

The Human Rights Responsibilities of Corporations in Global Supply Chains

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Abstract

In a globalised economy, transnational corporations from all sectors are directly or indirectly linked to global supply chains, in particular through transnational business activities and foreign investments. That this represents a potential threat to individuals and the environment has been revealed by persistent human rights abuses and damage to the environment. In practice, human rights abuses by transnational corporations often take place in countries of the Global South and affect the most vulnerable people, such as women workers, child labourers and residents of poor and rural areas. Nevertheless, the existing international human rights system does not impose direct human rights obligations on private actors, including transnational corporations. The responsibilities of transnational corporations for human rights in global supply chains are mainly based on a patchwork of soft regulations. In re-

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cent years, however, new initiatives have emerged at the national and international level, such as the development of an internationally legally binding treaty to regulate business activities with respect to human rights or domestic legislation for corporate due diligence obligations. Most of these initiatives emphasise the role of the State in incorporating a “mediated” approach to the human rights responsibility of transnational corporations. This article explores recent developments connected to the human rights responsibilities of corporations and discusses their feasibility under international human rights law.

Keywords: International Human Rights Obligations, Transnational Corporations, Global Supply Chains, Ruggie Principles, Corporate Social Responsibility, International Treaty to Regulate Transnational Corporations, International Investment Law, National Legislation, Due Diligence

A. Introduction

A recent study comparing States and corporations has revealed that of the 100 largest economic players in the global order, just 29 are States while 71 are multinational corporations.¹ Although States like the United States, France, Germany and China occupy top positions in the ranking, a number of powerful multinationals are on a par with the world’s leading economies.² “[G]lobalisation has changed the rules of the game”³ and “brought about a global structure in which state power is not the exclusive governing principle anymore” the authors of the study writes.⁴ The economic and political power of corporations has enabled these actors to increasingly pose a State-like threat to individuals’ human rights and to the environment. This is particularly evident when it comes to global supply chains,⁵ where large companies work with a variety of suppliers, subsidiaries and contractors in foreign countries to manufacture and transport their goods and services.⁶ In recent

1 *Babic/Fichtner/Heemskerck*, Italian Journal of International Affairs, 2017, p. 28.

2 *Babic/Heemskerck/Fichtner*, Who is More Powerful – States or Corporations? In: The Conversation, 10 July 2018, available at: <https://theconversation.com/who-is-more-powerful-states-or-corporations-99616> (18/3/2022).

3 *Ibid.*

4 *Ibid.*

5 The Organization for Economic Cooperation and Development (OECD) defines supply chains as follows (in the context of mineral supply chains): “The process of bringing a raw mineral to the consumer market involves multiple actors and generally includes the extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacturing and sale of end product. The term supply chain refers to the system of all the activities, organisations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers.” See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, OECD Publishing, 3rd edition, 2016, p. 14.

6 *Nolan*, in: Deva/Bilchitz (eds.), p. 239.

years, there has been considerable debate, not only about the role played by the human rights obligations of States in protecting individuals from corporate human rights abuses, but also, more specifically about the direct imposition of human rights obligations on corporations in relation to their global supply chains.⁷

Lying behind the discourse on corporations' (direct) responsibility to protect human rights in global supply chains is the fact that in a globalized economy transnational corporations are directly or indirectly involved in complex supply chain networks (e.g. in the textile or automobile sector) whose capacity to pose a threat to individual rights has been repeatedly revealed by persistent violations of human rights, for example, of the right to health, work or social security, and environmental destruction.⁸ Transnational corporations benefit economically from business activities connected to global supply chains, such as cheap labour and production conditions, the extraction of commodities and weak regulations, especially in developing countries.⁹ The business activities of large companies often span multiple industries and geographic locations, including jurisdictions with low human rights standards.¹⁰ In practice, human rights abuses in global supply chains very often take place in developing countries, for example, in factories where products are manufactured for, but not owned or operated by, transnational corporations from the Global North.¹¹ While global supply chains certainly offer opportunities for social and economic development in developing countries, for instance, by creating job opportunities, they very often negatively impact individuals in these countries who belong to vulnerable groups, such as women, migrant workers, child labourers, minorities and residents of poor and rural areas.

