The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface

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Abstract

What should be the interface of the United Nations Guiding Principles on Business and Human Rights (UNGPs) with other regulatory regimes in the business and human rights (BHR) universe? This article explores this issue in relation to two specific contexts. First, the interface of 'social norm' with evolving 'legal norms': relation of Pillar II of the UNGPs and mandatory human rights due diligence (HRDD) laws as well as parent companies' direct duty of care for negligence. Second, the interface of 'soft norms' and evolving 'hard norms': how the UNGPs should inform the proposed BHR treaty. It is argued that legal norms should align with Pillar II only in a 'loose manner'. They should draw from and build on the HRDD concept under Pillar II, but not be constrained by it, because a hard alignment of Pillar I laws with Pillar II could undercut the independent but complementary status of the two pillars. Moreover, the UNGPs should serve only as a 'starting point' and not the 'end point' in the evolution of other hard or soft norms in the future. Such an approach would be desirable because the UNGPs alone are unlikely to be enough to challenge or confront the existing structure of irresponsibility and inequality.

Keywords: alignment, complementarity, mandatory HRDD laws, treaty, UNGPs

I. Introduction

One significant contribution of the United Nations Guiding Principles on Business and Human Rights (UNGPs)[1] has been to put beyond debate that business enterprises have a responsibility to respect all internationally recognized human rights throughout their

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[1] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UNGPs), A/HRC/17/31 (21 March 2011).

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operations.[2] Debates may continue, however, about the soundness of the normative basis of this *minimum* responsibility, the nature and extent of the business responsibility, and the efficacy of the main tool prescribed for businesses to discharge this responsibility – human rights due diligence (HRDD) – in achieving the desired outcome in practice. Lack of imagining robust means to hold companies accountable for human rights abuses – especially in weak governance zones, in cases with transnational dimensions or in situations where the relevant states are complicit with businesses – will perhaps remain another legitimate area of debate.

The UNGPs have also inspired evolution of law and policy frameworks in various states[3] as well as at the international level.[4] This raises questions about the relationship of the UNGPs with such legal norms. In particular, the interface of Pillar II of the UNGPs, which enshrines the business responsibility to respect human rights as a social norm, with the legalization of human rights responsibilities of business at the national, regional and international levels would require clarification. At the same time, the COVID-19 pandemic has exposed fundamental flaws of the current economic system[5] – from poverty and inequality to gender-based violence, vulnerability of children and migrant workers, digital divide, government repression of civic space in emergencies, climate crisis, and risks posed by new technologies. This in turn raises an inevitable inquiry: whether the current business and human rights (BHR) standards – including the UNGPs – are 'fit for the purpose' in transforming the current economic order and disrupting various power structures of injustice.[6]

This article seeks to grapple with two inter-related questions that are likely to assume greater significance in coming years. First, what should be the relation of the Pillar II 'social norm' with evolving 'legal norms' in the form of mandatory HRDD laws as well as parent companies' direct duty of care for negligence? Second, how should the UNGPs as 'soft norms' inform the evolution of 'hard norms', such as the proposed BHR treaty (or other future norms generally) to deal with existing models of corporate irresponsibility[7] and other deep-rooted structural challenges inherent in the current economic order?

Asking these questions does not mean that the UNGPs are not useful or that they might not remain relevant in the future. On the contrary: it is because of the important place of

[2] Only a few scholars now question the existence of such a responsibility. Although many businesses in private continue to be uncomfortable with the terminology of 'human rights', hardly any business executive would say publicly now that they have no human rights responsibilities or that their only responsibility is to maximize shareholders' profit.

[3] Apart from mandatory HRDD laws in Europe, soft guidelines have been issued by some states, e.g., India's National Guidelines on Responsible Business Conduct 2018; Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains 2016.

[4] OHCHR, 'OEIGWG Chairmanship Second Revised Draft 6.08.2020', https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (accessed 23 February 2021). For analysis, see Surya Deva, 'The Business and Human Rights Treaty in 2020: The Draft is "Negotiation-Ready", but are States Ready?', *OpinioJuris*, (8 September 2020), http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/ (accessed 23 February 2021).

[5] The system consists of diverse strands, from a neoliberal free market economy to a socialist market economy.

[6] Surya Deva, 'A Just Recovery for Whom? And How to Achieve It?', *Business and Human Rights Journal Blog* (8 January 2021), https://www.business-humanrights.org/en/blog/a-just-recovery-for-whom-and-how-to-achieve-it/ (accessed 25 February 2021).

[7] Such models may relate to both structures (corporate groups) and operations (supply chains or gig platforms).

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the UNGPs in the BHR universe that a 'critical compass' should constantly be used to discuss, and conduct further research about, the interface of the UNGPs with the wider regulatory eco-system to ensure that the *means* do not inadvertently become the *ends.* This article is an attempt to trigger such discussion and research.

Section II of this article explores the relation of the Pillar II social norm with legal norms in two contexts: the relation of Pillar II with Pillar I laws, and the relation of Pillar II with judicial articulation of the direct duty of care of parent companies. I will argue that these legal norms should align with Pillar II only in a 'loose manner': they should draw from and build on the concept of HRDD under Pillar II, but not be constrained by it. A hard or complete alignment of Pillar I legal norms with the Pillar II social norm might in fact be counter-productive, as this could undercut the independent but complementary status of the two pillars. Section III will then analyse the interaction of the UNGPs with the proposed BHR treaty (or other similar future initiatives) to grapple with continuing regulatory challenges in the BHR field. I will argue that the UNGPs should serve only as a 'starting point' not the 'end point' in the evolution of other hard or soft norms in the future. Such an approach would be desirable because the UNGPs alone are unlikely to be enough to challenge or confront the existing structure of irresponsibility and inequality. Not merely hard but more ambitious norms may need to be created and better implemented. The article concludes in section IV with some futuristic thoughts about the UNGPs' regulatory orbit within the BHR universe.

