BALANCING POWER ASYMMETRIES AND COMPLEMENTING RESPONSIBILITIES WITHIN THE FUTURE TREATY ON BUSINESS AND HUMAN RIGHTS

Political Feasibility and Positive Idealism as Legislative Yardsticks in International Human Rights Law

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List of Abbreviations

ASEAN	Association of Southeast Asian Nations
BHR	Business and Human Rights
BRICS	Acronym to associate the emerging economies of Brazil, Russia, India, China and South Africa
ChACJHR	Charter of the African Court of Justice and Human Rights
CIL	Customaty International Law
CJEU	Court of Justice of the European Union
CSO	Civil society organisation
CSR	Corporate social responsibility
ECHR	European Convention on Human Rights
GDP	Gross domestic product
GDPR	General Data Protection Regulation of the European Union
HRC	Human Rights Council of the United Nations
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
IHRL	International Human Rights Law

NAP	National Action Plan
NGO	Non-governmental organisation
OEIGWG	Open-ended intergovernmental working group
P2B	Plattform-to-Business
PIL	Public International Law
SRD	Second Revised Draft
TFEU	Treaty on the Foundation of the European Union
TNC	Transnational corporation
TRD	Third Revised Draft
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCh	Charter of the United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNGP	United Nations Guiding Principles on Business and Human Rights
US	United States
USD	United States Dollar

A. Introduction – Subject and *Raison d'être* of this Work

The issue of Corporate Social Responsibility (***'CSR'***) has been the subject of an interdisciplinary scientific discourse in various academic fields, such as political science, economic science, social sciences and philosophy.[1] This is an inevitable development, as businesses influence and define the social, economic and political life of contemporary society significantly.[2] From an IHRL perspective, CSR is not merely a concept addressing moral issues of corporate interactions and their impact on society,[3] but rather a legal phenomenon relating to basic issues of general Public International Law ('***PIL***'), intertwined with various specific fields of legal doctrine, such as *subjectivity*, *attribution, accountability,* and *responsibility*. This enumeration is far from being exhaustive; CSR and IHRL are in a particularly intensive and steady state of tension with each other.

Developed in a state-centred world, the international regime of Human Rights protection is suited to the post-war era, not the era of globalisation or even post-globalisation as we face it today.[4] To adapt IHRL to the realities of the present societal, economic and political order under the aspect of globalisation has been the core of Business and Human Rights ('***BHR***') as a regulatory subject of PIL and an unresolved concern on the legislative agenda of the international community for more than a half a century.[5] Positively codified law has not been able to keep pace with many economic developments and, in particular, the rise and spread of Transnational Corporations ('***TNCs'***).[6]

From a purist IHRL point of view, respect for Human Rights interests should be regarded as a non-negotiable precondition in order to be granted the privilege to conduct business in

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[1] See for instance, J. Brune, *Menschenrechte und Transnationale Unternehmen* (2020); Wettstein, *Multinational corporations and global justice, supra* note 1; Börzel and Deitelhoff, 'Business', in T. A. Börzel, A. Draude and T. Risse (eds), *The Oxford Handbook of Governance and Limited Statehood* (2018), 250.

[2] Cf. Cernic, 'Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concenring Multinational Enterprises ans Social Policy', 6 *Miskolc Journal of International Law* (2009) 24, at 24.

[3] See I. Blumberg, *Corporate Social Responsibility* (2018), at 8.

[4] Kabasakal Arat, 'Looking beyond the State but not Ignoring it: A Framework of Analysis for Non-State Actors and Human Rights', in G. J. Andreopoulos, Z. F. Kabasakal Arat and P. H. Juviler (eds), *Non-state actors in the human rights universe* (2006), 3 at 16.

[5] Cf. Kinley and Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', 44 *Virginia Journal of International Law* (2004) 931, at 935.

[6] Stephens, 'The amorality of Profit, Transnational Corporations and Human Rights', 20 *Berkeley Journal International Law* (2002) 45, at 54.

society.[7] In other words, Human Rights compliance of businesses ought to affect their social *'licence to operate'*.[8] While the general respect businesses are supposed to have for IHRL is arguably indisputable, the international legal order does not provide for answers on how compliance by businesses ought to take place. At what point is the licence to operate forfeited and what are the consequences? Does it apply to all businesses? Does it apply internationally and transculturally? Although these questions are not new to IHRL, the international legislator – the community of states – has so far failed to provide an answer. The way to remedy these lacunae is dealt with under the umbrella term 'BHR legislation'.

Currently, there is an attempt to resolve BHR as a regulatory concern, by means of a formal treaty negotiation process initiated by the United Nations, under the lead of an Open-Ended Inter-Governmental Working Group on BHR ('***OEIGWG'***). The treaty initiative joins a series of rather moderately successful regulatory attempts on BHR on the international stage, and its outcome is uncertain at the time of writing. This paper is dedicated to both general subjects of BHR regulation, but it primarily deals with a discussion of the OEIGWG initiative, which is supposed to result in a somewhat hard law supplement to the so-called United Nations Guiding Principles on Business and Human Rights (***'UNGP***'). These had already been unanimously endorsed by the international community, in 2011.[9] At the time of writing, the negotiation process has been actively pursued for more than six years and has produced four draft treaties, the most recent being the Third Revised Draft ('***TRD'***) from August 2021.

The aim of this thesis is to examine the legislative and diplomatic progress of the regulatory process, particularly with regard to its responsiveness and potential BHR-specific added value, on the basis of an empirical, but above all ethical and *'normative analysis'* of the regulatory subject.[10] The main part of the thesis is designated to three regulatory issues of the future BHR treaty, which are addressed in the drafts and have been the subject of great disagreement within the treaty negotiations. These three core issues are the personal scope of application of the future BHR treaty (**C.I**.), its direct applicability to businesses as non-state addressees and obligors of the treaty (**C.II**.), as well as its way of enforcement by the treaty's

[7] Deva, 'Alternative Paths to a Business and Human Rights Treaty', in J. L. Černič and N. Carrillo-Santarelli (eds), *The Future of Business and Human Rights*: *Theoretical and practical considerations for a UN treaty* (2018), 13 at 25 f.

[8] J. Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/8/5' (2008), at 17 (para. 54).

[9] 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31: Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises' (2011).

[10] On the notions of empirical, ethical and normative analysis see Peters, 'Realizing Utopia as a Scholarly Endeavour', 24 *European Journal of International Law* (2013) 533, at 546 f., 549 f.

beneficiaries, namely potential victims of Human Rights abuses (**C.IV**.). Furthermore, the intended way to define the material scope of application of the treaty is briefly assessed (**C.III**.).

IHRL should be subject to continuous change, determined by the circumstances of their actual realisation.[11] Human Rights treaties should attempt to project the prominent role attributed to Human Rights protection at the formal level to daily realities. One of the ends of this work is to examine whether the envisaged future BHR treaty as its stands today, or rather its published drafts, satisfy this ideal and normatively necessary regulatory ambition of IHRL.

The thesis follows a normative analysis based on the so-called *'ideational positivism'* as an expression of the '*scholarly endeavour to enhance a realistic utopia'* in PIL, as defended by *Anne Peters* and underlying *Andrew Cassese's* book *'Realizing Utopia – The Future of PIL'*.[12] The concept of normative analysis defined by *Peters* and *Cassesse* inspired and determines the methodological procedure of this thesis. To enhance a realistic utopia as a scholarly endeavour is based on an understanding of international legal scholarship as a way to contribute to legal reform and change where this proves necessary, which mandatorily will include a subjective valuation of concerned scholars.[13] With their ideas resulting from such subjective valuations, international legal scholars may serve as *'norm entrepreneurs'* contributing to the process of emergence and reform of law.[14]

The examination underlying this thesis is thereby ought to be a normative analysis of lex lata, by reference to legal principles and standards of justice derived therefrom in order to find out what the law ought to be and how this could be achhieved in practice. Normative analysis intends to provide ideas and proposals that might give incentives for social and legal change with regard to BHR regulation, while still fitting into the identified legal system and thus being coherent and consistent. The analysis takes into account preposistions and principles of IHRL, which are identified by way of doctrinal and ethical research. The arguments made in this thesis thereby flow from a natural law approach and an ethical understanding of law not only as the totality of codified and effective voluntary acts. But rather a presumption that, especially in IHRL, there is meta-level above this – namely rules that have a claim to validity

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[11] Talapina, 'Evolution of Human Rights in the Digital Era', 14 *Proceeding of the Institute of State and Law of the RAS* (2019) 122, at 123.