Human rights abuses that occur in the context of transnational corporate activities in global supply chains have become more visible in recent years as a result of several litigation cases that have come before domestic courts in Europe and North America. One emblematic case involves a lawsuit against the German textile discounter *KiK* before a German regional court.¹² The case centred on a fire at a textile factory in Karachi, Pakistan, in 2012, in which more than 250 workers died and many more were injured.¹³ The factory in Pakistan produced clothing for *KiK*, but the German retailer neither operated the factory nor owned a share in the subcon-

7 See also Skogly, in: Deva/Bilchitz (eds.), p. 318.

8 See *Human Rights Watch*, Human Rights in Supply Chains, 30 May 2016, available at: <https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence> (18/3/2022).

9 Ibid.

10 Ibid.

11 *Rahim*, in: Deva/Birchall, p. 130; *Nolan*, in: Deva/Bilchitz (eds.), p. 240.

12 German Regional Court Dortmund (Landgericht Dortmund), judgment of 10 January 2019, 7 O 95/15. See also European Center for Constitutional and Human Rights (ECCHR), *Pakistan – Textile industry – KiK*, available at: https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/#case_case (18/3/2022).

13 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 29.

tracting company.¹⁴ The victims and their relatives claimed before the German court that *KiK* was also responsible for the incident in Pakistan, arguing that as the factory is Karachi's main customer, *KiK* was able to influence its business processes and therefore had an obligation to guarantee the working conditions and the safety of the employees.¹⁵

While the *KiK* case was ultimately dismissed, in its landmark judgment *Nevsun Resources Ltd. v Araya* ('*Nevsun*') of 2020, the Canadian Supreme Court opened the door to new corporate human rights obligations in the context of business activities in supply chains.¹⁶ The lawsuit before the Supreme Court concerned three Eritrean workers who claimed that they were conscripted into a forced labour regime, where they were ordered to work at an Eritrean mine owned by the Canadian company *Nevsun*.¹⁷ The plaintiffs argued that *Nevsun* had breached customary international law prohibitions of forced labour, slavery and inhuman treatment.¹⁸ In its judgment, the Supreme Court declined to dismiss the claim that corporations could be liable under customary international law.¹⁹ It highlighted that "the central feature of the individual's position in modern international human rights law is that the rights do not exist simply as a contract with the state"²⁰ and that "it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law'."²¹ The court decided that human rights are "discrete legal entitlements, held by individuals, and are 'to be respected by everyone'"²² and "may be violated by private actors."²³ However, under current law, the position of the Canadian Supreme Court remains controversial. In recent years, various initiatives aimed at addressing the responsibility of transnational corporations embedded in global supply chains for human rights and the environment have emerged both at the national and international level. This article discusses the recent developments and trends towards holding corporations responsible for human rights abuses in

14 German Regional Court Dortmund (Landgericht Dortmund), judgment of 10 January 2019, 7 O 95/15. See also European Center for Constitutional and Human Rights (ECCHR), *Pakistan – Textile industry – KiK*, available at: https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/#case_case (18/3/2022).

15 Ibid. See also *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 29. The court dismissed the case, see Landgericht Dortmund (German Regional Court Dortmund), Judgment 10 January 2019, 7 O 95/15.

16 See *Hughes-Jennet/Parcasio*, Corporate civil liability for breaches of customary international law: Supreme Court of Canada opens door to common law claims in *Nevsun v Araya*, EJIL:Talk!, 29 March 2020, available at: <https://www.ejiltalk.org/corporate-civil-liability-for-breaches-of-customary-international-law-supreme-court-of-canada-opens-door-to-common-law-claims-in-nevsun-v-araya/> (18/3/2022).