II. Relation of the Social Norm and Legal Norms

Pillar II of the UNGPs, which lays down the business responsibility to respect human rights and prescribes HRDD as an ongoing process for businesses to discharge this responsibility, is not grounded in legal norms.[8] Ruggie and Sherman assert that 'the corporate responsibility to respect human rights under the Guiding Principles … is neither based on nor analogizes from state-based law. It is rooted in a transnational social norm, not an international legal norm'.[9] Nor was Pillar II meant to be legally binding; rather, it was envisaged to operate as a supra-legal norm co-existing with other (legal) norms. This was perhaps needed to ensure that the Human Rights Council endorsed the UNGPs unanimously and that business associations did not lobby against their endorsement by states.

However, even if 'the transposition of a state-based legal concept onto the corporate responsibility to respect human rights … is fundamentally inappropriate',[10] the business responsibility under Pillar II cannot operate entirely within its own 'social norm' compartment created by the UNGPs. Nor could its relationship with other legal norms be one-directional: Pillar II of the UNGPs influencing legal norms but such norms having

[8] The 'responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social licence to operate'. Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5 (7 April 2008), para 54.

[9] John Gerard Ruggie and John F Sherman III, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 *European Journal of International Law* 921, 923.

[10] Ibid, 924.

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no impact on how Pillar II is implemented by companies in varied circumstances. There has always been a dynamic relation between 'law and society' as well as 'law and ethics'. The relation is often of a reciprocal influence and complementarity. I will argue that the relation of the Pillar II social norm with related legal norms should be of reciprocal influence and complementarity as well. Such a relation will be possible only if there is a 'loose alignment' between the two: whereas a hard or absolute alignment will undermine regulatory dynamism, a complete non-alignment will create regulatory incoherence. How the proposed loose alignment should unfold is unpacked below in two illustrative contexts: relation with Pillar I laws, and relation with judicial articulation of the direct duty of care.

A. Pillar II Social Norm and Pillar I Laws

Unlike Pillar II, the state duty to protect human rights under Pillar I of the UNGPs 'is grounded in international human rights law'.[11] This duty 'is a standard of conduct, not result' and 'international law gives states broad discretion as to how to discharge their duty to protect'.[12] Pillar I recommends that states adopt a 'smart mix' of measures, including laws, to foster business respect for human rights.[13] It also focuses on 'the diverse array of policy domains through which States may fulfil this duty with respect to business activities'.[14] However, Pillar I does not expressly recommend that states discharge their duty to protect by institutionalizing mandatory HRDD generally for all businesses: the possibility of HRDD is expressly mentioned *only* in the specific context of state-owned enterprises[15] and business operations in conflict-affected areas.[16] This perhaps provided several leading Swiss businesses a basis to suggest that a mandatory extraterritorial HRDD law in Switzerland would be inconsistent with the UNGPs.[17] Such a position triggered a response from Ruggie, asserting that 'there is no inconsistency in states adopting measures that require businesses to meet their responsibility to respect human rights through legislation'.[18]

Despite Pillar I not tying the duty to protect human rights exclusively to requiring HRDD by businesses, such a connection has inadvertently evolved in many settings. I will argue that this is problematic for several reasons. First, as the concept of HRDD under Pillar II in itself has limitations,[19] states should employ all 'appropriate' means to

[11] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: WW Norton & Company, 2013), 84.

[12] Ibid.

[13] UNGPs, note 1, Principle 3 and the commentary.

[14] Human Rights Council, 'Protect, Respect and Remedy', note 8, para 27.

[15] UNGPs, note 1, Principle 4 and the commentary.

[16] Ibid, Commentary to Principle 7.

[17] 'Sorgfaltsprüfung bezüglich Menschenrechte und Umwelt im Zusammenhang mit Auslandaktivitäten von Unternehmen: Kein Schweizer Alleingang in der Gesetzgebung', https://static.woz.ch/sites/woz.ch/files/text/download/lobbyschreiben_von_8august2019.pdf (accessed 9 March 2021).

[18] 'Letter from John Ruggie' (19 September 2019), https://media.business-humanrights.org/media/documents/files/documents/19092019_Letter_John_Ruggie.pdf (accessed 9 March 2021).

[19] HRDD under Pillar II has conceptual, operational and structural limitations. Let me briefly allude to some of these limitations. First, HRDD does not contemplate any responsibility of 'result' in any situation. Second, it conflates

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discharge their duty, instead of using only one tool with known limitations. Second, although the state duty to protect is merely a standard of conduct, when this is used to establish *merely* a standard of conduct even for businesses, it creates a 'double layer of the standard of conduct' and in turn undermines the importance of achieving the result that businesses do not violate human rights in practice. Third, the content of business responsibility under Pillar II may be under-inclusive *vis-à-vis* states' obligations under international human rights law. For example, the moral minimum of 'internationally recognised human rights' under Principle 12 does not include environmental rights. Nor does it include a specific articulation of human rights of women, children, indigenous persons or persons with disabilities.[20] Fourth, the entire spectrum of Principle 13 typology of adverse human rights *impacts* applicable to all businesses and their entire business relationships may not be a suitable candidate for legalization with liability at this point of time;[21] rather, some appropriate modifications may be necessary.

In my view, Pillar I laws need not be identical to the content of Pillar II in all respects. As long as there is a 'loose alignment' with Pillar II,[22] such laws may vary depending on local conditions and circumstances prevailing in different states or world regions.[23] In other words, Pillar I laws may be narrower (not covering all companies or all human rights), wider (cover climate change or impose requirements additional to HRDD) or higher (impose strict liability in certain situations or for abuses directly linked to their supply chains) than Pillar II, provided they can be regarded appropriate to discharge the state duty to protect human rights. Businesses would of course need to follow such laws as well as meet their Pillar II responsibility. I analyse this issue further below.

The business responsibility to respect all internationally recognized human rights under Pillar II should be seen as an 'end'. To achieve this end, Principle 15, which is a foundational principle, provides that 'business enterprises should have in place policies and processes appropriate to their size and circumstances, *including*:'[24] make a policy commitment, conduct ongoing HRDD, and have in place a remediation process.

