, domestic tribunals are and will continue to have a primary role in the business and human rights field. Some tendencies and shifts have recently appeared in the context of domestic jurisdictions, that have contributed to a greater understanding of the role of law, both domestic and international, to ensure corporate accountability for human rights violations. For instance, while for many years the focus in extraterritorial litigation was on piercing the corporate veil in cases involving transnational business activities, a recent trend in Europe has started to make a convincing case that parent companies have a duty to effectively oversee the activities that happen within their supply chains, and particularly in their foreign subsidiaries.[12] Pursuant to the recent human rights and environmental due diligence legislations, larger companies may be held accountable if they fail to identify, assess and remedy the risks to human rights and the environment associated with their activities across their supply chain, despite obstacles to legal proceedings.[13] Furthermore, other jurisdictions have started to point out the existing analogy between the *objective* of human rights due diligence and the existing duty to prevent harm to others (*alterum non laedere*) that generally exists in civil codes.[14] In addition, some courts have recently started to interpret that, in line with their constitutional and conventional duties, procedural rules (including on burden of proof, disclosure of key documents, or even on jurisdiction in transnational civil litigation) must be interpreted in a way that ensures integration of a human

Note 12 *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 (10 April 2019); *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 (12 February 2021).

Note 13 Ibid. In France, a recent parliamentary report (C Dubost and D Potier, Report on the assessment of the 27 March 2017 on the duty of vigilance (24 February 2022) available at https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b5124_rapport-information#_Toc256000053) lists a total of six cease-and-desist letters for non-publication of a plan, four injunction requests and a single liability action, which has not led to a definitive decision yet.

Note 14 See generally Cantú Rivera, Humberto (ed.), *Experiencias latinoamericanas sobre reparación en materia de empresas y derechos humanos*, Bogotá, Konrad Adenauer Stiftung, 2022; also, Cantú Rivera, Humberto and Barboza López, Miguel, "Corporate Liability for Human Rights Abuses in Latin American Courts: Some Recent Developments", *Business and Human Rights Journal*, 2022 (forthcoming).

rights perspective.[15] As more and more cases involving human rights abuses by business enterprises are filed before courts, judges from different levels and regions will be presented with the opportunity to contribute to define the contours of business and human rights law. There are, of course, two possible scenarios: that a judicial dialogue will continue to grow, facilitating a global judicial conversation that may lead to some level of convergence around substantive and procedural issues in cases involving business enterprises and human rights violations; or that there will be such a level of fragmentation as a result of differing judgments, that neither victims nor businesses will benefit from any legal certainty.

In addition, a range of non-judicial sanctions may be imposed, including administrative orders suspending companies' operating licenses or compelling compliance with due diligence obligations, subject to a daily fine.[16] Orders to rehabilitate environmental harm and other culturally appropriate remedies may also be considered. In addition, the establishment of operational grievance mechanisms given their proximity to local communities could play a crucial role in terms of accessibility of non-judicial remedies to affected rights holders.[17] Through these mechanisms, employees could inform corporate actors of potential human rights and environmental harms related to their activities, with the goal of encouraging engagement and dialogue between stakeholders to address them and ultimately hold these businesses accountable in the case of actual damages.

On a different note, regional human rights courts will also continue to see an increment in cases involving business activities, which will present them with the opportunity to generate greater convergence between international and regional human rights instruments. Whereas widening the jurisdictional scope of regional human rights courts to include businesses cannot be ruled out, the growing amount of cases brought against States will facilitate the analysis –and resulting guidance– on many difficult issues that must yet pass a serious judicial scru-

Note 15 Suprema Corte de Justicia de la Nación (México), Primera Sala, *Amparo directo en revisión 5505/2017* (13 January 2021); Cámara Nacional de Apelaciones del Trabajo (Argentina), *I., M. G. c. Techint S.A. Compañía Técnica Internacional s/ accidente – ley especial* (February 27, 2015).

Note 16 See Part 1 for a list of domestic legislations on due diligence, such as the French Duty of Vigilance Act and the Dutch Child Labour Due Diligence Act.

Note 17 General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/72/162 (18 July 2017), par. 71.

tiny, particularly considering the recent legislative developments on human rights due diligence taking place across numerous jurisdictions. Examples of topics that will receive greater attention in regional human rights systems include the duties of home States to regulate transnational business activities of companies based or domiciled in their jurisdiction; the meaning and scope of the duty to adopt measures to give effect to the obligations established in relevant regional conventions; the minimum elements of human rights due diligence legislation; and particularly the topic of access to justice, where much greater clarity and coherence may be provided when interpreting procedural questions, including the exercise of jurisdiction, the applicable law, the reversal of the burden of proof or statute of limitations, among others.