[12] Peters, *Realizing Utopia as a Scholarly Endeavour, supra* note 10, at 550 ff.; A. Cassese (ed.), *Realizing Utopia*: *The Future of International Law* (2012).

[13] Peters, *Realizing Utopia as a Scholarly Endeavour, supra* note 10, at 537, 543.

[14] Decken and Koch, 'Recognition of New Human Rights: Phases, Techniques and the Approach of 'Differentiated Traditionalism'', in A. von Arnauld, K. von der Decken and M. Susi (eds), *The Cambridge handbook of new human rights*: *Recognition, novelty, rhetoric* (2020), 7 at 9.

by virtue of their necessity. This normatively-ethical approach to law presumes that where normative analysis shows that the ethically necessary content of law is not yet agreed upon, there is an imperative for the legislator to codify law. In the thesis, this is referred to as normative necessity. By focussing on normative necessities, the thesis tries to contribute to creating a counterweight to the pragmatic analyses on BHR legislation. In the center of the ethical and doctrinal research is the recognition that the concept of human dignity is a premise underlying IHRL and its very regulatory raison d'etre. The notion of human dignity is not created by IHRL, but exists independently of it. The norms of IHRL serve to give effect and protect human dignity, but neither their codification nor their enforcement impacts human dignity as such.

Sources of IHRL therefore are not a constitutive element of human dignity, rather human dignity is a constitutive element of IHRL and where human dignity is referred to in the legal text, this is done declaratively. It therefore exists on a meta-level, based on moral and ethical considerations of humanity and independent of its codification or implementation. It is thus diametrically opposed to purist and positivist theories of law, which define law only by its legality and effectiveness as a voluntary act of a sovereign authority. Human dignity understood in this way constitutes the linchpin of the normative analysis of this thesis.

Any emerging area of law needs academic standard setters, and this applies in particular to PIL, which is lacking homogenous legislative organs, is defined by high dynamism and does not provide for a universal benchmark of values such as a constitution on the domestic basis.[15] Scholarship, thus, necessarily ought to refer to considerations beyond positivist legal standards, such as ethical and normative valuations, in order to satisfy the claim of PIL to be *'just'*.[16] A definition and the threshold of justice necessarily needs to be sought beyond the sources offered by the positivist legal *status quo,* taking particular account of ethical considerations.[17] In consequence, legal scholarship based on ideational positivism might come to the conclusion that the state of law does not correspond to the needs of practice from a normative perspective, or it might propose standards whose full implementation is not, or at least not yet, feasible due to compelling circumstances beyond the law. Yet this should not be taken as a reason to marginalise this method of scholarly engagement with a regulatory subject. Rather, it reflects the natural interplay between legal scholarship, practice and legislation, at the end of which stands a necessary balancing act between both opposing

[15] Peters, *Realizing Utopia as a Scholarly Endeavour, supra* note 10, at 537.
[16] *Ibid.,* at 548.
[17] *Ibid.*

poles or rather a 'reality-check'.[18] Based on such an understanding of international legal scholarship, normative analysis as a kind of methodology intends to evaluate emerging and existing norms and to make reform proposals – not to decide whether or not a particular norm comes into existence, but rather to assess how this is to be valued from a normative and ethical perspective.[19]

Due to its inherent dynamism, heterogenous understanding and its rationale to sustainably serve the human interests of society in relation to those in power, normative analysis is important in IHRL, more than in any other field of law.[20] Indeed, if normative analysis in the sense just described has any raison d'être at all in legal science, it is in the field of IHRL. For IHRL is characterised precisely by the fact that it is a superior or at least outstanding field compared to other areas of PIL. This follows from the close connection of IHRL with morality and ethics, its philosophical foundations and the fact that Human Rights exist and are awarded to people solely on the basis of their humanity, regardless of other preconditions.[21] For this reason, human rights cannot be considered in complete isolation from their moral and ethical significance: this explains why it concerns and impacts us more when states violate Human Rights than when they fail to comply with international norms on packaging sizes in international shipping.[22] Everyone would agree that both cases are violations and laws of different quality. No matter how legally binding and effective the laws on the size and shape of cartons and their enforcement mechanisms may be, we feel that a violation of Human Rights is more serious. Even if the affected rights are not codified in a legally binding form, e.g. as is the case with the UDHR.[23] This is what makes Human Rights distinctive and different from 'normal law'. And this is also what justifies the standard of normativity and effectiveness by which the creation of IHRL should be measured and to which reference will be made throughout this work. It is the concern of normativity, as interpreted and applied within this paper, to balance the paradoxical status quo of the area of law that concerns and affects society as its beneficiary the most, but at the same time is the weakest and most toothless in legal terms.

The history of BHR as a regulatory concern of PIL is long. Consequently, the academic discourse that has taken place so far, as well as the opinions and approaches on the subject are very extensive and diverse. Nevertheless, it appears that scholarship on BHR has often

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[18] *Ibid.*, at 543.

[19] *Ibid.*, at 549 f.

[20] *Ibid.*, at 550.

[21] Cf. Luban, 'Human Rights Pragmatism and Human Dignity', in R. Cruft, S. M. Liao and M. Renzo (eds), *Philosophical foundations of human rights* (1st ed., 2015), 263 at 264.

[22] *Ibid.*, at 268.

[23] For details see Sect. **B.I.1.**

concentrated on and been limited to the identification and resolution of – primarily political – obstacles regarding the implementation of a binding treaty, without, in a first step, comprehensive examination of why such a treaty is desirable and what exactly is to be achieved and resolved by it, thus, its very object and purpose.[24] However, this would have been just as important, if not even logically necessary, in order to be able to convincingly counter the arguments in favour and against a future BHR treaty. Normative analysis allows the exploration of this aspect. Thereby, this thesis intends to provide a vision of what a future BHR treaty should seek to achieve, thus, commencing from the 'right' starting point before focusing on any counterarguments.[25] A key assumption of this work is that normative analysis justifies the demand for an ambitious future BHR treaty. This would serve to make the step to finally come to terms with the regulatory issue of BHR, and that precisely such a treaty will not counteract the legal progress and codification of BHR as a regulatory subject of IHRL, but rather serve as an accelerator for this field of law. Additionally, an ambitious BHR treaty will constitute a general source of reform and progress and have a radiating effect on the application of IHRL beyond the scope of the treaty.[26]

Idealism is inherent to the very concept of Human Rights and is essential even in the scientific examination of IHRL. The path to fundamental advances in law and particularly in the field of Human Rights is never an easy one.[27] This finding is somewhat obvious, as promotion of freedom rights and individual liberties on one sideis usually accompanied by a loss of power and authority on the other. Those in a superior position lose rather than take significant advantage of any such development, which will contradict their genuine interests. The creation and enforcement of Human Rights is about the equalisation or at least the just design of power asymmetries and subordination relationships, which always necessarily means some form of loss for one of the parties. Traditionally, the parties losing power for the benefit of IHRL have been states.

History shows that obstacles on the way towards Human Rights protection have always seemed insurmountable at first sight. However, it was the innovative and progressive thoughts and approaches of the few who set the first stone for change by identifying problems as well as possibilities and, regardless of the given prospects of success at the

[24] Bilchitz, 'The Necessity for a Business and Human Rights Treaty', 1 *Business and Human Rights Journal* (2016) 203, at 204.

[25] Cf. *ibid.*

[26] Cf. Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 2., who within the introduction to his remarkable piece on non-state actors noted, that the way we decide to deal with non-state actors, namely businesses, will be decisive for the way we perceive IHRL as a whole in future.