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responsibility to respect and responsibility to protect human rights in relation to businesses. Third, HRDD does not address adequately the problems flowing from the imbalance of power and information between businesses and rights-holders – merely asking businesses to do 'meaningful consultation with potentially affected groups and other relevant stakeholders' (Principle 18) does not go far enough in practice. Fourth, HRDD may not be able to dismantle business models of irresponsibility and inequality (see discussion in section III).

[20] The commentary to Principle 12, however, refers to these as 'additional standards' that businesses may need to consider depending on circumstances.

[21] The scope and effect of a mandatory human rights and environmental due diligence law proposed by the European Commission is yet to be seen.

[22] As the proposed German mandatory HRDD claims that its requirements 'closely align with the due diligence standard' of the UNGPs, Ruggie in his letter to the government raised concerns about the proposed legislation not being 'closely' aligned with the UNGPs, e.g., focus on tier one suppliers, absence of salient human rights risks, and over-focus on contractual enforcement of human rights clauses. Shift, 'Ruggie's letter to the German government' (9 March 2021), https://shiftproject.org/wp-content/uploads/2021/03/Shift_John-Ruggie_Letter_German-DD.pdf (accessed 10 March 2021). In my view, governments need not claim or ensure a complete alignment of their Pillar I laws with the Pillar II social norm.

[23] In relation to mandatory HRDD laws, OHCHR noted that 'there is not one, single model'. OHCHR, 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (June 2020), 1, https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf (accessed 13 April 2021). This holds true for all Pillar I laws.

[24] Emphasis added.

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Although HRDD is prescribed as the main means to achieve this end, this need not be the only means – the word 'including' implies that these three steps do not exhaust the entire set of measures that businesses should take. Even if HRDD is a standard of means and not of result,[25] the appropriateness of means taken by businesses should be tested on the touchstone of their likelihood in achieving the identified end. Additional means might need to be employed if the prescribed three means prove to fall short generally or in certain circumstances. Therefore, while enacting laws as part of their obligations under Pillar I, states should go beyond HRRD legislation modelled on Pillar II. States may, for example, extend the scope of the right to information against companies, as done in South Africa,[26] or proposed in Norway as part of the mandatory HRDD law.[27] Similarly, a no-fault (strict) liability or adopting a regulatory approach based on the precautionary principle may be appropriate in certain situations. States should also start drawing certain 'red lines': it is doubtful whether companies producing products like tobacco could ever respect all human rights,[28] or whether companies should be prohibited from entering certain markets where no meaningful HRDD (including exercise of leverage) is at all possible.[29]

In short, if states *only* focused on enacting mandatory HRDD laws as part of their duty under Pillar I and/or *merely* looked at Pillar II to derive the content of such laws, they may not satisfy the threshold of taking 'appropriate' means to discharge their duty to protect human rights under international law. Although the UNGPs 'should be understood as a coherent whole'[30] and there are important interlinkages between Pillars I and II,[31] the two pillars should not end up becoming one.[32] Pillar II should not be subsumed by Pillar I: rather, the former should stand independent in parallel to any legalization of the human rights responsibilities of business flowing from Pillar I.[33] Such an 'independent but complementary' status of Pillar II will be especially critical in certain situations, e.g., where legalization under Pillar I does not cover all human rights or all businesses, or where mandatory HRDD laws do not provide for remediation.

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[25] HRDD may also operate as a 'standard of expected conduct'. Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 *International & Comparative Law Quarterly* 789, 794.

[26] Section 32(1) of the South African Constitution provides: 'Everyone has the right of access to – a. any information held by the state; and b. *any information that is held by another person* and that is required for the exercise or protection of any rights' (emphasis added). See also Section 3(b) read with sections 50–72 of the Promotion of Access to Information Act 2000. For an analysis, see Lisa Chamberlain, 'Fighting Companies for Access to Information' (2016) 13:23 *Sur – International Journal on Human Rights* 199.

[27] Mark Taylor, 'Mandatory Human Rights Due Diligence in Norway – A Right to Know', *Blogging for Sustainability* (12 April 2021), https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/2021/mandatory-human-rights–taylor.html (accessed 13 April 2021).

[28] Danish Institute for Human Rights, 'Human Rights Assessment in Philip Morris International' (4 May 2017), https://www.humanrights.dk/news/human-rights-assessment-philip-morris-international (accessed 10 March 2021).

[29] At the time of writing, two such concrete scenarios are operations in the Xinjiang province in China and in Myanmar after the 2021 coup.

[30] UNGPs, note 1, General Principles.

[31] Karin Buhmann, 'Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action' (2018) 3 *Business and Human Rights Journal* 23.

[32] The 'move to have the corporate responsibility to respect human rights parallel states' obligations is unnecessary, and it is out of character with the Guiding Principles'. Ruggie and Sherman, note 9, 926.

[33] The business responsibility to respect human rights 'exists over and above compliance with national laws and regulations protecting human rights', Human Rights Council, note 1, Commentary to Principle 11.

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Moreover, it should be noted that the state duty to protect is neither created nor limited by Pillar I: it is merely elaborated on by Pillar I in a non-exhaustive manner in the specific BHR context. In fact, Pillar I should only be the 'starting point' – not the 'end point' – for states to discharge their duty to protect against human rights abuses by third parties including businesses. Let me provide two concrete examples for why states should follow the proposed holistic approach. First, if certain elements of the state duty to protect are more developed under regional human rights law, those higher standards should be followed. The Inter-American jurisprudence on the state duty to guarantee human rights, which corresponds with the state duty to protect, is a case in point,[34] as it requires states to take, among other steps, preventive measures such as training public officials, raising social awareness, and strengthening or creating public institutions.[35] Second, Principle 2 of the UNGPs arguably sets 'the bar clearly below the current state of international human rights law' regarding the extraterritorial obligations of states to discharge their duty to protect human rights.[36] If states merely looked at Principle 2 and its commentary, they might not be proactive in enacting laws with extraterritorial dimensions. Yet, such extraterritorial laws are needed despite states showing selective and inconsistent political appetite for them.[37] The real issue is not whether such a duty (not merely power) to act extraterritorially currently exists,[38] but whether it *ought* to exist to satisfy the threshold of appropriateness.[39] International law is dynamic and its principles must evolve as per the changing needs to remain relevant.