The same can be said about human rights treaty bodies. These mechanisms, corresponding to each one of the core human rights treaties[18] adopted within the United Nations, have a petition system that allows individuals to present a petition for human rights violations, as a result of actions or omissions by the State. Even though the ratification level of such treaties varies, and that they have addressed the issue mostly through their interpretative function,[19] there have been some relevant cases on business and human rights that have been addressed through the petition mechanisms of human rights treaty bodies. For example, a recent decision by the Human Rights Committee discussed the role of home States in regulating the activities of businesses of their nationality overseas.[20] While the Committee found the case inadmissible, and therefore did not discuss the merits of the case, a concurring opinion highlighted how addres-

Note 18 The treaty bodies cover civil and political rights; economic, social and cultural rights; torture; enforced disappearances; discrimination against women; racial discrimination; the rights of the child; people with disabilities; and migrant workers. Only the latter does not have an active petition mechanism, as it has not yet reached the required number of ratifications for it to enter into force. In addition, in some cases the petition mechanisms were introduced through optional protocols to the main treaty, which have not necessarily received the same level of ratification as its substantive counterparts.

Note 19 Human rights treaty bodies can issue general comments regarding specific topics of interest, where they clarify the scope of State duties in that regard. In 2013, the Committee on the Rights of the Child issues its general comment no. 16 on State obligations regarding the impact of the business sector in children's rights; and in 2017, the Committee on Economic, Social and Cultural Rights issued its general comment no. 24 on State obligations in the context of business activities. In other general comments, treaty bodies have also addressed the role of businesses and States in relation to specific human rights.

Note 20 Human Rights Committee, *Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013*, CCPR/C/120/D/2285/2013 (26 July 2017), known as *Basem Ahmed Issa Yassin et al. v Canada*.

sing the issue of extraterritorial jurisdiction requires specific elements to be submitted by the petitioners, in order to establish the existence of a sufficient connection or nexus. Furthermore, the concurring opinion stated other substantive issues that would need to be addressed in a case where jurisdiction was admitted, notably an analysis of the adoption of positive measures to ensure respect of the rights of persons affected by extraterritorial activities of corporations and the scope of the standard of due diligence of States for acts committed by private parties.[21]

While the focus on States and their due diligence duty may continue to be the central aspect of petitions brought before human rights treaty bodies, it is likely that in the future they will have to define the specific content of extraterritorial obligations, particularly in relation to positive obligations and access to remedy, considering the ongoing trends regarding supply chain regulation. Furthermore, in the context of the negotiations for a legally binding instrument on business and human rights, the idea of an optional protocol to an eventual treaty would establish the competence of the treaty body over States parties and corporations alike.[22] Whether that option is eventually adopted or an optional protocol widens the competence of existing treaty bodies to consider complaints brought in relation to transnational business activities –while also giving businesses the opportunity to provide written explanations or statements–, the petition mechanisms of human rights treaty bodies will be in a position to develop their own jurisprudence on the scope and contours of State obligations in relation to business activities and their impact on human rights.

In the same vein, considerations about the establishment of an international human rights court have existed since the time when the Universal Declaration of Human Rights (UDHR) was adopted. That idea of establishing a global court resurfaced in the context of the 60th anniversary of the UDHR, when a report was commissioned on the feasibility and technical aspects for such a court to exist.[23] Article 7.2 of the Draft Statute of a

Note 21 Ibid. Concurring opinion of Committee members Olivier de Frouville and Yadh Ben Achour, par. 11.

Note 22 *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, 2018, articles 10 and 11.

Note 23 Kozma, Julia, Nowak, Manfred and Scheinin, Martin, *A World Court of Human Rights*

World Court of Human Rights set forth that the court may have competence regarding complaints for human rights violations by an entity, understood in the definition as any inter-governmental organization or non-State actor, including any business corporation, which has made a declaration recognizing the competence of the World Court. Such an approach would allow to bypass the State-centric model of international human rights law. Other options have also been suggested, including the creation of an International Court of Civil Justice that would have jurisdiction over transnational mass tort cases,[24] the establishment of an International Court on Transnational Corporations and Human Rights,[25] or the strengthening of existing international or regional judicial mechanisms through the creation of special chambers on the topic.[26] While these options are confronted with the political, technical and financial complexities of setting up new international mechanisms, they provide solid arguments to posit that new mechanisms may become important additions to combat the existing procedural and substantive limitations found in domestic or international courts to address business and human rights issues.

A final point that is important to consider in the context of international accountability is the role that counterclaims can play in investment arbitration. As it is well known, international investment agreements generally imposed on host States the threat of being subjected to international arbitration for regulations that could directly or indirectly impact foreign investments in the country, despite focusing on the protection of public goods, such as health or the environment.[27] The system, as it currently operates, can generate perverse incentives for States not to adequately protect human rights.[28] However, a recent example may point towards the future and a more balanced

- *Consolidated Draft Statute and Commentary*, 2010, available at https://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf

Note 24 Steinitz, Maya, *The Case for an International Court of Civil Justice*, Cambridge, Cambridge University Press, 2018.

Note 25 *Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 2017.

Note 26 Ibid.

Note 27 General Assembly, *Human rights-compatible international investment agreements: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/76/238 (27 July 2021), pars. 15-19.