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

18 Ibid.

19 Ibid.

20 Ibid., para. 110.

21 Ibid., para. 114.

22 Ibid., para. 110.

23 Ibid., para. 111.

global supply chains. First, it examines the current framework governing (potential) human rights obligations for corporations (B). Second, it analyses recent developments and trends towards holding businesses responsible for human rights abuses at the national and international levels, notably the internationally legally binding instrument to regulate the activities of transnational corporations, the human rights-related obligations of investors in international investment law and domestic initiatives to create due diligence laws (C). Finally, the article engages with the challenges raised by the imposition of direct and enforceable human rights obligations on corporations (D).

B. The Responsibility for Human Rights in Global Supply Chains

I. Taking Stock: Corporations' Human Rights Obligations

International human rights law does not impose direct human rights obligations on corporations, “simply because these actors are not parties to the relevant human rights conventions”.²⁴ Customary law also does not recognise any direct human rights obligations for corporations.²⁵ An exception are human rights obligations that arise from *jus cogens* norms, such as the right not to be enslaved, or subjected to forced labour, as well as the prohibition of torture.²⁶ These norms are - due to their very nature as preemptory norms – applicable to private actors, including business entities.²⁷

II. Softening Human Rights Responsibility: Regulatory Approaches for Corporations

The debate concerning the responsibility of transnational corporations for international human rights is currently being conducted primarily in the context of Corporate Social Responsibility (CSR). This concept stipulates that transnational corporations are responsible for human rights beyond their core economic activities.²⁸ At the international level, corporate responsibility is mainly pursued by means of soft regulatory instruments developed primarily by international organisations, such as the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD).²⁹ These instruments are based on voluntary commitments and are enforced mainly through self-regulation on part of companies.

Nevertheless, soft law documents on corporate responsibility have provided a basis for concrete cases. For instance, in *Global Witness v. Afrimex Ltd.*, the United Kingdom National Contact Point considered a complaint based on the OECD

24 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 3.

25 *Peters*, p. 101.

26 *Ibid.*

27 *Ibid.*, p. 101.

28 *Neubäuser*, p. 12.

29 *Peters*, p. 102.

Guidelines for Multinational Enterprises.³⁰ The complaint alleged that *Afrimex* paid taxes to rebels in the Democratic Republic of Congo, and failed to conduct sufficient due diligence in its supply chain, using child and forced labour in sourcing minerals from mines.³¹ The National Contact Point found that Afrimex had violated the Guidelines for Multinational Enterprises.³²

The key instrument that serves as a “current globally agreed baseline”³³ is the UN Guiding Principles on Business and Human Rights (Ruggie Principles) adopted by the UN Human Rights Council in 2011.³⁴ The Ruggie Principles neither impose legal obligations on corporations (and States) nor create new legal obligations for corporations under international law, but rather build on States’ existing human rights obligations.³⁵ The principles rest on three pillars – protect, respect and remedy – and anticipate that States will be primarily responsible for protecting individuals from human rights abuses by business actors. The first pillar of the Ruggie Principles requires States to protect individuals against human rights violations by corporations (duty to protect):³⁶ “[States] should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights.”³⁷ They should take “appropriate steps to prevent, investigate, punish and redress human rights abuses by corporations by means of effective policies, legislation, regulations, and adjudication”.³⁸ This requires States to review legal loopholes and, if necessary, take measures to oblige businesses to respect human rights not only within their territory, but also in their transnational activities.³⁹

The second pillar of the Ruggie Principles directly addresses business actors and is dedicated to “corporate responsibility to respect human rights”.⁴⁰ Corporate responsibility applies to all human rights.⁴¹ In practice, economic, social and cultural

30 United Kingdom National Contact Point, *Global Witness v. Afrimex Ltd.*, Final Statement of 28 August 2008; see also *Peters*, p. 102. On the OECD Guidelines for Multinational Enterprises, see [https://mneguidelines.oecd.org/mneguidelines/\(18/3/2022\)](https://mneguidelines.oecd.org/mneguidelines/(18/3/2022)).

31 United Kingdom National Contact Point, *Global Witness v. Afrimex Ltd.*, Final Statement of 28 August 2008.

32 *Ibid.*

33 *Council of Europe (CoE)*, Recommendation CM/Rec. (2016) 3 of the Committee of Ministers to Member States on Human Rights and Business, adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers’ Deputies, Appendix I.1.a.