B. Pillar II and Judicial Articulation of the Direct Duty of Care

Although there are conceptual differences between human rights law and tort law, the latter has been frequently used to protect human rights.[40] Torts of negligence, nuisance,

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[34] Soledad García Muñoz, Special Rapporteur on Economic, Social, Cultural and Environmental Rights, *Business and Human Rights: Inter-American Standards* (CIDH, 2019) 60–86.

[35] Fernando Basch et al, 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions' (2010) 7:12 *Sur – International Journal on Human Rights* 9, 13–14.

[36] Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 *Business and Human Rights Journal* 41, 45. Knox also argues that Ruggie might have paid 'insufficient attention to the differences in the language of human rights treaties'; John Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation* (Martinus Nijhoff Publishers, 2012) 51, 79. See also Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (10 August 2017).

[37] Chambers discusses some 'reasonableness' factors to mitigate against host states foreign interference into their domestic affairs. Rachel Chambers, 'An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional Dilemma Raised/Created by the Use of the Extraterritorial Techniques' (2018) 14:2 *Utrecht Law Review* 22, 37–38.

[38] O'Brien concludes that 'at present, there cannot be said to exist any positive legal basis for such a duty'. Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' (2018) 3 *Business and Human Rights Journal* 47, 72.

[39] Cassel notes that international law 'today broadly permits, generally encourages, and sometimes obligates states to exercise jurisdiction over transnational business activities'. Doug Cassel, 'State Jurisdiction over Transnational Business Activity Affecting Human Rights' in Surya Deva and David Birchall (eds.), *Research Handbook on Human Rights and Business* (Cheltenham, Edward Elgar, 2020) 198.

[40] See Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Australian Bar Review* 1; Jane Wright, *Tort Law and Human Rights*, 2nd edn (Oxford: Hart Publishing, 2017).

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privacy, battery, trespass and deceit are prime candidates to hold businesses accountable for various human rights abuses or environmental pollution. Out of these possibilities, the evolution of a direct duty of care of parent companies, as part of the tort of negligence, has raised most hope in seeking at least partial remedy for human rights abuses linked to their subsidiaries.[41] The direct duty of care cases have succeeded – although mostly at the jurisdictional stage rather than on the merits[42] – in several jurisdictions such as the United Kingdom (UK), the Netherlands, Canada and Australia.[43]

What should be the relationship of HRDD under Pillar II and the direct duty of care under the tort of negligence?[44] Despite specific arguments made by lawyers and/or by civil society organizations (CSOs) in *amicus* briefs, most decisions in these tort cases have not so far made an explicit reference to the UNGPs or other international human rights standards directly applicable to businesses.[45] This compartmentalized judicial approach should ideally change in the future, because international human rights law should have a bearing on the nature and extent of the corporate duty of care as well as on what may amount to the breach of such a duty under the tort of negligence. However, even if this judicial approach does not change, these tort decisions would have implications for how businesses conduct HRDD under Pillar II. This will again require a 'loose alignment' so that tort law and the UNGPs do not push or pull businesses in different directions. However, such an alignment may be missing as of now, as I will show with reference to two UK Supreme Court decisions.

In *Vedanta Resources plc v Lungowe*,[46] the Supreme Court held that the liability of parent companies in relation to the activities of their subsidiaries is not a distinct or novel category of negligence and that it 'depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary'.[47] The liability under the direct duty of care principle – which in effect

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[41] Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 *City University of Hong Kong Law Review* 1; Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1 *Business and Human Rights Journal* 179; Tara Van Ho, 'Vedanta Resources Plc and Another v Lungowe and Others' (2020) 114 *American Journal of International Law* 110.

[42] Judgments in *Four Nigerian Farmers and Milieudefensie v Shell* are an exception being on the merits. Lucas Roorda, 'Wading through the (Polluted) Mud: The Hague Court of Appeals Rules on Shell in Nigeria', *Rights as Usual* (2 February 2021), https://rightsasusual.com/?p=1388 (accessed 13 April 2021).

[43] See, e.g., *CSR Ltd v Wren* [1997] 44 NSWLR 463; *Chandler v Cape* [2012] EWCA Civ 525; *Choc v Hudbay Minerals Inc* 2013 ONSC 1414; *Vedanta Resources plc v Lungowe* [2019] UKSC 20; *Esther Kiobel v Royal Dutch Shell plc* [2019] ECLI:NL:RBDHA:2019:4233; *Nevsun Resources Ltd v Araya* 2020 SCC 5; *Four Nigerian Farmers and Milieudefensie v Shell* ECLI:NL:GHDHA:2021:132, ECLI:NL:GHDHA:2021:133 and ECLI:NL:GHDHA:2021:134; *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3.

[44] Sanders discusses in detail how the UNGPs could impact the tort of negligence claims, but not how such claims could affect the UNGPs. Astrid Sanders, 'The Impact of the "Ruggie Framework" and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation' in Jena Martin and Karen Bravo (eds.), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge: Cambridge University Press, 2016) 288.

[45] The decision in *Choc v Hudbay Minerals Inc* (2013 ONSC 1414) was an exception. The UK Supreme Court in *Okpabi* also noted that interveners 'drew to the court's attention international and domestic standards relating to the responsibilities of business enterprises in relation to human rights and environmental protection'. *Okpabi*, note 43, para 73.

[46] [2019] UKSC 20.

[47] Ibid, para 49.