Note 28 Ibid., pars. 20-27.

approach between States and foreign investors in the context of international arbitration. In Urbaser v Argentina, the State was sued for causing financial loss to a shareholder in a concession that supplied water and sewage services in Buenos Aires. However, the State filed a counterclaim based on article 46 of the ICSID Convention, alleging that the concessionaire failed to provide the necessary level of investment in the concession, which led to violations of the human right to water. While the counterclaim was unsuccessful, two silver linings appeared: the first was that the arbitral tribunal rejected the argument according to which the investor, as a non-state actor, was not bound by human rights obligations. The second was the creation of a precedent for a host State human rights counterclaim, an exercise that could pave the way for further efforts to introduce human rights into ICSID arbitration.[29] This sets forth the stage for two important developments: achieving a balance between investor rights and obligations, particularly to respect human rights and the environment; and facilitating the exercise of a human rights-based defence for States in investment arbitration, fostering the integration of human rights considerations in arbitral disputes. While this would not necessarily imply direct accountability and remedies for victims, it would ensure that States do not jeopardize their budgetary capacity to protect human rights at the expense of costly arbitral awards and are not discouraged from actively enforcing the protection of human rights or the environment.

4. International legal personality

One of the key questions in general international law is whether international legal personality is reserved to States and international organizations,[30] as per the classical doctrines, or if it is an anachronistic paradigm that has been surpassed by the theory of participants in international law.[31] While States continue to define most aspects of international law as it exists today, it is undeniable that companies, individually or through States,

Note 29 See Guntrip, Edward, "Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?", *EJIL: Talk!*, 10 February 2017, available at https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/

Note 30 Dupuy, Pierre-Marie & Kerbrat, Yann, *Droit international public*, 15th ed., Paris, Dalloz, 2020.

Note 31 Higgins, Rosalyn, *Problems & Processes: International Law and How We Use It*, Oxford, Oxford University Press, 1995.

exercise an important influence in the shaping of international legal standards. Should international law and the definition of international legal personality remain immune and abstract from the changes in reality? Or should a new basis be formed to recognize that actors beyond States and international organizations can effectively enjoy international legal personality? While the question has been largely confined to academic debates, with some sporadic appearances and discussion in practice, the consolidation of economic power and political influence of the private sector calls for a reflection on the topic.

The subject is of particular importance when the question turns to business and human rights. As it is well known, the history of this debate goes back to the negotiations of a UN Code of Conduct for Transnational Corporations[32] in the 1970s, and remains relevant to this day, as civil society organizations and even some States have called for the determination of international liability for harms committed by transnationally operating businesses in the context of the negotiation of a legally binding instrument in the Human Rights Council.[33] While the recent discussions in the UN negotiation point to a traditional, State-centric instrument that would leave liability to domestic fora –and that would of course be a political choice made by governments that does not preclude future developments in the field[34]–, it would be important to consider the limits of such a perspective when compared to the economic power and influence of businesses. Are States capable of regulating, in all instances, all business activities happening within their territory or jurisdiction? What happens if the business activities occur in a non-territorial space, as it is usually the case with internet transactions? Can States effectively regulate transnational business activities, considering the existing paradigms of corporate law (including separate legal personality), trade and investment agreements (including regulatory chill and the difficulties to stipulate corporate obligations in addition to corporate rights), et cetera?

Note 32 Sagafi-Nejad, Tagi & Dunning, John H., *The UN and Transnational Corporations: From Code of Conduct to Global Compact*, Bloomington, Indiana University Press, 2008.

Note 33 *Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 2017.

Note 34 Carrillo Santarelli, Nicolás, "A Defence of Direct International Human Rights Obligations of (All) Corporations" in Černič, Jernej Letnar & Carrillo Santarelli, Nicolás (eds.), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty,* Cambridge, Intersentia, 2018; López Latorre, Andrés Felipe, "In Defence of Direct Obligations for Businesses Under International Human Rights Law", *Business and Human Rights Journal*, Vol. 5(1), 2020.

The question of international legal personality is not a minor one, furthermore as the lack of international structures to establish liability is an important obstacle to ensuring adequate international accountability. Despite this, the challenges in fields such as international investment law, taxation, cultural heritage, human rights or even environmental protection, where States of all types face regulatory challenges vis-à-vis business enterprises, may suggest that reconsidering the paradigm of international legal personality may be necessary. After all, the post-war structures of international law should not be immune or abstract from reality and should rather focus on trying to encompass and address the new developments and challenges that exist in our modern (and future) societies. One of the key scenarios in the horizon would then be reimagining some of the basic constructs of international law that have limited the possibility of determining international accountability for business enterprises. It does not necessarily imply the need to reconstruct international legal personality in its entirety, but rather recognizing the unique regulatory challenges that exist regarding transnational business activities,[35] and transitioning from a State-centric approach to international law, to a model that limits State responsibility for failure to adequately regulate businesses and that recognizes and sanctions business wrongdoing directly.