[27] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 203.

time, hoped and trusted to find a way to reach the goal.[28] The very emergence of IHRL was not a development that came overnight; rather, even after Human Rights were explicitly enshrined in the UNCh, there was no clear consensus as to whether they gave rise to binding obligations for states.[29] Such understanding has only emerged overtime, in the later course, significantly influenced by scholarship and jurisprudence, and it took more than twenty years after the adoption of the Universal Declaration of Human Rights in 1948[30] ('***UDHR***') and the entry into force of the UNCh until Human Rights were recognised by means of specialised legally binding treaties with the International Convention on the Elimination of All Forms of Racial Discrimination[31] and later the International Covenant on Civil and Political Rights[32] ('***ICCPR***').[33] To date, IHRL has developed as a core pillar of PIL to an extent that was inconceivable by the vast majority of observers in 1945.[34]

The legal field of PIL, which is very much shaped by political interests, is particularly susceptible to a dilution of the normative quality of its rationale and its provisions. Even though PIL law-making and politics cannot be completely separated from one another – neither is such separation necessary – the *raison d'être* of PIL lies precisely in subjecting the pursuit and exercise of political interests to certain rules within the international community, and to permit exercise of political power only within the limits of normative reasonableness in order to create a balanced equilibrium of interests. While PIL is undoubtedly political, it also consists precisely of establishing a balance in the exercise of political power, which ought to be based on ethical and normative values.[35] Normativity as a counterweight to political feasibility must therefore remain visible in the emergence and creation of PIL. However, the history of PIL as a regulatory concern, and the treatment of this subject on the international legislative agenda provides an unparalleled example of how over-reliance on supposed *'realism'*, mostly being pragmatism, might lead to emerging law no longer having much in common with the actual needs of reality it is supposed to respond to. Pragmatising a regulatory subject does not necessarily offer a solution that is closer to reality, but it can also lead to existing grievances being neglected instead of attempting to resolve them by way of creative and progressive legislation. Attempts to create an international, legally binding, and

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[28] *Ibid.*

[29] S. Wheatley, *The idea of international human rights law* (2018), at 69.

[30] United Nations General Assembly, 'Proclamation of the Universal Declaration of Human Rights: UN Doc. A/RES/217' (1948).

[31] International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966; ICERD.

[32] International Covenant on Civil and Political Rights, 16 December 1966; (ICCPR).

[33] Cf. Wheatley, *supra* note 29, at 69; 96 f.

[34] *Ibid.*, at 13.; Alston, 'The UN's Human Rights Record: From San Francisco to Vienna and beyond', 16 *Human Rights Quarterly* (1994) 375, at 377.

[35] Cf. Peters, *Realizing Utopia as a Scholarly Endeavour, supra* note 10, at 541.

comprehensive regulatory regime on the subject matter of BHR have been repeatedly dismissed and rejected with reference to their lacking a sense of reality, especially under the guise of 'political feasibility' and their timeliness. This paper intends to illustrate that the balance of the realistic or rather pragmatic path taken so far shows that the desired added value of pragmatism – a larger-scale and faster, more effective handling of the subject matter – failed to materialise. How much reality is left in realism, e.g. when it relies on voluntariness in favour of recognition where there is no volition?

At the core of any effective regulation of BHR by way of a treaty is, thus, a balancing act between the normatively appropriate regulatory content given the subject matter of the regulation, and the necessary political feasibility ubiquitous in PIL. While a progressive regulatory instrument would be necessary from the perspective of normativity, it is inevitable that such a progressive approach be restricted in favour of political interests, to some extent, in order to find a successful solution.[36] However, the *pragmatisation* of normative necessities in terms of political feasibility is primarily a matter for political legislators, not necessarily for scholarship. The point at which both poles, positive idealism and political feasibility, are closest to each other, is where the kind of law that satisfies the claim to realise utopia at its best can be found. Neither of the two poles can thus be waived in the creation of law. While the BHR debate has long been characterised by a rather one-sided focus on political feasibility, whereby aspects of moral and ethical justification or normative necessities have been neglected,[37] more recent scholarship on BHR appears to tend towards a more idealistic approach on their scientific discussion of international regulation.[38] This paper intends to make a further contribution to this trend and beyond that, it intends to apply a different

[36] Cf. Bernaz, 'Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty' *Human Rights Review* (2020), at 17; Fasciglione, 'A Binding Instrument for Business and Human Rights as a Source of International Obligations for Private Companies: Utopia or Reality?', in D. Russo, M. Buscemi, L. Magi and N. Lazzerini (eds), *Legal Sources in Business and Human Rights*: *Evolving Dynamics in International and European Law* (2020), 31 at 32.

[37] Cf. Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide', 22 *Business Ethics Quarterly* (2012) 739, at 744.

[38] Authors, such as Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, in the more recent (post-initiation of the OEIGWG process) scholarly debate argue rather in favor of a progressive treaty, including the option for direct international obligations of business actors and draw a picture of the academic discourse which is quite different of that after the UN Norms failure, which has lead to the UNGP. See also Nowak and Januszewski, 'Non-State Actors and Human Rights', in M. Noortmann, A. Reinisch and C. Ryngaert (eds), *Non-State actors in international law* (2015); Fasciglione, *supra* note 36; Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36; Deva, 'From 'business or human rights' to 'business and human rights': what next?', in S. Deva and D. Birchall (eds), *Research Handbook on Human Rights and Business* (2020), 1.

approach to 'political feasibility' itself, which often appears to be regarded as an unalterable and coercive external circumstance.[39]

The first chapter shall illustrate the role of TNCs in today's globalised and economy-centric society, underlining this with facts and numbers regarding corporate activities. Subsequently, the origins of the legal phenomenon of BHR, and the course of the academic discourse shall be illustrated, finding that there is a regulatory gap in PIL which has been able to grow over the last decades, during which TNCs were benefiting from the industrialisation of society and PIL, especially within the field of International Trade and Investment Law, while in IHRL and BHR a legislative marathon of inadequacy is to be observed.[40]

The OEIGWG negotiations taking place at the time of writing are more than necessary. IHRL provided for an unprecedented high tide, granting the opportunity to adapt an ambitious and comprehensive BHR treaty.[41] With the outcome of this process, the legislators[42] in charge can, and will, pave the way for the development of BHR as a legal field in IHRL. Depending on what the exact content of a future BHR treaty will be and whether it is actually adopted in the end or not, it may have spill-over and knock-on effects into various other areas of PIL, ranging from such fundamental issues as international subjectivity to specific issues of norm hierarchies and the interpretation of Trade and Investment Laws. Of paramount importance to the individual, however, is the influence that such a BHR treaty might have on the general understanding and relevance of IHRL in the twenty-first century, as well as on the responsiveness and effectivity of PIL.[43] PIL ought to be responsive with regard to the legislative needs of the international community.[44] Therefore, the opportunity presented by the pending drafting process must be considered carefully and exploited to the full.

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[39] See D. Garrido Alves, 'Law-Making, Civil Society and the Treaty on Business & Human Rights: Strategies for effectiveness' (2019) (LL.M. Thesisat University of Cambridge, Cambridge), at in particular at 41 ff.

[40] Cf. J. Martens and K. Seitz, *The struggle for a UN treaty* (2016), at 27.

[41] D. Bilchitz and S. Deva (eds), *Building a treaty on business and human rights*: *Context and contours* (2017), at 479.f.

[42] Whilst the term legislator will be used for reasons of simplicity in the context of this thesis, it has a different meaning in PIL than in other disciplines and, generally, there is no such thing as 'one' legislator in PIL, see Sect. **B.II.3** below.

[43] Cf. Deva, 'Multinationals, Human Rights and International Law: Time to Move Beyond the "State-Centric" Conception', in J. L. Cernic and T. L. van Ho (eds), *Human Rights and Business*: *Direct Accountability for Human Rights* (2015), 27 at 45.

[44] Decken and Koch, *supra* note 14, at 17.