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avoids the need to pierce the corporate veil – may also arise for omissions. For example, the parent may incur 'responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so'.[48]

The UK Supreme Court reaffirmed the *Vedanta* principle in *Okpabi v Royal Dutch Shell plc*.[49] The Court reiterated that instead of conducting a 'mini trial' at the jurisdictional stage, the focus should only be on whether there is an arguable case.[50] It also stressed the 'importance of internal corporate documents' which 'may materially add to or alter the evidence relevant to whether the claim has a real prospect of success'.[51] Perhaps the most important for our purpose was the Supreme Court rejecting the argument that 'promulgation by a parent company of group wide policies or standards can never in itself give rise to a duty of care', because foreclosing this option would be inconsistent with the *Vedanta* principle.[52] The Court also clarified that it is not the parent's control over the subsidiary but over the management of the subsidiary's relevant activities that matters.[53]

The combined effect of *Vedanta* and *Okpabi* is that companies would have to be more careful in what they say publicly about their global human rights policies and HRDD processes, how they manage their relation with subsidiaries (especially operations of subsidiaries), and how they document internal discussions about human rights issues. While the UNGPs encourage companies to communicate to various stakeholders how they address their adverse human rights impacts,[54] the rulings in *Vedanta* and *Okpabi* may discourage them to do so, because 'a company which elects to publish a human rights policy and take steps to implement it will, according to the judgment in *Vedanta*, assume a duty of care where a competitor which wilfully disregards its responsibility under the UN Guiding Principles will not.'[55] Even if it is accepted that companies 'adopt and implement human rights related policies at a group level for a number of reasons'[56] and 'taking a hands-off approach may not protect the company under *Vedanta*',[57] this does not negate the existence of some incoherence between soft and hard norms and the consequent 'catch 22' situation faced by companies.

In short, if companies know in advance the potential routes of *Vedanta* liability,[58] they may avoid taking those routes, even if soft standards like the UNGPs expect them

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48 Ibid, para 53.

49 [2021] UKSC 3.

50 Ibid, paras 21, 109, 111 and 120.

51 Ibid, paras 128 and 129.

52 Ibid, para 143.

53 Ibid, para 147.

54 UNGPs, note 1, Principle 21. Consultation with, and communication to, the relevant stakeholders is in fact critical to all four stages of HRDD.

55 Hogan Lovells, 'The Implications of the UK Supreme Court's Decision in Vedanta for the Management of Human Rights Risk in Overseas Operations and Supply Chains' (30 May 2021), https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/implications-uk-supreme-courts-decision-vedanta-management-human (accessed 29 March 2021).

56 Ibid.

57 Peter Nestor and Jonathan Drimmer, 'How Companies Should Respond to the Vedanta Ruling' (30 April 2019), https://www.bsr.org/en/our-insights/blog-view/how-companies-should-respond-to-the-vedanta-ruling (accessed 30 March 2021).

58 Four such routes were articulated by the appellants in the *Okpabi* case. *Okpabi*, note 49, para 26.

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to follow those very routes.[59] Alternatively, companies may start complying with the UNGPs 'superficially' so as not to expose them to potential litigation akin to *Vedanta* and *Okpabi*. Either of these two pathways adopted by companies will undermine the value of the UNGPs. To avoid such an outcome, the tension between disclosure/transparency norms and accountability regimes – where public disclosure of human rights information may be seen as creating 'litigation landmines' – should be minimized.

In addition to the role that mandatory HRDD laws could play,[60] I suggest three strategies to minimize such a tension and create a 'loose alignment' between the UNGPs and tort litigation (including to hold parent companies accountable for abuses by their subsidiaries or suppliers). First, courts should consider the UNGPs and other international BHR standards while adjudicating tort cases that involve, in essence, business-related human rights abuses. For example, Principle 13(b) of the UNGPs may be used in articulating a duty of care that a company may have for human rights abuses in its supply chains that are 'directly linked' to its 'operations, products or services'.[61] Similarly, a company may be regarded in breach of its duty of care if it did not put in place appropriate human rights policies and processes and/or did not conduct meaningful human rights due diligence.[62] However, such a *purposive* reliance on the UNGPs should be used only to strengthen – and not to narrow – the protection of (human) rights already offered by tort principles. For this reason, it will be problematic if conducting HRDD in itself were to operate as a defence to corporate liability based on the tort of negligence, especially if the harm was caused, or contributed to, by the company in question.[63]

Second, disclosing human rights-related information should not be optional for companies, because non-shareholders have a right to know such information affecting them.[64] Nor should disclosure by companies be free from quality controls, for states must not be allowed to outsource completely their duty to exercise oversight and enforcement

[59] It is worth noting that Ruggie during his mandate was aware of legal liability risks created by HRDD or disclosure of information. 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework', A/HRC/11/13 (22 April 2009) paras 80–83. It seems that he underplayed the practical significance of such risks for companies.

[60] Bueno and Bright, note 25, 812 and 816.

[61] Commenting on *Hamida Begum (on behalf of MD Khalil Mollah) v Maran (UK) Limited* [2021] EWCA Civ 326, Holland and Bonner note: 'the Court's recent findings mean that companies choosing to source their products in circumstances where it is foreseeable that environmental, human rights and/or health and safety violations will occur may owe a duty of care to those exposed to these unsafe conditions. The involvement of a third party, or even the third party's control over the unsafe conditions, does not negate that duty where the violations are entirely predictable'. Oliver Holland and Rachel Bonner, 'Recent UK Court of Appeal Judgment May Lead to Greater Accountability of Companies Hiding Behind Complex Supply Chains' (2 April 2021), https://www.business-humanrights.org/en/blog/recent-uk-court-of-appeal-judgment-may-lead-to-greater-accountability-of-companies-hiding-behind-complex-supply-chains/?utm_campaign=coschedule&utm_source=twitter&utm_medium=leighdayintl (accessed 12 April 2021).

[62] See Cassel, note 41.

[63] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 *European Journal of International Law* 899, 910–18; ITUC, *Towards Mandatory Due Diligence in Global Supply Chains* (Brussels: ITUC, 2020) 14.

[64] 'The obligation to disclose is the necessary fulfilment of the right of all of us to know what negative impacts companies are having on people and the planet and what those companies are doing to address those impacts'. Taylor, note 27.

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over corporate disclosures to market forces.[65] From this normative perspective, an over-reliance on the 'comply or explain' model or the 'liability-free disclosure' model is problematic, because this allows companies to exploit social goodwill but at the same time avoid liability or public scrutiny.