5. Environmental protection and the fight against climate change

With every passing year, temperatures continue to set record highs all over the world. The scientific community's diagnosis for such a phenomenon –as many others that continue to occur, including droughts, fires, floods and other natural disasters– is that human-induced climate change is the reason. On the other hand, environmental degradation threatens livelihood, as it is currently known, exposing humankind to diseases, loss of biodiversity, and limiting the exercise of rights of present and future generations. One key common characteristic of both climate change and environmental degradation is the high potential for

Note 35 Deva, Surya, *Regulating Corporate Human Rights Violations: Humanizing Business*, London, Routledge, 2012.

it to cause transboundary harm,[36] which in some instances has given rise to discussions on extraterritorial obligations of States to prevent and remedy such harm.[37] This has also led to important considerations on the role and responsibilities of corporations –and particularly those with transnational activities– in this regard.[38]

As explained above, the paradigm of international legal personality has led the international community to adopt specific instruments where the focus is centrally on States, with the Paris Agreement being one of the latest to set forth State duties to limit temperature rise through reduction of greenhouse gas emissions[39] and other measures. And yet, the question of the responsibility and accountability of business enterprises in relation to the global climate, biodiversity and pollution crises has also gained more prominence, particularly within the field of human rights. 2021 and 2022 have been notable years for the international human rights community in relation to these two agendas. First, in October 2021, the Human Rights Council recognized for the first time the existence of a human right to a clean, healthy and sustainable environment.[40] Such recognition is not only a political statement, but also a confirmation of the existence of constitutional rules, regional treaties[41] and judicial decisions that to different extents recognize that a healthy and clean environment is a precondition for the exercise of all other human rights. This adoption by the Human Rights Council was seconded in July 2022 by the UN General Assembly, which passed a historic resolution recognizing the existence of this very right.[42] As with the right to water several years before, the

Note 36 Transboundary environmental harm commonly takes one of three forms: air pollution, pollution of a transboundary watercourse, or transboundary shipment of dumping of wastes.

Note 37 Inter-American Commission on Human Rights, *Business and Human Rights: Inter-American Standards*, CIDH/REDESCA/INF.1/19 (1 November 2019), par. 249.

Note 38 Ibid, par. 250.

Note 39 Paris Agreement, art. 2.

Note 40 Human Rights Council, *The human right to a clean, healthy and sustainable environment*, A/HRC/RES/48/13 (8 October 2021).

Note 41 For example, both the Aarhus Convention in Europe and the Escazú Agreement in the Americas recognize the procedural approach to the right to a healthy environment, with their focus on access to information, public participation and access to justice in environmental matters. Furthermore, the African Convention on Human and Peoples' Rights and the Additional Protocol to the American Convention on Human Rights in the field of Economic, Social and Cultural Rights (San Salvador Protocol) explicitly recognize the existence of the right to a healthy environment.

Note 42 General Assembly, *The human right to a clean, healthy and sustainable environment*, A/

political recognition of the right to a healthy environment serves as a benchmark upon which international organizations, States and other actors can lead further work to implement it, including its eventual development and insertion into domestic, regional and international legal frameworks.

Furthermore, on the same date that the Human Rights Council recognized the right to a healthy environment, it decided to establish a new mandate for a Special Rapporteur on the promotion and protection of human rights in the context of climate change.[43] The mandate includes studying and identifying how the adverse effects of climate change affect the full and effective enjoyment of human rights and make recommendations on how to address and prevent these adverse effects, as well as providing advice in the context of the design and implementation of mitigation and adaptation policies, practices, investments and projects, among others.[44] In its first report to the Council,[45] the Special Rapporteur on human rights and climate change identified that within its six thematic priorities, it would be necessary to address corporate accountability with respect to human rights and climate change. While still a preliminary approach, the report points out that voluntary disclosure by companies of the risks relating to human rights and climate change would help investors make informed investment decisions and considers whether reporting of those risks should be mandatory.[46] Such a focus is evidently welcome, but it is also important to highlight many of the other initiatives that have been presented in relation to the link between climate change and the business and human rights agenda, and that could potentially help to shape the future of the world.

One of the key questions that arise in this regard is what States

RES/76/300 (28 July 2022).

Note 43 Human Rights Council, *Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*, A/HRC/RES/48/14 (8 October 2021).

Note 44 Ibid.

Note 45 Human Rights Council, *Report of the Special Rapporteur for the Promotion and Protection of Human Rights in the Context of Climate Change: Initial Planning and Vision for the Mandate*, A/HRC/50/39 (3 June 2022).