B. Emergence of BHR as a Regulatory Subject of PIL

On the societal level there have been demands for the disempowerment of business entities for quite some time now, arising out of a public concern that, with a lack of sufficiently restrictive regulation, businesses, and in particular TNCs, could prove more harmful than beneficial to the general public good.[45] Originally, such an assessment was promoted by the political left and stems from an anti-capitalist, critical, partly even radical ideology. This made it easy to disregard BHR as a regulatory subject, as it was not yet a widely represented concern amongst the general public. The modern demand for the regulation of corporate conduct under PIL, as we know it today, emerged in the last decades of the 20th century. It is not limited to a Marxist political minority, but rather propagated by esteemed and credible organisations, such as Amnesty International or Human Rights Watch, as well as modest legal scholars. This ultimately contributed to the subject of BHR regulation being taken seriously by all kinds of political and economic stakeholders.[46] NGO's like Amnesty International or Human Rights Watch recognised the need for change within the contemporary approach to IHRL and, hence, began to change their ethos, which was originally limited to exposing and holding states accountable for state failure regarding IHRL, recognising businesses as a second disruptive factor necessarily to be included in the context of their work and monitoring.[47] This section shall briefly illustrate at what point in time and due to what events a general awareness of the impact of business on society has arisen among the general public, academia, and lastly politics, while a comprehensive and binding legal response to the very same issue has not yet been found.

While the current discourse on the role of businesses in IHRL takes place under the notion *BHR*, there is widespread agreement in legal science that the legal notions of CSR and BHR do not refer to an identical phenomenon or problem, but are rather to be separated from each other[48] and partly even considered as contradictory.[49] According to the common differentiation, CSR is a concept under which corporations bear a responsibility to society as

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[45] Cf. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal* (2001) 443, at 446.

[46] *Ibid.*

[47] Karp, *Responsibility for human rights, supra* note 47, at 22; Wettstein, *CSR and the Debate on Business and Human Rights, supra* note 37, at 473 f; Wettstein, 'The history of BHR and its Relationship with CSR', in S. Deva and D. Birchall (eds), *Research Handbook on Human Rights and Business* (2020), 23 at 26.

[48] Karp, *Responsibility for human rights, supra* note 47, at 53 f; Suárez Franco and Fyfe, 'Voluntary vs. Binding: Civil Society's Claim for a Binding Instrument', in J. L. Černič and N. Carrillo-Santarelli (eds), *The Future of Business and Human Rights*: *Theoretical and practical considerations for a UN treaty* (2018), 139 at 142; For general evaluation on the differentiation between both notions see Wettstein, 'The history of BHR and its Relationship with CSR', *supra* note 47.

[49] Karp, *Responsibility for human rights, supra* note 47, at 53 f.

a whole. In essence it is limited to the inclusion of interests of the common good in corporate decision-making processes and not – as traditionally envisaged for business – to act in the best interests of their shareholders only.[50] Originally, this responsibility was neither geared to Human Rights in the narrower sense, nor did it have an initially close connection to Human Rights interests; rather, CSR as a concept originates primarily from considerations of business ethics, which are not dependent upon IHRL.[51] Taking public interest into account when trying to comply with CSR aspirations does not mandatorily give greater weight to social interests. Rather, any final decision is based on the discretion of the corporation concerned, which will decide based on its own and mostly autonomously defined values and ideals – not upon legally prescribed standards. The notion of BHR, on the other hand, according to *Karp* is an initiative that makes corporations responsible to the individual in a very specific and predefined manner, concerning particular rights and interests; it requires business not only to conduct a balancing of interests, but rather to always act in accordance with their mandatory Human Rights obligations in situations where they apply, irrespectively of any rules and values of their own or contradicting rules of a sovereign power, because Human Rights are non-discretionary and leave only a very narrow margin of discretion to businesses.[52]

While both notions must indeed be distinguished from each other, they are not necessarily contradictory or incompatible. Rather, BHR can be regarded as an evolution of, or even a critical response to, the concept of CSR and its failure to create a socially responsible global economy.[53] BHR as a notion containing not only a sense of responsibility but also a relationship of obligations between businesses and Human Rights provides for an enhancement, building on the same concept as CSR – that businesses have obligations going beyond economic efficiency and shareholder interests.[54] But it additionally intends to address any weaknesses of CSR and improve on these by means of new and legal approaches. Such weaknesses are, for example, to the voluntarism characterising CSR and the discretionary margin it leaves to its business addressees.[55] Both necessarily fade when

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[50] Cf. *ibid.*, at 53.

[51] Wettstein, *CSR and the Debate on Business and Human Rights, supra* note 37, at 739 f.

[52] See on all this Karp, *Responsibility for human rights, supra* note 47, at 52 ff.

[53] Ramasastry, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability', 14 *Journal of Human Rights* (2015) 237, at 238.

[54] Deva, 'From 'business or human rights' to 'business and human rights': what next?', *supra* note 38, at 1.

[55] Cf. Ramasastry, *supra* note 53, at 237; Cf. Suárez Franco and Fyfe, *supra* note 48, at 142; See also the definition of corporate social responsibility in European Commission, 'COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: A renewed EU strategy 2011-14 for Corporate Social Responsibility' (2011), at 3.

mere responsibilities founded in business ethics become enforceable (legal) obligations as envisaged by the BHR movement.[56] Coexistence of CSR and BHR is a necessary consequence of the qualification of BHR as a response to CSR – a response presupposes the existence of the counter pole, it is conditioned by the latter and buildson it.[57]

The close link between both concepts exists not only conceptually but also factually. In the 1990s, businesses increasingly started to be exposed and blamed publicly for involvement in actions detrimental to Human Rights.[58] This point in time marks the beginnings of BHR and stems from a societal expectation towards business that had existed before and probably first contributed to the emergence of the academic discourse in connection with CSR. The debate on BHR regulation, namely the pending OEIGWG negotiations, would probably not be where it is today if it had not been preceded by the more general CSR movement. By nature, as a form of critical response and as the more recent of both concepts, BHR is certainly more progressive and arguably more offensive in comparison to CSR. However, the emergence of the concept of CSR and rise of awareness for it has been a cornerstone for all societal, scientific, and legislative developments related to BHR, including the ongoing negotiations for the future BHR treaty, which constitute the main point of departure for this paper. Thus, the concept of BHR in particular will play a major role in the following.[59]

It is important to note that advocates of progressive BHR regulation neither promote delegitimisation of capitalism nor corporate power *per se*, but rather question whether the standards by which the legitimacy of economic behaviour and the exercise of economic power have been measured so far require adjustment and how such adjustment should look. If these new standards are to be based on IHRL, the question can only be answered by comparing corporate influence on IHRL with the influence of the law's initial addressees, namely states. Where such comparison reveals proximity that could justify an alignment in regulatory treatment, a case for BHR regulation is made.

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[56] This does not mean that all changes introduced with the advanced concept of BHR will necessarily be more successful or bring about improvements, but it does mean that they are created and introduced into the debate with this goal in mind and therefore must not constitute a contradiction of both notions.

[57] Wettstein, on the other hand, seems to argue that although BHR is to be understood as a critical response to the concept of CSR, it has developed completely independently of the latter and does not build on the latter, cf. Wettstein, 'The history of BHR and its Relationship with CSR', *supra* note 47, at 23 ff.

[58] Wettstein, *CSR and the Debate on Business and Human Rights, supra* note 37, at 743.

[59] The above differentiation is primarily for declaratory purposes and the relationship between BHR and CSR will not be discussed in further detail here. Reference will be made only where this appears to be significant for the purposes of this paper. For a detailed account of the relationship between BHR and CSR and its path of development, see Ramasastry, *supra* note 53; Wettstein, *CSR and the Debate on Business and Human Rights, supra* note 37.

I. Scope and Rationale of IHRL

In order to examine and evaluate the issue of BHR and its allocation within the legal field of IHRL, it is inevitable that the general substance of IHRL is briefly addressed.