Third, the idea of accountability of companies for human rights abuses related to the entire life cycle of their products or services should be mainstreamed as an integral part of respecting human rights. It will not be unprecedented if lead companies are held liable for human rights abuses linked to their products or services. Strict liability under the products liability regime is a case in point.[66] If companies cannot monitor (and control effectively) human rights abuses by their subsidiaries or by suppliers, they should perhaps not be allowed to outsource their operations to such business partners simply for efficiency or cost-saving purposes. Profiting from foreseeable human rights abuses should result in some liability.

III. UNGPs' Interface with the Proposed BHR Treaty

Leaving aside those who do not see the need for any treaty, there have been repeated calls that any future BHR treaty (or perhaps treaties) should align with the UNGPs.[67] It has also been suggested that the two processes should and could be complementary.[68] For example, Augenstein et al note that 'there is an increasing recognition on both sides of the debate that "hard" and "soft" law approaches can play a complementary role'.[69] However, what does alignment of international legal norms with the UNGPs really mean in practice: should the text of treaty provisions generally (or in relation to HRDD specifically) be *identical* to that of the UNGPs, or will it suffice if the treaty *calibrates* appropriately the text of the UNGPs? Moreover, how could the BHR treaty complement the UNGPs?

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[65] Rachel Chambers and Anil Yilmaz Vastardis, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability' (2021) 21:2 *Chicago Journal of International Law* 233.

[66] See, for example, Council Directive 85/374/EEC Of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products. Comparing the products liability regimes in the US and Europe, Shapo notes that the 'policy heart of the Directive, as is the case with American products liability law, lies in its imposition of strict liability'. Marshall S Shapo, 'Comparing Products Liability: Concepts in European and American Law' (1993) 26 *Cornell International Law Journal* 279, 289.

[67] See, e.g., 'Report on the Sixth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', A/HRC/46/73 (14 January 2021), para 12; 'ENNHRI Statement on Occasion of the 4th session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG)', http://ennhri.org/wp-content/uploads/2019/09/Statement-on-Occasion-of-the-4th-session-of-the-Open-ended-intergovernmental-working-group-on-transnational-corporations-and-other-business-enterprises-with-respect-to-human-rights.pdf (accessed 12 April 2021).

[68] Phil Bloomer, 'Unity in Diversity: The Advocates for the Guiding Principles and Binding Treaty Can Be Complementary' (3 November 2014), https://www.business-humanrights.org/en/blog/unity-in-diversity-the-advocates-for-the-guiding-principles-and-binding-treaty-can-be-complementary/ (accessed 12 April 2021); Sara Blackwell and Nicole Vander Meulen, 'Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights' (2016) 6 *Notre Dame Journal of International & Comparative Law* 51.

[69] Daniel Augenstein, Mark Dawson and Pierre Thielbörger, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights?' (2018) 3 *Business and Human Rights Journal* 1, 22.

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Ruggie sees 'no intrinsic contradiction' between implementing the UNGPs and 'further international legalization' in the form of a treaty.[70] Yet, as a practical way forward, he has argued in favour of 'narrowly crafted international legal instruments' as 'precision tools' and has identified gross human rights violations as possible candidates for such a treaty.[71] In a more general context, Ruggie and Sherman have suggested that how HRDD 'is translated into legislation and regulation is an iterative process that flows from the Guiding Principles but requires far more contextual and textual specificity.'[72] These views could be interpreted to mean that the BHR treaty need not have a *literal alignment* with the UNGPs. Such a position will be in line with the 'loose alignment' argument advanced in this article, because the conversion of soft-social norms into legal norms as well as the process of multilateral negotiations may require some adaptive borrowing from the text of the UNGPs. For example, if the BHR treaty were to mandate states to 'encourage all but require only certain' business enterprises to conduct HRDD, that should still be regarded aligned with the UNGPs. Similarly, if the treaty were to focus only on state-based judicial and non-judicial remedy mechanism (and thus leave out non-state-based grievance mechanisms), that would again satisfy the loose alignment threshold.

As far as complementarity is concerned, Mares argues that the UNGPs–treaty relation can be analysed on two levels: 'first, the UNGPs as a precursor of the treaty (process complementarity), and second, the two instruments co-existing in a smart policy mix (substantive complementarity)'.[73] I will propose that from a substantive complementarity perspective, the BHR treaty can complement the UNGPs in two broad ways: basic complementarity, and ambitious complementarity. To achieve the latter outcome, the treaty would have to take the UNGPs only as a 'starting point' and build on them a regulatory architecture which can respond effectively to the needs of rights-holders in changing times.

A. Basic Complementarity

The BHR treaty could provide a basic (or low-level) complementarity to the UNGPs by supporting or strengthening their implementation by states, businesses and other stakeholders.[74] For example, if the treaty included mandatory HRDD provisions, this may encourage states outside Europe to take their Pillar I obligations and also connections between Pillars I and II more seriously. Similarly, by requiring states to ensure that their

[70] John Ruggie, 'Third United Nations Forum on Business & Human Rights: Closing Plenary Remarks' (3 December 2014) 2, https://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie_SR_SG_BHR.pdf (accessed 13 April 2021).

[71] John Ruggie, 'A Business and Human Rights Treaty? International Legalisation as Precision Tools' (13 June 2014), https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision (accessed 12 April 2021).

[72] Ruggie and Sherman, note 9, 926.

[73] Radu Mares, 'Regulating Transnational Corporations at the United Nations: The Negotiations of a Treaty on Business and Human Rights', unpublished paper under peer review (on file with the author) 16.

[74] See Surya Deva, 'Panel V.1: Moving Forward in the Implementation of the UN Guiding Principles on Business and Human Rights' (27 October 2015), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVSubtheme1/SuryDeva.pdf (accessed 12 April 2021).