Note 46 Ibid., section IV.D.

and businesses can do to prevent further environmental degradation and mitigate the effects of climate change. While the obvious response would be a more rigorous regulation of particularly polluting industries[47] –which would be in line with State obligations under international human rights law[48]–, one important element to consider –and that is in full display as the war in Ukraine continues to unfold in 2022– is how deeply embedded carbon and fossil fuels are in the global economy, and how much is left to be done to fully transition to a green economy, particularly when a lack of supply of those fossil fuels threatens progress in the fight against climate change.[49] This, of course, calls for a reflection on the need for short-, medium- and long-term planning to ensure a transition to sustainable and renewable sources of energy that duly takes into account geopolitical difficulties and shifts, while considering the risks and effects that such processes have for communities in the Global South. That is, while taking steps to transition to a low-carbon economy, efforts should also be made to ensure that it is a just transition for all.[50]

Within this scheme, an important question is how current thinking and methodologies can evolve to integrate climate change considerations. One such idea is the development of

Note 47 Inter-American Commission on Human Rights, *Business and Human Rights: Inter-American Standards*, CIDH/REDESCA/INF.1/19 (1 November 2019), par. 250. See Part 1 for a description of these standards. See also CIEL, *States' Human Rights Obligations in the Context of Climate Change: Guidance Provided by the UN Human Rights Treaty Bodies*, 2022, available at https://www.ciel.org/wp-content/uploads/2022/03/States-Human-Rights-Obligations-in-the-Context-of-Climate-Change_2022.pdf.

Note 48 See Human Rights Committee, *General Comment No. 36. Article 6: right to life*, CCPR/C/GC/36 (3 September 2019), par. 62: "*The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.*"

Note 49 Plumer, Brad, Friedman, Lisa and Gelles, David, "As War Rages, a Struggle to Balance Energy Crunch and Climate Crisis", *The New York Times*, 10 March 2022.

Note 50 Joint contribution of GI-ESCR, Landesa, ProDESC and AIDA, *Submission to the CESCR for the development of the General Comment on Land and Economic, Social, and Cultural Rights. Written Contribution on Land, Renewable Energy, and Women's Rights*, available at https://www.ohchr.org/en/calls-for-input/2021/call-written-contributions-draft-general-comment-no-26-land-and-economic.

climate due diligence,[51] and within it, of integrating climate change as a consideration in human rights impact assessments.[52] In relation to climate due diligence, the concept involves integrating the climate dimension into existing risk-based due diligence processes, where the focus should be on risk mitigation and integration, with the first one focusing on reducing greenhouse gas emissions, and the second on integrating climate-related objectives in corporate policies and processes.[53] Concerning consideration of climate change in human rights impact assessments, the focus should be on identifying and addressing the actual and potential risks associated with climate change and how they interfere in the enjoyment of human rights, which should lead to concrete measures to mitigate negative impacts.[54]

Within such measures, corporate reporting should also be considered. As it can be observed, adopting such an approach –particularly through mandatory measures– could lead to the fulfilment of the procedural leg of the right to a healthy environment, notably access to information related to environmental matters.[55] Even though a very large percentage of companies still face important challenges to understand and implement human rights due diligence processes, little progress will be achieved in the future in the fight against climate change unless such considerations are included within existing methodologies and processes. In the words of Macchi, *"[k]eeping climate due diligence and HRDD in separate silos could lead to ineffective or inconsistent actions..."*[56]

In this context, the work of States –and courts in particular– will be fundamental to provide further guidance on the role that public and private businesses should play to contribute to the fight against climate change and environmental degradation,

Note 51 Macchi, Chiara, "The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'", *Business and Human Rights Journal*, Vol. 6(1), 2021, pp. 93-119.

Note 52 Iglesias Márquez, Daniel, "Empresas, derechos humanos y el régimen internacional del cambio climático: la configuración de las obligaciones climáticas para las empresas", *Anuario Mexicano de Derecho Internacional*, Vol. XX, 2020, pp. 85-134.

Note 53 Macchi, Chiara, *op. cit.*, p. 98.

Note 54 Iglesias Márquez, Daniel, *op. cit.*, p. 111.

Note 55 See also the Task Force on Climate-related Financial Disclosures, which require that companies disclose risks related to climate change in their reporting, available at https://www.fsb-tcfd.org/.

Note 56 Macchi, Chiara, *op. cit.*, p. 109.

as well as incentivizing or sanctioning conducts that positively or negatively affect human rights. Four key trends will probably continue to solidify in the coming years and decades:

- 1. One key trend that will gain prominence will be that of strategic litigation to demand that both States and businesses comply with their corresponding duties and responsibilities in the field of human rights. Lawsuits will not only be brought against the 'big polluters' (oil and gas companies), but increasingly against investors and financial institutions that fail to require adequate prevention and mitigation measures, and against States in domestic courts and regional and international mechanisms in relation to their policies and regulatory efforts to combat climate change and environmental degradation.
- 2. While developing risk-based due diligence legislation, States will increasingly require integrating climate change, biodiversity and pollution within the scope of impact assessments undertaken in relation to high-risk industries. As a result, risk measurement methodologies will progressively facilitate understanding of the specific links between the environment (including climate change and biodiversity) and human rights, and render possible the adoption of measures to reduce or mitigate actual and potential adverse impacts to human rights and the environment –including CO2 emissions– linked to their business activities.
- 3. Reporting standards will no longer be voluntary and will demand communicating the specific measures taken to prevent impacts on specific human rights and vulnerable groups resulting from climate change.
- 4. A rights-holder centered risk management system will be a central feature of all due diligence strategies, policies, procedures and action plans relating to human rights and the environment. It will engage stakeholders in an ongoing and dynamic manner.