34 *UN Human Rights Council (HRC)*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (John Ruggie), 21 March 2011, Guiding Principles in the Annex (UN Doc. A/HRC/17/31), adopted by the UN Human Rights Council, 6 July 2011 (UN Doc. A/HRC/RES/17/4).

35 *Peters*, p. 104 f.; *Krajewski*, in: *Krajewski* (ed.), p. 107. See also Ruggie Principles, para. 14 of the introduction: “The Guiding Principles’ normative contribution lies not in the creation of new international law obligations”.

36 Ruggie Principles, Principles 1–10.

37 *Ibid.*, Commentary on Principle 3.

38 *Ibid.*, Principle 1.

39 *Ibid.*, Commentary on Principle 3.

40 *Ibid.*, Principles 11–24.

41 *Ibid.*, Commentary on Principle 12.

rights are most frequently infringed by (transnational) business activities. Companies are required to conduct due diligence to assess the impact of their activities on human rights.⁴² That said, the alignment of the content of the second pillar of the Ruggie Principles with international human rights law indicates that corporate responsibility remains below the threshold of States' existing human rights obligations.⁴³ Moreover, the term "responsibility" does not refer to a "legal" basis for corporate human rights responsibility (in terms of the law of international responsibility), but rather to a political, social or moral one.⁴⁴ Similarly, in the context of the right to health, the UN Committee on Economic, Social and Cultural Rights ('UN Social Committee') refers to the "responsibilities" of business enterprises to realise this right.⁴⁵

The soft standards on corporate responsibility recognize the negative impacts of corporate activities in supply chains on individuals and the need to regulate the link between companies and their contractors and suppliers to protect human rights and the environment. According to the Ruggie Principles, a company's responsibility to respect human rights does not merely apply to its own activities, but also to its "business relationships".⁴⁶ This includes "business partners, entities in its value chain, and any other non-state or state entity *directly linked* to its businesses operations, products or services".⁴⁷ Corporate responsibility thus extends beyond the boundaries of the company itself and its formally affiliated entities to encompass the networks of suppliers and contractors.⁴⁸ The need for a broader concept of corporate responsibility is also affirmed by the OECD, for example, which points out that economic activities have undergone structural changes, in which the boundaries between multinational corporations, their suppliers and their contractors are increasingly blurring.⁴⁹ Furthermore, the Office of the High Commissioner for Human Rights (OHCHR) has highlighted that the concept of a direct link must be interpreted broadly, so as to include contractors and suppliers abroad, if it is to effectively protect human rights in the context of corporate activities.⁵⁰ Nevertheless, the reference to a "direct link" in the Ruggie Principles diminishes the respon-

42 Ibid., Principles 17–21.

43 Riedel, p. 120f.

44 Peters/Gless/Thomale/Weller, in: MPIL Research Paper Series No. 2020-06, p. 3.

45 UN Committee on Economic, Social and Cultural Rights (UN Social Committee), General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000 (E/C.12/2000/4), para. 42.

46 Ruggie Principles, Principle 13.

47 Ruggie Principles, Commentary on Principle 13 (emphasis added).

48 Nolan, in: Deva/Bilchitz (eds.), p. 244.

49 OECD Guidelines for Multinational Enterprises, see <https://mneguidelines.oecd.org/mne-guidelines/> (18/3/2022), preface, para. 2.

50 Nolan, in: Deva/Bilchitz (eds.), p. 245. See also Office of the *High Commissioner for Human Rights* (OHCHR), Frequently Asked Questions About The Guiding Principles On Business And Human Rights (2014), question 32, available at: www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf (18/3/2022).

sibility of corporations.⁵¹ It depends on whether the enterprise itself caused or contributed to the abuses of human rights or whether it was involved because the impact is directly linked to its business relationships.⁵² In practice, the Ruggie Principles will not hold the lead company accountable, especially in the case of big brands from the Global North, for activities of their suppliers that impact human rights.⁵³ Finally, the third pillar of the Ruggie Principles requires companies to provide effective remedies for victims of human rights abuses.⁵⁴