While the idea of the natural rights of people may arguably be traced back to antiquity, Human Rights as the legal discipline we know today have their beginnings in domestic legal systems, with the British *Magna Carta* of 1215 being considered their historic point of departure. [60] The Magna Carta was based on the idea that the absolute and potentially arbitrary power of the state over its citizens must be limited.[61] This finding still dominates the development of Human Rights and constitutes their *raison d'etre*, as it remains the concern of IHRL to limit the permissible exercise of political power.[62] More than 500 years after the adoption of the Magna Carta, in the 18th century, there was an increasing revolutionary rethinking of the relationship between the state and its citizens in Western Europe. This was led by a number of scholars and intellectuals such as *Locke, Rousseau, Voltaire* and *Kant* and later commonly referred to as *'the Enlightment'* movement.[63] All of the ideas and approaches developed by these authors had in common that they challenged the subordination of individuals in relation to the state as well as the legitimacy of state power and its structure, proposing respective reformation.[64] The drivers of the Enlightment can thus be regarded as some of the first *'norm entrepreneurs'* of IHRL.[65] According to *Kant*, human beings not only have inalienable natural rights, he considers it the key to perpetual global peace to grant rights and liberties to people.[66] Accordingly, the state ought to regard itself somewhat as a servant of its citizens and implement measures to establish a public and social order reflecting precisely such a relationship.[67] Not only were*Kant's* theories on the relationship between the sovereign state and its citizens *avant la lettre* at the time of their emergence, they are also very much in tune with the current zeitgeist. With the significance of IHRL as legal discipline as well as political issue rising, the sovereignty of the state is increasingly perceived not as a naturally granted source of authority, but rather as a means to enforce the human interests of a state's citizens.[68]

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[60] Bates, 'Foundations: History', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (3rd ed., 2018), 3-21 at 4.

[61] *Ibid.*, at 4f.

[62] Wettstein, *CSR and the Debate on Business and Human Rights, supra* note 37, at 756.

[63] Bates, *supra* note 60, at 6.

[64] Cf. *ibid.*

[65] Decken and Koch, *supra* note 14, at 9.

[66] Tesón, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992) 53, at 55, 61.

[67] Cf. *ibid.*, at 64.

[68] Peters, *Realizing Utopia as a Scholarly Endeavour, supra* note 10, at 549; Tomuschat, *Human Rights, supra* note 68, at 2 f.

As a result of these social, moral, and academic developments, an increasing number of states began to introduce basic Human Rights positively in their national legal systems, regularly at the constitutional level.[69] Initially, Human Rights protection fell within the internal sphere of a state and its domestic jurisdiction only. Before IHRL as we know it today developed as a core pillar of PIL in the mid-twentieth century, all matters that today would be regarded as international Human Rights issues have been resolved domestically, as national laws have been the only positive source for Human Rights. Until the 1940s, PIL addressed the issue of individuals being exposed to potentially abusive state power in a very limited way only – if at all.[70] The concept of merely national responsibility for Human Rights protection was only challenged after the Second World War, when the international community learned in the most extreme and tragic way of the threats to Human Rights protection if left to the sole disposition of single nation states.[71] This led to the finding that there is a need for an international concept and international responsibility to safeguard Human Rights, which should be beyond the reach of individual states and rather on the agenda of the whole international community. The international community realised that states constituting a threat to their own citizens are likely to constitute a threat to international peace as well, thereby reincorporating the Kantian theory of perpetual peace.[72] This marks the birth of modern IHRL as we know it today, codified in international treaties, containing extraterritorial dimensions of application and responsibilities beyond a state's own jurisdiction.[73]

1. Codified Sources

The main and first positivist instruments and treaties that codified and recognised core Human Rights standards on an international plane are the UDHR, which has been adopted in the wake of the traumatic events of the Second World War and the political and economic situation prevailing in its aftermath, as well as the ICCPR and the International Covenant on Economic, Social and Cultural Rights of 1966 (***'ICESCR'***)[74]. These three instruments constitute the basic fundament of international Human Rights protection, formally raising Human Rights to a concern and regulatory subject of PIL. Accordingly, they are often referred

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[69] Bates, *supra* note 60, at 7-11.

[70] *Ibid.*, at 11.

[71] Cogan, 'The Regulatory Turn in International Law', 52 *Harvard International Law Journal* (2011) 322, at 334.

[72] Cf. *ibid.*, at 334 f.

[73] See Bates, *supra* note 60, at 16 ff., 20.; cf. M. Monnheimer, *Due Diligence Obligations in International Human Rights Law* (2021), at 258 ff. IHRL is a very broad, multifaceted and dynamic field of law, raising many unresolved legal questions and problems that need to be addressed. This section is only intended to provide a brief overview of the content, function, and character of this field of law and, for reasons of limited scope, will only deal with those areas and characteristics which are either necessary for a basic understanding of IHRL, or of importance for BHR and the further related purposes of this paper.

[74] International Covenant on Economic, Social and Cultural Rights, 16 December 1966; ICESCR.

to collectively as the *International Bill of Rights*; distinguishing these instruments from other Human Rights treaties that have been developed over the following decades.[75] While the idea of Human Rights was not initially created by virtue of the International Bill of Rights, the latter implemented the intention to formulate and codify a source for Human Rights standards applicable to all states and people across the globe.[76] And indeed, the evolution of modern IHRL was set in motion by this event and thereby, ultimately, the idea of universal and international Human Rights as a primarily philosophical and moral phenomenon of only domestic dimension has been terminated.

However, not all regulations and rights set forth in these legal instruments are uncontroversial. Until today, the Human Rights set forth in the ICESCR do not enjoy the same universal recognition as those rights set forth in the ICCPR. The ICESCR is at least partly regarded as not determining explicit obligations for its ratifying states, nor for legal claims or the protected individuals, instead stipulating responsibilities only in dependence of availability of the necessary resources.[77] This is referred to as an obligation of *progressive realisation*, which according to some is of a much weaker nature in terms of binding force and immediate effect than Art. 2 ICCPR, which prescribes an immediate obligation.[78] By wording and design, the realisation of the rights in the Covenant depends on the resources of states and is no obligation of performance or success.[79] In other words, the rights set forth in the ICESR are not unconditional. In consequence of this relatively weak legal design and construction, the legal force and binding effect of the ICESCR in its entirety is challenged regularly.[80] Given the material content and substance of the rights set out in the ICESCR as well as their significance for the individual, this is a very regrettable and, from a Human Rights perspective, very detrimental consequence. Most importantly, this controversial status of the ICESCR is detrimental to the protection and compensation of victims in the context of BHR. Due to their substantive nature, ICESCR rights are particularly often exposed to great

[75] More on this further below; Chinkin, 'International Law: Sources', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (3rd ed., 2018), 63 at 66.

[76] Bates, *supra* note 60, at 18.

[77] W. Vitzthum, A. Proelß and M. Bothe, *Völkerrecht* (8th ed., 2019), at 271.

[78] van Boven, 'Substantive Rights: Categories of Rights', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (3rd ed., 2018), 135 at 136; Monnheimer, *supra* note 73, at 74.

[79] M. N. Shaw, *International Law* (2017), at 308; cf. M. Herdegen, *Völkerrecht* (16th ed., 2017), at 388.; Even though the Committee on Economic, Social and Cultural Rights has determined that various of the rights contained in the single provisions of the Covenant seem capable of immediate effect, i.e. comparable to the provisions of the ICCPR, see United Nations Commitee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 3: The nature of States parties' obligations, UN Doc. E/1991/23' (1990), the general clause in Art. 2 ICESCR, referring to the implementation of the obligations of the Covenant, considerably reduces its legal force, at least with regard to the Covenant's external appearance.

[80] van Boven, *supra* note 78, at 137.

dangers in relation to economic corporate actions and businesses. Due to the lack of universal recognition, the means and possibilities to counter BHR-specific threats thus appear even worse than risks to '*normal*' Human Rights.