6. Business and human rights norms, corporate practice and the purpose of business

One of the key discussions in the field of business and human rights is whether the tools that have been developed to promote the corporate responsibility to respect human rights –and the expectations that have arisen as a result of them– are adequate to respond to the realities of corporate practice. Another one, which extends to the field of business ethics, relates to the feasibility of redefining the purpose of business beyond the traditional opposition between shareholder and stakeholder value, so that business becomes a key actor in addressing underlying social tensions and needs. While human rights due diligence as a concept was indeed introduced by the UNGPs in 2011, and human rights impact assessments became part of the jargon within the field, they are but an addition to the set of risk management practices that already exist and are used by corporations worldwide.

Within the broader landscape of corporate practice, several concepts and trends have become more prevalent as a result of the efforts to promote obtaining a social license to operate, focusing on positive contributions of business to the society in which they operate, contributing to sustainable development and even producing measurable data regarding the implementation of adequate corporate governance practices. For example, the approach of creating shared value,[57] which aims at pursuing financial success in a way that also yields social benefits, has become a relatively widespread concept which promotes that companies use their core activities in a way that contributes to address societal challenges or contribute to cover societal needs. In the words of Porter and Kramer, a shared value perspective looks beyond redistribution, and "*focuses on identifying and expanding the connections between societal and economic progress.*"[58] The concept has become widely used to the extent that institutions such as UNICEF have adopted a model that, on the basis of public-private partnerships and engagement, seek to create shared value projects which contribute to the realization

Note 57 Porter, Michael E. and Kramer, Mark R., "Creating Shared Value", *Harvard Business Review*, January/February 2011. See also the eight Principles for Purposeful Business designed by the British Academy anchored in the belief that the purpose of a company "is to produce profitable solutions to problems of people and planet," while at the same time "not profiting from producing problems for people or planet," available at https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/

Note 58 Porter, Michael E. and Kramer, Mark R., *op. cit.*, p. 66.

of children's rights.[59] The same approach has been followed by different transnational businesses, which have devoted resources to addressing pressing social needs within their core business activities.

And yet, the idea of creating shared value has also received a fair share of criticism, namely on the basis of two shortcomings: the first one is that it ignores the tension between social and economic goals, in particular in supply chains; the second one is that it fails to fully understand and capture the challenges of business compliance, which is a complex issue in global supply chains, especially where regulation does not reach with the same force the lower tiers.[60] While the academic debate is certainly convincing in both directions, many multinational businesses and global institutions seem to consider the shared value concept as an interesting opportunity to contribute to alleviate social needs through their core business activities. In a way, in the words of Dyllick, the shared value concept creates space for managers to define strategies and actions addressed at solving social issues, helps to legitimise socially relevant strategies and actions vis-à-vis narrow financial interests, and will also probably conduct to more openness to regulatory changes aimed at internalising external costs.[61]

This discussion on creating shared value to some extent reflects the perception regarding the involvement of businesses in sustainability.[62] One key moment in this area was the adoption of the Sustainable Development Goals by the UN General Assembly in 2015. As it has been generally noted, the resolution acknowledged the leading role of business in society and called the private sector to contribute to solving sustainable development challenges.[63] While the resolution expressly mentioned

Note 59 UNICEF, *Theory of Change, UNICEF Strategic Plan, 2022-2025*, UNICEF/2021/EB/10 (4 August 2021), pars. 163, 264 and 360.(b), addressing their efforts in relation to their different goal areas.

Note 60 Crane, Andrew et al., "Contesting the Value of "Creating Shared Value"", *California Management Review*, Vol. 56(2), 2014.

Note 61 Dyllick, Thomas, "The opposing perspectives on creating shared value", *Financial Times*, 24 April 2014, available at https://www.ft.com/content/88013970-b34d-11e3-b09d-00144feabdc0#comments-anchor

Note 62 See Larry Fink's letter to CEOs of January 2022 linking capitalism with sustainability with respect to decarbonizing the global economy, available at https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

Note 63 General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (25 September 2015), par. 67 under Goal 17.

the relevance of implementing international standards such as the UNGPs to protect labour rights and environmental and health standards,[64] in practice there has been an important divergence between what businesses do and say in terms of sustainability, and what is expected of them in terms of respecting human rights and implementing risk-based due diligence processes. The UN Working Group on business and human rights acknowledged that specific shortcoming, stating that the first step in the road to business sustainability is respecting human rights.[65] This, however, is a key element that still needs to be fully understood and operationalized by businesses, particularly considering that risk management and sustainability tend to have different levels of priority –and particularly different approaches– within the business world.