C. Recent Developments at the International Level

I. Treaty-Making: The Legally Binding Instrument on Business and Human Rights

One possible approach in seeking to establish and improve corporate responsibility for human rights is the adoption of a legally binding international treaty.⁵⁵ In light of concrete experiences of human rights violations by business enterprises, Ecuador and South Africa proposed a resolution to the Human Rights Council to draft a legally binding international treaty for business actors.⁵⁶ In 2014, the Human Rights Council established an “open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”.⁵⁷ The mandate of the working group is “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”⁵⁸ So far, the working group has presented three drafts of the treaty.⁵⁹ At the beginning of the drafting process, many Western States, including the United States (US) and the European Union (EU), were reluctant to create a legally binding international treaty and voted against the resolution.⁶⁰ However, in 2019, the EU acknowledged the added value of a legally

51 *Nolan*, in: Deva/Bilchitz (eds.), p. 244.

52 Ruggie Principles, Principle 19. See also *Nolan*, in: Deva/Bilchitz (eds.), p. 245.

53 *Ibid.*

54 Ruggie Principles, Principle 22.

55 See e.g. *Cernic/Carrillo-Santarelli* (eds.).

56 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 4.

57 *HRC*, Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights, 14 July 2014 (UN Doc. A/HRC/RES/26/9). See also UN Human Rights Council Resolution 26/22 on Human Rights and Transnational Corporations and other Business Enterprises, 15 July 2014 (UN Doc. A/HRC/RES/26/22).

58 *HRC*, Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights, 14 July 2014 (UN Doc. A/HRC/RES/26/9), para. 1.

59 The drafts of the treaty are available at: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc> (18/3/2022).

60 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 5.

binding treaty as a means to enhance the protection of human rights in relation to transnational activities of corporations.⁶¹

The draft treaty is a “mediatory instrument”.⁶² It does not establish direct human rights obligations for companies, but obliges States to “ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities [...]”.⁶³ In particular, companies are required to undertake human rights due diligence and to assess and publish findings about human rights infringements that arise from their business activities.⁶⁴ The draft treaty thus reflects a general trend, which can also be identified at the national level, towards monitoring corporate activity through the introduction of mandatory risk management mechanisms.

Furthermore, States should also ensure that their domestic laws provide for legal liability with respect to the *transnational* activities of corporations in supply chains, “from causing or contributing to human rights abuses, when the [corporation] controls, manages or supervises [another legal or natural person] or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities [...]”.⁶⁵ According to the draft treaty, transnational corporations may be held responsible for human rights infringements in supply chains in cases where they “control” a supplier or “foresee” the risks of human rights abuses in other countries. Nevertheless, it will be often difficult to prove that a corporation “controlled” its suppliers or was able to foresee human rights abuses at the first tier of a supply chain.

Although this proposal represents an important development, it is uncertain to what extent a legally binding international treaty can be effectively implemented at the international and national level. For instance, developing countries already experience difficulties implementing their own domestic laws in the context of corporate activities. It is also unclear whether existing international human rights bodies would be able to enforce the provisions of such a treaty or whether new enforcement mechanisms would have to be established. Ultimately, it remains to be seen whether States—from the Global North and South—are willing to take such a new “legally binding” path.

61 *European Union (EU)*, Opening Remarks by the European Union in the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, 14 October 2019.

62 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 5.

63 Third Revised Draft of 17 August 2021, article 8.1., available at: <https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf> (18/3/2022).

64 *Ibid.*, article 6.3.

65 *Ibid.*, article 8.6.