The ICCPR, in turn, does not suffer from weaknesses comparable to those of the ICESCR. Arguably, the ICCPR contains the most widely recognised and respected Human Rights standards at the international level.[81] It is an expression of this imbalance in recognition, that a categorisation of Human Rights into economic, social and cultural rights on the one hand and political and civil rights on the other commonly takes place.[82] The civil and political Human Rights enshrined in the ICCPR are unambiguously designed as legal obligations, open to derogation under certain limited conditions only.[83] Moreover, individuals can claim and even assert the rights enshrined in the ICCPR at the international level, by way of individual complaints, if the procedural requirements are met.[84] Moreover, the other state parties to the ICCPR are provided a possibility to lodge a complaint in the event of non-compliance with Covenant by another state, even though they themselves are not the immediate beneficiaries of the allegedly violated obligation.[85] Given these mechanisms, unsurprisingly, the status of the rights enshrined in the ICCPR is widely uncontested and acknowledged.[86]

The UDHR as the third of the instruments forming the International Bill of Rights arguably has no legally binding character,[87] though it must be noted that opinions on its legal force and binding effect differ – everything from qualification as non-binding declaration of intent to *ius cogens* is represented here.[88] Formally, however, the UDHR constitutes a declaration of intent, which has hardly ever been adopted with the legal will of the states to bind themselves by law, but it has been and arguably still is notably influential for the development of IHRL and has gained a great deal of authenticity and legitimacy over time, as it is frequently

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[81] Cf. *ibid.*

[82] *Ibid.*, at 136.

[83] Shaw, *supra* note 79, at 314.; In fact, the contracting states can only derogate from the provided rights in the event of a so-called public emergency according to Art. 4 ICCPR. However, not even such emergency derogation permits a deviation from all rights, but only to the extent that the law in question is derogable in terms of Art. 4 para. 2 of the ICCPR. Furthermore, a derogation is also subject to the restrictions of necessity and proportionality as set out in Art. 4 para. 1 ICCPR.

[84] See Optional Protocol to the ICCPR, in particular Art. 1. Most of the state parties to the ICCPR have subjected themselves to the individual complaint procedure of the Optional Protocol as well, Herdegen, *supra* note 79, at 386.

[85] Art. 41 of the ICCPR.

[86] van Boven, *supra* note 78, at 137.

[87] See Bates, *supra* note 60, at 19.

[88] Vitzthum, Proelß and Bothe, *supra* note 77, at 269 f.

invoked in international legal practice without any significant resistance or objections.[89] Most substantive Human Rights set out in the UDHR are widely recognised and have been positively confirmed in various legally binding instruments – both international and national – such as not least the ICCPR.[90]

To sum up, the probably most representative codified formal source of IHRL is the ICCPR. However, the ICESCR rights are particularly relevant in relation to business activities and economic acts, as they are typically affected by such acts, arguably even to a much greater extent than is the case with the rights of the ICCPR. In light of this, any future regulation of BHR issues should take these rights into account and should intend to reconfirm their legitimacy.

Furthermore, there are regionally relevant instruments of IHRL, which are derived from the International Bill of Rights as core normative reference points, but which focus on specific themes or geographic regions and influence the overall protection of Human Rights internationally.[91] Developments in one place, particularly in the context of case law and supervision over Human Rights instruments, can have an impact on the application and interpretation of other instruments as well as CIL.[92]

2. Nature and Core Substance of Human Rights and Obligations

Human Rights play a central role in the international legal system and, accordingly, already have been accounted and mentioned in several legal documents, including treaties which are originally beyond the field of IHRL.[93] According to the preamble of the UDHR, Human Rights are the foundation of freedom, justice, and peace in the world. As for the legal regime of PIL, *Tomuschat* has put its as follows:

'[Human Rights] have become an essential ingredient of the structural foundations of the international legal order, imparting directions to states and international organizations in all of their fields of competence'.[94]

Notwithstanding the formal foundations of modern IHRL described above, Human Rights also provide for a close connection to Natural Law, which exists regardless of any formal codification of law. The notion of Natural Law consists of the assumption that certain rights, claims and rules of conduct exist and must be observed independently of any positivist legal

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[89] Cf. J. Crawford and I. Brownlie, *Boenwlie`s principles of public international law* (9th ed., 2019), at 612.

[90] See for instance A. Kaczorowska, *Public International Law* (2nd ed., 2003), at 262 f.

[91] N. K. Appea Busia, *The State, Non-State Actors and violation of economic, social and cultural rights:* (2009), at 45.

[92] Cf. Crawford and Brownlie, *supra* note 89, at 637 ff.

[93] Appea Busia, *supra* note 91, at 11; Crawford and Brownlie, *supra* note 89, at 615 f.

[94] Tomuschat, *Human Rights, supra* note 68, at 3.

norm or rather codification.[95] Instead, those rights and obligations exist as a result of higher law than man-made codifications, as a somewhat universal and absolute set of principles governing all human beings.[96] Natural Law, thus, refers to the ethical dimension of legal systems.[97] Consequently, according to Natural Law, the protection of Human Rights is not only incumbent on states by virtue of their contractual obligation to do so and the principle *pacta sunt servanda*, but exists beyond these manmade legal concepts. There is no consensus in legal science on whether Human Rights indeed originate in Natural Law, whether such a thing as Natural Law exists at all or whether Human Rights ought to be regarded as an abstract legal concept created by the international community.[98] However, what can be proven is that the idea behind Natural Law, which is that people have rights based solely on their humanity, is reflected in many instruments and approaches to Human Rights protection.

IHRL emerged from the idea that all human beings possess human dignity, solely by virtue of their humanity, and that they are entitled to unconditional protection of this dignity.[99] This understanding is identifiable within the UDHR, which in substance has much in common with the Natural Law approach and definitely contains a Natural Law component, mainly reflected in its focus on the indispensability of human dignity and universality of Human Rights.[100] The necessity to protect human dignity absolutely, in turn, leads to the emergence of other and related specific interests and rights, the protection of which is a precondition for sufficient protection of human dignity.[101] In other words, Human Rights are rights necessary to guarantee the untouchable and unconditional right to human dignity. Since Human Rights derive from human dignity, human dignity thus constitutes the central *raison d'etre* of all individual Human Rights identified in the treaties and other sources of IHRL.[102]

In principle, the right to the protection of human dignity is unconditional and absolute. Therefore, it exists in relation to any actor interfering with the human dignity of a Human Rights beneficiary, independently of external circumstances or the personal characteristics of

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[95] Chinkin, *supra* note 75, at 65.

[96] Cf. *ibid.*

[97] Cf. Peters, *Realizing Utopia as a Scholarly Endeavour, supra* note 10, at 548 f.

[98] See Wheatley, *supra* note 29, at 191. arguing against a Natural Law origin of International Human Rights Law.

[99] Carrillo, 'Direct International Humanitarian Obligations of Non-State Entities: Analysis of the lex lata and the lex ferenda', in J. L. Cernic and T. L. van Ho (eds), *Human Rights and Business*: *Direct Accountability for Human Rights* (2015), 51 at 52 f; see alsoCruft, Liao and Renzo, 'The Philosophical Foundations of Human Rights: An Overview', in R. Cruft, S. M. Liao and M. Renzo (eds), *Philosophical foundations of human rights* (1st ed., 2015) at 4 ff.

[100] Cf. Wheatley, *supra* note 29, at 175 f. Monnheimer, *supra* note 73, at 47 f; 260 ff.

[101] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 205.

[102] *Ibid.*

an interfering entity.[103] At the time of emergence of IHRL, the state held an unprecedented capacity to violate human dignity. Precisely for this reason, it was the power of the state and its role in relation to citizens which has been challenged in the context of Human Rights protection when the need to regulate this relationship was identified.[104] The ethical origins of Human Rights protection, but also its legal roots, are strongly based on the assumption that no effective Human Rights protection is possible where arbitrary exercise of sovereign power exists and, consequently, protection of individuals from state arbitrariness remains a predominant focus of IHRL. However, the right to the protection of human dignity exists, but not necessarily exclusively in relation to states. Rather, the unconditional nature of the origins of Human Rights protection allows the conclusion that wherever it is found to be necessary, the protection of Human Rights ought to be adapted to all conceivable threats. Additionally, the Natural Law origin and centrism on human dignity, both of which imply that Human Rights benefit all people just by virtue of their humanity, is that, theoretically, Human Rights should exist and be recognised independently of the existence of any formal law. However, the effectiveness and success of Human Rights Law depends a lot on a *positive codification of rules*.[105]

Regardless of the Natural Law theory of Human Rights protection, it is recognised nowadays that there are particular Human Rights obligations incumbent upon states, regardless of their treaty commitments, as they constitute customary PIL.[106] Human Rights that are frequently recognised as customary PIL are arguably the principle of non-discrimination, the prohibition of slavery, the prohibition of torture and the prohibition of genocide.[107] However, the identification of obligations from customary PIL is particularly difficult with regard to Human Rights.[108] Opinions range from relatively limited circles of rights such as the aforementioned list, to all rights recognised in the UDHR as well as ICESCR rights outside the 'classical' categories of Human Rights.[109]

It would exceed the scope of this work to illustrate individually all the rights guaranteed by the International Bill of Rights. However, a brief and generalised overview should be provided here. The ICCPR stipulates its substantive rights in Part III, comprising 21 Articles. The ICESCR locates its substantive rights in the same place, also in its third part and determines those rights in ten Articles.