Finally, one of the recent trends in the business world relates to the use of environmental, social and governance (ESG) criteria for the purpose of deciding on and rating investments,[66] where the promise of having a positive environmental and social impact as a result of the investment is a key feature. It revolves around three elements that, in the view of socially responsible investors, can have a positive effect: evaluating how a company relates to environmental issues, including climate change; assessing the link between the company and society, and particularly with its stakeholders; and finally, measuring how the company's governance structure and practices facilitate responsible conduct. This has led to disclosure practices that seek to reflect how a company addresses such issues, in an effort to attract responsible investment to their company. Key to this is the concept of *materiality*, a notion used to identify anything that has direct consequences or creates risks for in-

Note 64 *Ibid*.

Note 65 UN Working Group on Business and Human Rights, *The business and human rights dimension of sustainable development: Embedding "Protect, Respect and Remedy" in SDGs implementation*, 30 June 2017, available at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Session18/InfoNoteWGBHR_SDGRecommendations.pdf

Note 66 Adams, Tom, Smalling, Lindsay and Dichter, Sasha, "ESG Investing Needs to Expand Its Definition of Materiality", *Stanford Social Innovation Review*, 23 February 2022, available at https://ssir.org/articles/entry/esg_investing_needs_to_expand_its_definition_of_materiality. They define ESG investing as follows: "*In its most simplified form, ESG investing is "negative screening" -not investing in companies with harmful practices or actively engaging company leadership to change those practices... ESG investing is widely perceived as the "do good" alternative to traditional investing, but this approach as it is currently practiced does not generate or measure positive impact, other than by reducing harm relative to the status quo*."

vestors.[67] But despite its prominence in the business and investment world, there are increasing questions around the potential for ESG as a tool that can address social and environmental issues.

With the increasing interest and pressure over ESG criteria, the main challenges lie in clarifying what it actually measures and how those measurements are communicated -or marketed. Indeed, often ESG criteria look at the risks that specific issues or situations ("*indicators*") entail for an investment;[68] and yet, the business and human rights movement is founded on the opposite view: the risk that companies cause or contribute to adverse social impacts.[69] This difference is particularly relevant, because the tool is then expected to address issues for which it was not designed.[70] A resulting question is whether bridging those two different approaches could be useful to facilitate addressing business and human rights issues through ESG criteria.

Some of the main challenges to link these two fields are ensuring an adequate comprehension of what is to be measured through ESG criteria, and that there is an evolution from the "*single materiality*" approach to "*double materiality*"[71] –and even "*dynamic materiality*"–, where not only impacts to investment are measured, but also business impacts to people and the environment are taken into account. The first question is particularly complex, considering that often "*ESG factors are not material to the performance of a particular business, nor do they highlight areas where the business has the greatest impact on society.*"[72] Indeed, a study of six ratings agencies found that they

Note 67 Ibid.

Note 68 Pucker, Kenneth P. and King, Andrew, "ESG Investing Isn't Designed to Save the Planet", *Harvard Business Review*, 01 August 2022, available at https://hbr.org/2022/08/esg-investing-isnt-designed-to-save-the-planet

Note 69 Ruggie, John Gerard, *Just Business: Multinational Corporations and Human Rights*, New York, W.W. Norton, 2013, p. 69.

Note 70 Pucker, Kenneth P. and King, Andrew, *op. cit*.

Note 71 See Täger, Matthias, *'Double materiality': what is it and why does it matter?*, 21 April 2021, available at https://www.lse.ac.uk/granthaminstitute/news/double-materiality-what-is-it-and-why-does-it-matter/

Note 72 Porter, Michael E., Serafeim George & Kramer, Mark, "Where ESG Fails", *Institutional Investor*, 16 October 2019.

used 709 different metrics across 64 categories, where only ten were common to all.[73] If the purpose of the industry is to produce information that can be compared by investors to decide where to invest, then having such a heterogeneous group of indicators is surely not an adequate approach to produce standardized information. Furthermore, the level of understanding and development of criteria for the three focus areas –environment, society and governance– is not equal. In the view of John Ruggie, the inadequate conceptualization of the indicators in the S (but also in the E) domain are the cause for the poor performance and resulting information, particularly because there are numerous human rights issues that are measured through specific indicators (relating for example to community relations, diversity issues, health and safety, etc.), while also including a separate human rights category.[74] Considering that many of these investment decisions are made on the basis of the information supplied, having such a poor understanding of what human rights are and how they are impacted by business activities can only contribute to the "illusion of S".[75]

The second question, about the evolution from single to double materiality, is also accompanied by the question about what governments can do to contribute to clarify the expectations around sustainability reporting.[76] It reflects a deeper discussion on the relationship between business and society. Should businesses only look to the risks they may suffer, or should they also consider how they endanger people and planet? Adopting a broader definition would require companies and ratings agencies to consider their own impacts on society or the environment, even if there is no immediate financial value to shareholders in doing so.[77] Furthermore, as the operating context of companies is constantly changing, it becomes increasingly relevant for them –and for investors– to anticipate how issues

Note 73 Tricks, Henry, "In need of a clean-up", Special report: ESG Investing, *The Economist*, 23 July 2022, p. 4.