II. International Investment Law: Human Rights-Related Obligations for Corporations

The human rights obligations of transnational corporations are also discussed in the context of international investment law.⁶⁶ For many years, the issue of (potential) human rights obligations of investors was largely absent from international investment law.⁶⁷ In recent years, however, international investment law has increasingly turned to the issue of the direct or indirect human rights obligations of investors.⁶⁸ While existing bilateral and multilateral investment agreements occasionally contain provisions on investor compliance with human rights and environmental standards, those provisions generally lack enforceability before investment arbitration tribunals.⁶⁹

That said, the new generation of international investment treaties incorporates the direct or indirect human rights obligations of investors.⁷⁰ For instance, the Morocco-Nigeria Bilateral Investment Treaty (BIT) explicitly refers to direct human rights obligations of investors: “Investors and investments shall uphold human rights in the host state.”⁷¹ These obligations can, in part, be directly enforced by the host State before treaty-based international arbitration tribunals.⁷² Furthermore, the Pan African Investment Code of 2016 contains one of the most progressive provisions on human rights for investors.⁷³ The draft text includes comprehensive human rights obligations for foreign investors, while also explicitly opening up the possibility for States Parties to bring *counterclaims* against foreign investors claiming potential human rights violations before investment arbitral tribunals.⁷⁴

66 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 5. See also *Yilmaz-Vastardis/Chambers*, ICLQ, 2018/2, pp. 389–423.

67 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 5.

68 See, e.g. *Kriebaum*, in: Reinisch/Kriebaum (eds.).

69 See, e.g. Canada-Mongolia Bilateral Investment Treaty of 8 September 2016, in force since 24 February 2017, available at: [https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3698/canada---mongolia-bit-2016-\(18/32022\)](https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3698/canada---mongolia-bit-2016-(18/32022)).

70 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 5, with further references.

71 The Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria of 3 December 2016, article 18 (3) available at: <http://investmentpolicyhub.unctad.org/IIA/country/27/treaty/3711> (18/3/2022).

72 *Ibid.*, article 28 (1): “The Parties shall strive with good faith and mutual cooperation to reach a fair and quick settlement of any dispute arising between them concerning interpretation or execution of this Agreement in accordance to the provisions of Article 19. In the event the dispute has not been settled, it may be submitted at the request of either Party to an Arbitral Tribunal composed of three members”.

73 Draft Pan-African Investment Code, December 2016, available at: https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (18/3/2022).

74 *Ibid.*

So far, there have been very few investment-related arbitral cases dealing with human rights obligations of investors.⁷⁵ The most important case is the International Centre for Settlement of Investment Disputes (ICSID) award in the case *Urbaser v Argentina* ('Urbaser') of 2016.⁷⁶ In this dispute concerning the privatisation of water supply in the Argentine province of Buenos Aires, a counterclaim filed by a host State (Argentina) based on the right to water was examined for the first time in an international investment arbitration.⁷⁷ The arbitration proceedings initiated by Spanish investor consortium *Urbaser* on the basis of the BIT between Spain and Argentina concerned an alleged violation by Argentina of the principle of fair and equitable treatment, as well as expropriation.⁷⁸ Argentina filed counterclaims alleging *Urbaser's* "failure to provide the necessary investment into the Concession, thereby violating its commitments and its obligations under international law based on the human right to water."⁷⁹

The counterclaim was unsuccessful.⁸⁰ Nevertheless, the arbitral tribunal advanced important considerations with regard to human rights obligations of foreign investors in host States. The tribunal rules that transnational corporations do not have positive human rights obligations that can be derived directly from the right to water.⁸¹ It stated that only States have an obligation to perform and not companies.⁸² Moreover, the tribunal held that "in order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law."⁸³ However, the tribunal expressly stated that the situation ought to be assessed differently with regard to a direct human rights obligation of companies to *respect* human rights: "Such an obligation [to respect] can be of immediate application, not only upon States, but equally to individuals and other private parties."⁸⁴

The reasoning of the arbitral tribunal in the *Urbaser* case reflects the approach increasingly taken in international legal discourse, which holds that companies are not subject to positive human rights obligations, but that the human rights obligation of *respect* should be imposed on business actors.⁸⁵ In its decision, however, the arbitral

75 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 6.

76 International Centre for Settlement of Investment Disputes (ICSID), *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaio, Bilbao Biskaio Ur Partzuergoa v. The Argentine Republic*, Award of 8 December 2016 (ICSID Case No. ARB/07/26).

77 *Ibid.*

78 *Ibid.*

79 *Ibid.*, para. 36.