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[103] Nowak and Januszewski, *supra* note 38, at 127.

[104] Tomuschat, *Human Rights, supra* note 68, at 119.

[105] Vitzthum, Proelß and Bothe, *supra* note 77, at 265.

[106] Tomuschat, *Human Rights, supra* note 68, at 42.

[107] Shaw, *supra* note 79, at 217.

[108] Tomuschat, *Human Rights, supra* note 68, at 42.

[109] *Ibid.*

Among others, the ICCPR provides for the right to life and corresponding restrictions of the death penalty,[110] the prohibition of torture[111] and slavery[112], the right to freedom combined with the prohibition of arbitrary detention,[113] fundamental judicial and *habeas corpus* rights,[114] freedom of movement,[115] the rights to privacy,[116] freedom of religion, of thought, conscience[117] as well as opinion and expression[118], freedom of assembly[119] and association[120] as well as the protection of the family[121] and minorities[122] – just to provide a brief overview. In contrast, the ICESCR defines rights such as the right to work[123] under fair and favourable conditions[124], the right to form trade unions,[125] social security and insurance,[126] maternal and family protection,[127] the right to a certain standard of living and quality of life[128] and health[129], the right to access to education[130], as well as cultural life and science[131].

The rights just listed can be superficially summarised as rights of freedom, well-being and political participation.[132] There is somewhat of a disagreement about whether there are hierarchies within particular Human Rights, i.e. in terms of less essential rights and indispensable rights of outstanding importance.[133] Generally, all Human Rights are

[110] ICCPR, Art. 6.
[111] ICCPR, Art. 7.
[112] ICCPR, Art. 8.
[113] ICCPR, Art. 9.
[114] Cf. ICCPR, Art. 10, 11, 14, 16.
[115] ICCPR, Art. 12.
[116] ICCPR, Art. 17.
[117] ICCPR, Art. 18.
[118] ICCPR, Art, 19.
[119] ICCPR, Art. 21.
[120] ICCPR, Art. 22.
[121] ICCPR, Art. 23.
[122] ICCPR, Art. 27.
[123] ICESCR, Art. 6.
[124] ICESCR, Art. 7.
[125] ICESCR, Art. 8.
[126] ICESCR, Art. 9.
[127] ICESCR, Art. 10.
[128] ICESCR, Art. 11.
[129] ICESCR, Art. 12.
[130] ICESCR, Art. 13.
[131] ICESCR, Art. 15; Note that this list, too, is neither exhaustive nor able to give an account of the scope and content of these mentioned rights. It rather only serves to provide a superficial and exemplary overview of the material content of Human Rights in general. Where necessary for the purposes of this work, particular individual rights will be examined and discussed in more detail.
[132] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 205.
[133] van Boven, *supra* note 78, at 142.

interdependent and therefore, at least to some extent, indivisible.[134] It is therefore contradictory with regard to the systematic of IHRL to make a classification into more and less important rights. However, even strict defenders of the indivisibility approach will hardly be able to deny that there are qualitative differences in the content of Human Rights. The violation of certain Human Rights carries a higher level of injustice than the violation of others. It makes a difference whether a certain conduct causes the death or severe health damage of an individual or whether it restricts his or her freedom of speech and assembly. Incidentally, this is reflected in the assessments of the law as well, namely in Art. 4 para. 2 ICCPR, which determines a set of non-derogable Human Rights to which states need to adhere to, even in times of emergency.[135] Those are the rights to life, the prohibitions of torture and slavery, the prohibition of imprisonment for non-compliance with contractual obligations, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion. Furthermore, some Human Rights defined by the instruments of the International Bill of Rights are recognised as *ius cogens* and, thus, constitute absolute and mandatory law for states, even if they have not explicitly consented to it.[136] Human Rights that are widely recognised as *ius cogens* are for instance, the right to life, the prohibition of torture, inhumane treatment and genocide as well as the right to self-determination.[137] The willingness to recognise Human Rights as *ius cogens* obligations is generally increasing.[138] Additionally, some violations and deprivations of Human Rights are considered to be so severe that there is a need to prosecute and punish them by virtue of punitive sanctions in order to restore peace of law and justice. For this very purpose, the International Criminal Court ('***ICC***') and its Rome Statute[139] were established. The core crimes of PIL are stipulated in Art. 5 of the Rome Statute, namely genocide, crimes against humanity, war crimes and aggression. The field of International Criminal Law (***'ICL'***) is closely related to IHRL and is founded on the necessity to create international *individual* responsibility for particular types of Human Rights violations.[140] Clearly, this follows the

[134] *Ibid.*, at 140.; Although there are also approaches challenging the indivisibility of Human Rights, advocating for a rethink of this issue, cf. Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights', 30 *Human Rights Quarterly* (2008) 984-

[135] Monnheimer, *supra* note 73, at 248 f.; Shaw, *supra* note 79, at 274.

[136] Chinkin, *supra* note 75, at 73 f.

[137] This enumeration is by no means exhaustive and shall only serve as a superficial and brief illustration of the subject-matter of ius cogens Human Rights. See P. Zenovic, 'Human rights enforcement via peremptory norms: a challenge to state sovereignty', 1, at 32 ff.

[138] Chinkin, *supra* note 75, at 84.

[139] Rome Statute of the International Criminal Court, 17 July 1998; ICC-Statute.

[140] Bassiouni, 'The Discipline of International Criminal Law', in M. C. Bassiouni (ed.), *International Criminal Law*: *Sources, subjects, and contents* (3rd ed., 2008), 3 at 41 f.

approach that exclusive state responsibility is eventually insufficient to compensate for individual injustice arising from such Human Rights violations. Nevertheless, despite such differences between certain Human Rights, any categorisation, interpretation as well as respective application of IHRL ought to take sufficient account of Human Rights indivisibility, i.e. of the fact that it is hardly possible to establish and maintain single recognised Human Rights standards provided for and aspired, for instance, by the ICCPR, if other rights remain *entirely* unfulfilled or are violated in their fundamental essence. Accordingly, recognition of ICESCR rights has increased the more their necessity for the fulfilment of other Human Rights has been recognised.[141]

3. Universality, Conditionality, Human Rights, and the State-Centric Approach

A major and decisive characteristic of IHRL is its universality, which is widely recognised.[142] Universality follows from the foundation of IHRL in indispensable human dignity.[143] Art. 1 of the UDHR stipulates that *"[a]ll human beings are born free and equal in dignity and rights"*, which necessarily implies universal protection of such rights and dignity.[144] If all human beings possess inherent human dignity and this, in turn, leads to the emergence of Human Rights, then the latter – just like human dignity – must be granted to all human beings indiscriminately and equally.[145] Thus, IHRL, by nature, is of global and international effect and, at least theoretically, applies wherever humans are concerned. Moreover, Human Rights are generally inalienable to all people and can therefore not be waived or denied to their disadvantage.[146] If the principle of universal human dignity is applied consistently, one would think that it works not only in relation to the characteristics of the claimants themselves, but also in relation to all external circumstances and impacts originating from the sphere of potential duty-holders. Accordingly, consistent universal protection of Human Rights will result in unconditionality with regard to the threats to Human Rights protection as well.[147] In other words, dignity must not only be protected regardless of by whom it is claimed, but also

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[141] Cf. van Boven, *supra* note 78, at 140 f.

[142] Vitzthum, Proelß and Bothe, *supra* note 77, at 266; Tomuschat, *Human Rights, supra* note 68, at 47. Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1, 30 November 2012, at para. 6.