Note 74 Ruggie, John Gerard, "Corporate Purpose in Play: The Role of ESG Investing" in Rasche, Andreas, Bril, Herman and Kell, George (eds.), *Sustainable Investing: A Path to a New Horizon*, Abingdon, Routledge, 2021.

Note 75 Adams, Tom, Smalling, Lindsay and Dichter, Sasha, *op. cit.*

Note 76 At the time of writing, ongoing developments are taking place in Europe, particularly in relation with the European Sustainability Reporting Standards (ESRS) under the Corporate Sustainability Reporting Directive (CSRD).

Note 77 Ibid.

might become financially material for the entire industry or for a specific company, which calls for a "*dynamic materiality*" approach.[78] In that regard, understanding how human rights due diligence can contribute to identify, manage and report on those risks could be an instrumental step to promote convergence and facilitate understanding of the risks that companies can cause, contribute or be linked to, in line with the UNGPs.[79]

While the issues addressed in this section do not reflect the width of developments taking place in the field of business and human rights,[80] they do point to three key aspects that will need to be considered moving forward: the first is the need to facilitate a dialogue and understanding between the role of business in society (seen from the perspective of business management particularly) and the expectations of society regarding business. Existing parallel efforts –as the ESG example shows– could potentially pave the way to facilitate a more humane globalization, as long as the different stakeholders involved can speak a relatively common language. The second is ensuring that there is a constant dialogue between norms and practice, and particularly between international law and the practice of the business sector. The constant under-performance of States to hold non-State actors –including business– to account for their involvement in human rights violations and environmental degradation points to a systemic and structural issue; and yet, international law could be an instrument to guide performance of businesses in relation to environmental and social issues, including human rights, as long as it can be adequately integrated into deci-

Note 78 Kuh, Thomas et al, *Dynamic Materiality: Measuring What Matters*, 17 January 2020, available at https://advantage.factset.com/dynamic-materiality-measuring-what-matters; see also World Economic Forum and Boston Consulting Group, *Embracing the New Age of Materiality: Harnessing the Pace of Chance in ESG*, March 2020, available at https://www3.weforum.org/docs/WEF_Embracing_the_New_Age_of_Materiality_2020.pdf; Bancilhon, Charlotte and Park, Jacob, "Dynamic Materiality: How Companies Can Future Proof Materiality Assessments", *BSR Blog*, 22 July 2021, available at https://www.bsr.org/en/our-insights/blog-view/dynamic-materiality-how-companies-can-future-proof-materiality-assessments; Calace, Donato, "Double and Dynamic: Understanding the Changing Perspectives on Materiality", *SASB Blog*, 2 September 2020, available at https://www.sasb.org/blog/double-and-dynamic-understanding-the-changing-perspectives-on-materiality/, where the author writes: "*Importantly, double materiality and dynamic materiality are interrelated concepts acknowledging different aspects of the same process; while the former describes more accurately how issues can be financially and non-financially material, the latter articulates the dynamics that drive an issue to move along the continuum.*"

Note 79 *Keynote address by John Ruggie at the Event "The "S" in ESG: Best Practices and the Way Forward?"*, July 2021, available at https://shiftproject.org/keynote-ruggie-s-esg-july-2021/

Note 80 On 31 March 2022, the International Sustainability Standards Board launched a consultation on two proposed standards – one relating to general sustainability-related disclosure requirements and the other specifying climate-related disclosure requirements, available at http:///www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-disclosures/.

sion-making and management.[81] But most importantly, the key question to consider is whether international law can play a role in the discussions on the purpose of business. In a globalized economy, where rules become diffuse and boundaries (including territorial ones) become less relevant for the conduct of business activities, international legal perspectives should contribute to redefine the role and functions that business enterprises are expected to play in society, and particularly to facilitate a better integration of environmental and social concerns in their activities and business relationships.

Note 81 Parella, Kish, "The Symbiosis between Corporate Governance & International Law" in Bruner, Christopher and Moore, Marc (eds.), *A Research Agenda for Corporate Law*, Cheltenham, Edward Elgar, forthcoming.

3.

questions for 2050

1. Where should the business and human rights agenda be in 2050?

2. What should be the future of business and human rights regulation, and what role should the different stakeholders play in it?

3. Is thinking about different regulatory models for global and regional supply chains possible? How should they look like?

4. What role should international law play in the future for the purpose of corporate accountability and remedy for human rights abuses?

5. How should international trade and investment architecture look like if it is to help achieve sustainability? What would the implications be for the international economic system?

6. How should international law influence business practices in the future to promote more responsible business conduct?

7. How can business and human rights contribute to tackle systemic inequality and injustice?

annex 01

persons interviewed

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