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trade and investment agreements are compatible with their international human rights obligations, the treaty could move the needle in implementing Principle 9 of the UNGPs, which reminds states to 'maintain adequate domestic policy space' when pursuing investment treaties or contracts.[75]

So far developing a national action plan on BHR is the primary tool recommended by the UN Working Group on Business and Human Rights, and adopted by states, to implement the UNGPs. This process could also be used to domesticate and implement any future BHR treaty. As Blackwell and Meulen highlight, there is a mutual complementarity relationship between the two processes: national action plans could support the treaty process, as well as the proposed treaty being able to support the implementation of the UNGPs.[76]

O'Brien has proposed a framework convention based on the UNGPs as a model for the BHR treaty.[77] She argues that such a model would not only allow a marriage between soft law and hard law but also assist in overcoming deficiencies in the current treaty model.[78] Although there is nothing fundamentally wrong with the framework convention model, it is problematic to tie such a framework agreement exclusively to the text of the UNGPs. The last ten years' experience of states implementing the UNGPs through national action plans is quite telling: even if we leave aside the 'lack of action' element, the sole focus on the UNGPs in drafting these plans often means that states are not even considering many other relevant instruments. In any case, this approach is likely to achieve basic complementarity at best, although O'Brien hopes that 'this approach would also offer scope to generate new soft and hard law standards on topics of global concern as they emerge, such as systemic human rights challenges posed by big tech, AI, and the platform economy'.[79] As discussed below, urgency is required in developing more ambitious norms – both soft and hard – which at least give us a realistic chance to challenge, if not eliminate, the current state of corporate impunity.

B. Ambitious Complementarity

The proposed BHR treaty could also complement the UNGPs in a more ambitious way by upgrading the floor set by the UNGPs and/or by filling regulatory gaps that the UNGPs are unlikely to fill, especially in 'hard cases'.[80] Some of the potential pathways to achieve this are briefly discussed here. For one, the treaty could expand the 'minimum' basket of 'internationally recognised human rights' proposed by Principle 12 of the UNGPs. One

[75] Ibid, 2.

[76] Blackwell and Meulen, note 68, 68–74.

[77] Claire Methven O'Brien, 'Transcending the Binary: Linking Hard and Soft Law through a UNGPs-Based Framework Convention' (2020) 114 *American Journal of International Law Unbound* 186.

[78] Ibid.

[79] Ibid, 190.

[80] Surya Deva, 'Scope of the Proposed Business and Human Rights Treaty: Navigating through Normativity, Law and Politics' in Surya Deva and David Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge: Cambridge University Press, 2017) 154, 160–161.

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glaring gap of this minimum is environmental rights and climate change.[81] The treaty should fill this gap, because protection of the environment or a responsibility to prevent and mitigate climate change does not feature expressly even in the commentary to Principle 12, which provides that 'business enterprises may need to consider additional standards' depending on circumstances.

Second, the treaty could add more elements to the four-step HRDD process under Pillar II to ensure that the process does not end up becoming a legitimization exercise for corporate operations. For example, the role of independent trade unions must be central to HRDD process in supply chains. The same could be said about adopting a gender-responsive approach to HRDD, importance of the 'free, prior and informed consent' principle for Indigenous peoples, and the role of human rights defenders in both HRDD and remediation. For space constraint or other reasons, Pillar II does not pay adequate attention to these elements, but the proposed treaty should incorporate such elements.

Third, the BHR treaty could contribute to addressing the existing asymmetry between 'hard rights' and 'soft responsibilities' of business enterprises.[82] In addition to requiring states to enact mandatory HRDD laws with real teeth, the treaty could mandate states to include legally binding human rights obligations in international investment agreements. This should partly remedy the current asymmetry.[83]

Fourth, strengthening access to effective remedy and corporate accountability is another way in which the treaty could complement the UNGPs in a more ambitious way, as Pillar III or the OHCHR's Accountability and Remedy project[84] has so far made little difference to the situation of affected rights-holders on the ground. The treaty could make some progress in denting the current state of corporate impunity for human rights abuses by establishing an implementation mechanism at national as well as international levels, by creating a legal basis for mutual legal assistance and judicial cooperation in cases with transnational dimensions, and by crafting concrete pathways for states to remove barriers to access to remedy.

Fifth, it seems that the UNGPs do not challenge or confront the existing structure of irresponsibility and inequality utilized by businesses to their advantage.[85] Rather, they

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[81] To remedy the 'climate change blankness', the UN Working Group is developing an Information Note on what the UNGPs entail in relation to climate change. OHCHR, 'Climate Change and the UNGPs', https://www.ohchr.org/EN/Issues/Business/Pages/Climate-Change-and-the-UNGPs.aspx (access 20 February 2021).

[82] Surya Deva, 'The Zero Draft of the Proposed Business and Human Rights Treaty, Part II: On the Right Track, But Not Ready Yet' (14 August 2018), https://www.business-humanrights.org/en/blog/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-ii-on-the-right-track-but-not-ready-yet/ (accessed 12 April 2021).

[83] Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) *ICSID Review*, https://doi.org/10.1093/icsidreview/siaa002 (accessed 13 April 2021); Surya Deva, 'International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives' in Julien Chaisse et al (eds.), *Handbook of International Investment Law and Policy* (Springer, 2021), https://doi.org/10.1007/978-981-13-5744-2_46-1 (accessed 13 April 2021).

[84] OHCHR, 'OHCHR Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses', https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx (accessed 13 April 2021).

[85] Businesses are good at turning models of innovation into models of irresponsibility. Crane et al, for example, identify four innovative business models of modern slavery: risk reduction, asset leveraging, evading legal minimums, and workers as consumers; Andrew Crane et al, 'Confronting the Business Models of Modern Slavery' (2021) *Journal of Management Inquiry*, https://doi.org/10.1177/1056492621994904 (accessed 13 April 2021).

consciously work around difficult or contentious issues[86] and do not seek to 'rock the boat' of the current economic order. However, some of the existing as well as future challenges in the BHR field might not be overcome without dismantling current structures employed by businesses to entrench irresponsibility and inequality. The architecture that normalizes exploitative global supply chains,[87] economic inequality[88] and corporate capture of the state[89] is a case in point. The proposed BHR treaty (and perhaps a series of soft and hard instruments) in the future should look at introducing more systemic and radical changes to the existing asymmetrical relationship of rights-holders with states and businesses in a free market economy.