80 *Ibid.*

81 *Ibid.*, para. 1207: "The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service".

82 *Ibid.*, para. 1210.

83 *Ibid.*

84 *Ibid.*

85 See *Ratner*, *Yale Law Journal*, 2001/3, p. 517. See also *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 7.

tribunal erroneously assumed that such an obligation of respect of companies already exists *de lege lata*. According to current law, the tribunal's findings do not comply with existing international human rights obligations.

D. Domestic Initiatives: Corporate Due Diligence Legislation

Human rights can be enforced through private law.⁸⁶ Many European States have fulfilled their duty to protect human rights by adopting mandatory due diligence laws for corporations and their activities in supply chains. The most comprehensive law on the due diligence obligations of parent companies and “companies giving instructions” was adopted in 2017 in France (*loi de vigilance*).⁸⁷ The law amends the French Commercial Code and requires large French companies to establish a due diligence plan (“*plan de vigilance*”).⁸⁸ The law applies not only to French companies as such, but also to companies controlled by them as well as suppliers abroad, but only insofar as a specific business relationship can be established between the individual companies.⁸⁹

Closely connected to the French legislation was a Swiss proposal that advocated the introduction of human rights corporate responsibility in Switzerland (“*Konzernverantwortungsinitiative*”).⁹⁰ A popular initiative proposed a constitutional amendment aimed at controlling business enterprises, which were to be held vicariously liable for human rights violations committed by their subordinate companies.⁹¹ The popular initiative intended to introduce a mandatory due diligence procedure for Swiss companies in supply chains, but was rejected in a popular vote in November 2020.⁹²

On June 2021, Germany adopted a Law on Supply Chain Due Diligence (“*Lieferkettensorgfaltspflichtengesetz*”).⁹³ The law will enter into force on 1 January 2023.⁹⁴ It requires German companies to conduct regular risk assessments and adopt measures not only within the company, but also in relation to business activi-

86 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 10.

87 Loi no. 2017-399, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 27 March 2017, available at: [www.legifrance.gouv.fr/eli/loi/2017/3/27/EC-FX1509096L/jo\(18/3/2022\)](http://www.legifrance.gouv.fr/eli/loi/2017/3/27/EC-FX1509096L/jo(18/3/2022)). See also *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 10.

88 *Ibid.*

89 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 10. For an overview, see *Cossart/Chaplier/Beau de Lomenie*, *Business and Human Rights Journal*, 2017, pp. 317–323.

90 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 10.

91 Volksinitiative für verantwortungsvolle Unternehmen, available at: [https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/verantwortungsvolle-unternehmen.html\(18/3/2022\)](https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/verantwortungsvolle-unternehmen.html(18/3/2022)).

92 *Ibid.*

93 Federal Ministry of Labour and Social Affairs, *Sorgfaltspflichtengesetz*, available at: [https://www.bmas.de/DE/Service/Gesetze-und-Gesetzsvorhaben/gesetz-unternehmerische-orgfaltspflichten-lieferketten.html\(18/3/2022\)](https://www.bmas.de/DE/Service/Gesetze-und-Gesetzsvorhaben/gesetz-unternehmerische-orgfaltspflichten-lieferketten.html(18/3/2022)).

94 *Ibid.*

ties with direct suppliers.⁹⁵ Furthermore, there are a number of other national laws in European States that introduce mandatory due diligence obligations for corporations for specific human rights or areas. The UK Modern Slavery Act of 2015 requires British companies to prepare annual statements on the steps that they have been taking to ensure that slavery and human trafficking is not present in their business activities or in any of their supply chains, and to publish information on the company's website.⁹⁶ The Dutch Child Labour Due Diligence Law adopted in 2019 (but not yet in force) establishes due diligence obligations for companies to protect against child labour.⁹⁷ The law obliges companies to investigate whether their goods or services have been produced with child labour and to devise a plan to prevent the use of child labour in global supply chains.⁹⁸

While the adoption of due diligence laws at the national level is certainly an important step towards holding powerful companies responsible for human rights abuses in their global supply chains, experience shows that the expected impact of these national laws has not fully materialised in those supply chains. Many leading brands voluntarily commit to upholding human right standards, while continuing to operate in areas where these standards are not met.⁹⁹