Fulfilling the ambitious complementary role would require the BHR treaty to go beyond the text of the UNGPs and operate as a 'logical extension' of the UNGPs.[90] In fact, I will argue that all future norms in the BHR field – in the form of a treaty or otherwise – should take the UNGPs as a 'starting point' but not as the 'end point'.

IV. Conclusion

The UNGPs provide a common platform for states, businesses, civil society and other stakeholders to play a role in promoting business respect for human rights. The value of such a platform rooted in the 'new governance theory' should not be under-estimated.[91] Moreover, because of an unprecedented push for alignment with the UNGPs and their 'gravitational force',[92] the regulatory orbit of the UNGPs has been expanding continuously. At the same time, the UNGPs are not the sole regime in the regulatory universe of BHR. Nor were they parachuted into the BHR field from nowhere.[93] This scenario raises legitimate issues about the interface among various norms emanating from

[86] Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 78, 86–88.

[87] See Daniel Brinks et al (eds.), *Power, Participation, and Private Regulatory Initiatives: Human Rights under Supply Chain Capitalism* (Philadelphia: University of Pennsylvania Press, 2021).

[88] The current 'inequality is the product of a flawed and exploitative economic system, which has its roots in neoliberal economics and the capture of politics by elites'. Oxfam International, *The Inequality Virus* (London: Oxfam International, 2021) 11. See also Thomas Piketty, *Capital and Ideology*, translated by Arthur Goldhammer (Belknap Press of Harvard University Press, 2020).

[89] See ESCR-Net, 'Corporate Capture Project', https://www.escr-net.org/corporateaccountability/corporatecapture (accessed 13 April 2021); Centre for Constitutional Rights, 'Corporate Capture', https://ccrjustice.org/corporate-capture (accessed 13 April 2021).

[90] Surya Deva, 'Business and Human Rights: Time to Move Beyond the "Present"?' in César Rodríguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge: Cambridge University Press, 2017) 62, 65–66.

[91] John Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights' (2014) 20 *Global Governance* 5.

[92] Nico Krisch, Francesco Corradini and Lucy Lu Reimers, 'Order at the Margins: The Legal Construction of Interface Conflicts Over Time' (2020) 9:2 *Global Constitutionalism* 343, 356.

[93] The UNGPs are part of a continuum of BHR standards at the UN level because both what they include and do not include is influenced by the past regulatory initiatives as well as their failures or successes. Surya Deva, 'The UN Guiding Principles on Business and Human Rights and Its Predecessors: Progress at a Snail's Pace?' in Ilias Bantekas and Michael Ashley Stein (eds.), *Cambridge Companion to Business and Human Rights Law* (Cambridge: Cambridge University Press, 2021) 145, 169–71.

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different regulatory regimes within the BHR universe. This article has examined this interface in two specific contexts: relation of the Pillar II social norm and Pillar I laws, and relation of the UNGPs as soft norms and the proposed BHR treaty as hard norms.

I have contended that there should be only a 'loose alignment' between social and legal norms as well as between soft and hard norms.[94] The purpose of such a loose alignment should be to achieve an optimal level of coherence without excluding opportunities of regulatory innovation. While a 'complete or literal' alignment of all other norms with the UNGPs may appear tempting, it will be problematic for several reasons. In addition to stifling regulatory dynamism required to deal with ever-evolving challenges in the BHR field, this will reinforce and perpetuate limitations of the UNGPs. It may also create a false sense of progress being made merely by such alignment. In fact, it is also arguable that if all regulatory regimes revolve around the UNGPs seen as the centre of the BHR universe, this may also be inconsistent with the spirit of *polycentric* governance.

Moving beyond the 'end of the beginning' would not only require a better implementation of the UNGPs in years to come but also a creation of outcome-oriented norms (including hard law) at all levels.[95] States and businesses should not hide behind the UNGPs to prevent or slow down the legalization of human rights responsibilities of business or invoke them to freeze the evolution of more ambitious BHR norms required to meet newer or systemic challenges. New norms such as the proposed BHR treaty should have a mutually complementary relation with the UNGPs with a view to creating additional (dis)incentives and accountability tools for cumulative effectiveness.

Multiple strategies would be needed to build an effective regulatory eco-system which embodies ambitious norms capable of bringing transformative and systemic changes to the current economic order. I note three such strategies here. First, greater attention should be paid to the *needs* of rights-holders, not merely to what the duty bearers are *willing to supply* to respect, protect and fulfil human rights in relation to business. Second, lived experiences and expectations of the Global South should feature more prominently in the global BHR discourse. Different (or at least additional) regulatory approaches may, for example, be required to promote respect for human rights in the informal economy or to deal with situations where states offer no viable option to protect against human rights abuses by business. Third, as not all deficits in the role of states in regulating corporate behaviour could be filled by turning to non-state actors,[96] 'recovering the state' from the influence of corporate capture in the neo-liberal market ideology should also be part of the BHR project.[97] BHR issues should be embedded into political processes and social movements at all levels to build bottom-up a political will to act, rather than merely lamenting the lack of such will.

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[94] Some 'interface conflicts' may in fact be desirable to open new pathways for positive change. Krisch et al, note 92.

[95] For example, the 'procedural approach' of HRDD creates a real risk of 'cosmetic compliance'. Mares, note 73, 6. To avoid this risk, Shift has proposed 'seriousness signals' for regulators. Shift, '"Signals of Seriousness" for Human Rights Due Diligence' (February 2021), https://shiftproject.org/resource/signals-draft1/ (accessed 13 April 2021).

[96] Surya Deva, 'Business and Human Rights: Alternative Approaches to Transnational Regulation' (2021) 17 *Annual Review of Law and Social Science* (forthcoming).

[97] See Daniel Augenstein, 'The Crisis of International Human Rights Law in the Global Market Economy' (2012) 44 *Netherlands Yearbook of International Law* 41.

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