E. Current Challenges in Imposing Direct Human Rights Obligations on Corporations

Recent rulings, such as *Newsun* or *Urbaser*, open up new paths to considering transnational corporations as direct duty-bearers of international human rights obligations *de lege ferenda*.¹⁰⁰ As mentioned in the introduction, the growing power of transnational corporations indicates that economic actors increasingly exercise "corporate sovereignty",¹⁰¹ particularly in global supply chains, which need to be controlled by human rights obligations. Furthermore, the (deliberate) outsourcing of corporate activities especially to developing States with weak regulations and lower human rights standards also speaks in favour of the imposition of human rights obligations on transnational corporations. Imposing human rights obligations on businesses would make it possible to create a global standard to which all transnational corporations would have to adhere in a legally binding manner, in addition to the (possibly insufficient) domestic fundamental rights standards of the host States.

At the same time, there are also strong arguments against directly binding transnational corporations to international human rights. Unlike corporations,

95 *Krajewski/Felbermayr*, in: Sustainable Global Supply Chains, Report 2022, p. 37.

96 UK, Modern Slavery Act (2015), available at: <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> (18/3/2022).

97 The Dutch Child Labour Due Diligence Law, adopted by the Dutch Senate in May 2019 (not yet in force) is available at (in Dutch): <https://zoek.officielebekendmakingen.nl/stb-2019-401.html> (18/3/2022).

98 *Ibid.*

99 *Krajewski/Felbermayr*, in: Sustainable Global Supply Chains, Report 2022, p. 38.

100 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 20.

101 See *Barkan*.

States have a “national territory”.¹⁰² Thus, even though companies are powerful, they do not have State-like power, since they are not authorised to impose and enforce laws and regulations, as States do, and they lack police and a military apparatus.¹⁰³

Another issue is the difficulty of delineating a sphere of obligations of a company that corresponds to the sphere of jurisdiction of a State in which human rights obligations apply. Furthermore, public interest requirements that usually justify the restriction of human rights cannot be applied to human rights interferences committed by corporations in their own private and profit-oriented interest.¹⁰⁴ Moreover, it can hardly be expected that a weak host State will be better able to implement an international norm than its own domestic laws. For this reason, the international rules would have to be enforceable by international human rights bodies.¹⁰⁵ It remains unclear, however, whether these bodies would be able to enforce human rights obligations on corporations.

F. Conclusion

In *Nevsun*, the Canadian Supreme Court called international human rights law “the phoenix that rose from the ashes of World War II and declared global war on human rights abuses”.¹⁰⁶ In a globalised world, nearly all transnational corporations are embedded in global supply chains, whose potential to threaten individuals’ human rights and the environment has been repeatedly highlighted by the occurrence of human rights abuses in supply chains. Nevertheless, as this article has demonstrated, international human rights law does not impose direct legal obligations on transnational corporations. At the international level, corporate responsibility is mainly pursued through soft regulatory instruments, which are based on voluntary commitments and are enforced mainly through the self-regulation of businesses. In order to close the regulatory gap and effectively establish corporate human rights responsibility in supply chains, several initiatives have emerged at the international and national levels in recent years. The pending international treaty on business and human rights is a “mediatory” instrument that builds on the State’s duty to protect human rights.¹⁰⁷ This seems to be an appropriate approach to holding companies responsible in supply chains, given that it will be difficult to expand existing corporate human rights obligations without revising the international human rights system. Additionally various legislative measures have been taken at the domestic level to regulate the transnational activities of corporations in supply chains. All of these recent instruments and initiatives contribute to an evolving understanding of what ac-

102 See *Karavias*, p. 84.

103 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 22.

104 *Ibid.*

105 *Ibid.*

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

107 *Peters/Gless/Thomale/Weller*, in: MPIL Research Paper Series No. 2020-06, p. 5.

tions may be needed at the national and international levels in order to hold transnational corporations responsible for human rights abuses and any environmental damage resulting from global supply chains.

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