[143] Cf. Clapham, 'Challenges: Non-State Actors', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (3rd ed., 2018), 557 at 565.

[144] Tomuschat, *Human Rights, supra* note 68, at 47.

[145] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 206.

[146] *Ibid;* However, the concept of global Human Rights universality is not entirely without criticism, particularly with regard to cultural and moral differences across States, see for instance Besson, 'Justifications', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (3rd ed., 2018), 22 at 36; See also Tomuschat, *Human Rights, supra* note 68, at 47 ff.

[147] Cf. Carrillo, *supra* note 99, at 52, 53.

regardless of where the threat emanates from.[148] Unconditionality renders external factors irrelevant, such as the political or economic circumstances existing in a state or in relation to what type of actor, state or non-state, the observance of Human Rights is sought.[149] Rather, universal and unconditional protection of human dignity works in relation to all centres of power from where threats to human dignity might emanate.[150] However, this understanding of universality is incompatible with another principle of IHRL, namely its concentration on the state as the sole duty-bearer and responsible actor for Human Rights protection, the so-called *state-centrism* or *state-centric* approach.[151]

By design, Human Rights are rights of defence of the individual against the exercise of sovereign power, as, originally, the latter was considered the greatest threat to individual human interests and wellbeing.[152] After the events of the Second World War, the need to protect individual rights and freedoms equally against non-state interference was beyond the imagination of most stakeholders involved in this creation process.[153] The first stage in the process of creating new law is usually *'the idea'*, commonly driven and propagated by non-governmental parties, namely activists, scholars and other comparable norm entrepreneurs until it appears on the legislative agendas.[154] Such ideas arise as a result of the finding that there is a discrepancy between actual developments, for example technical progress or change of environment, and legal developments that makes reform efforts necessary in order to eliminate this discrepancy between law and reality.[155] This first step of law emergence is, thus, ultimately the result of normative analysis as described in the introduction.[156] However, in the aforementioned period, there was no occasion that could have contributed to the emergence of the idea to expand the circle of obliged actors and preventable risks with regard to IHRL beyond state power. Accordingly, the narrow state-centric classification of the protective purpose of IHRL prevailed and influenced its identification, interpretation and application in science and practice with regard to both IHRL in treaty law and customary

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[148] Clapham, 'Challenges', *supra* note 143, at 565.

[149] Carrillo, *supra* note 99, at 52.

[150] Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 39; Carrillo, *supra* note 99, at 53; Clapham, 'Challenges', *supra* note 143, at 565.

[151] See for detailed evaluation on the evolution and operation of the state-centered approach Kabasakal Arat, *supra* note 4, at 4 ff; van Ho, ''Band-Aids Don't Fix Bullet Holes': In Defence of a Traditional State-Centric Approach', in J. L. Černič and N. Carrillo-Santarelli (eds), *The Future of Business and Human Rights*: *Theoretical and practical considerations for a UN treaty* (2018), 111 at 111; cf. Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 25.

[152] Tomuschat, *Human Rights, supra* note 68, at 119.

[153] Kabasakal Arat, *supra* note 4, at 16; Cogan, *supra* note 71, at 334.

[154] Decken and Koch, *supra* note 14, at 9.

[155] *Ibid.*

[156] See Peters, *Realizing Utopia as a Scholarly Endeavour, supra* note 10, at 549 ff.

PIL.[157] Such concentration on state-centrism is the heart of the entire difficulty regarding the regulation of BHR by means of PIL.

According to the traditional concept of IHRL, the state is the only actor capable of realising the substantive content of Human Rights and, concomitantly, the only fundamental threat to Human Rights realisation, which is why the state bears legal responsibility and is subject to legal obligations under IHRL exclusively.[158] If legal Human Rights obligations address states exclusively, there is no possibility by which a breach of law, i.e. a Human Rights violation, with regard to another actor might occur; an actor which is not the addressee of a legal obligation cannot violate it.[159] Awareness of potential threats posed by non-state actors was only identified in the later course, when legislation in IHRL gained some temporal and substantial distance from the events of the Second World War and, concomitantly, social and economic developments led to an increased appearance and relevance of non-state actors at the international stage.[160]

Arguably, state-centrism and universality are in a state of tension and can hardly be applied harmoniously. It is therefore not surprising that in the application of IHRL, state-centrism has been subject to challenge repeatedly for some time, whenever this maxim appeared to counteract normative necessity and justice in individual cases. By virtue of the ICC, the recognised need to regulate accountability of private individuals for Human Rights violations has been legally recognised and codified, albeit only for a relatively small range of the gravest violations of Human Rights Law.[161] ICL as codified in the Rome Statute is, in a sense, an extended arm of IHRL, even referred to as its '*sword*', dealing solely with issues of accountability beyond the state, for individuals, in relation to a narrower range of criminalised

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[157] Cf. Joseph and Dipnall, 'Scope of Application', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (3rd ed., 2018), 110 at 111.

[158] Cogan, *supra* note 71, at 334 f; cf. Nowak and Januszewski, *supra* note 38, at 116 f.

[159] This is why according to some, Human Rights terminology should never refer to Human Rights 'violations' of non-state actors such as businesses. Rather, where a non-state actor is involved, one shall refer to a Human Rights 'abuse', Clapham, 'Human Rights Obligations for Non-State Actors: Where Are We Now?', in F. Lafontaine, F. Laroque and L. Arbour (eds), *Doing peace the rights way*: *Essays in international law and relations in honour of Louise Arbour* (2019), 11 at 15; Carrillo, *supra* note 99, at 59. Such distinction might result in one and the same infringement of a specific right being privileged or rather legitimised based on the violators nature. One might argue that where there is no explicit regulation, no actual violation of the right could occur. For the purposes of this paper, no distinction will be made between both terms. Rather, it is firmly assumed that businesses are already capable of committing Human Rights violations, even without the creation of direct and positively codified Human Rights obligations in PIL, as the identification of Human Rights violations should be defined solely by actual infringements of the material content of the law.

[160] See below, Sect. **B.I.**

[161] Karp, *Responsibility for human rights, supra* note 47, at 26.

Human Rights.[162] Thus, although strongly limited in substance, ICL represents a step away from absolute state-centrism in the field of Human Rights regulation on the formal level.

In general IHRL, the only way to take non-state actors such as businesses into account while maintaining the state-centrism is by means of the so-called 'horizontal' or 'positive' dimension of state obligations, which requires the latter to regulate the relationship between private actors in such a way that Human Rights violations are prevented and remedied when they nevertheless occur.[163] The Human Rights Committee has pointed out with regard to the ICCPR, that states can only fully comply with their obligations imposed by the Covenant if they protect individuals from acts committed by private persons or entities as well.[164] Failure to prevent, punish, investigate or redress Human Rights violations occurring on a horizontal level between private actors may generally amount to a violation of the state's Human Rights obligations imposed by the ICCPR.[165] At least with regard to incidents within a state's own jurisdiction, this obligation may be assumed to be generally and comprehensively recognised.[166] Basically, hence, IHRL already provides means to deal with businesses that have a negative impact on the purposes of IHRL. The application of these means in practice and their suitability to enforce the normative objectives of IHRL will be the subject of the main part of this paper.

It is one further peculiarity of IHRL that it is a part of PIL, which has been in a state of constant change since its inception and, thus, has developed very strongly since then. IHRL to some extent, might be described as a living organism within the framework of PIL. Human Rights treaties are often referred to as *'living instruments'* which need to be interpreted and applied in light of circumstances in contemporary society.[167] The dynamics and flexibility of IHRL might be due to the fact that this field of law is strongly intertwined with societal concepts of morals and ethics and thereby dependent upon the values of the respective community or society in question.[168] All these external circumstances greatly influence the

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[162] Bassiouni, 'The Discipline of International Criminal Law', *supra* note 140, at 34.; Cf. Karp, *Responsibility for human rights, supra* note 47, at 26.; see Sect. **B.III.1.b).i** below.

[163] van Ho, *supra* note 151, at 112.

[164] Clapham, 'Challenges', *supra* note 143, at 563; UN Human Rights Committee, 'General Comment No. 31, The Nature of the Legal Obligation Imposed on State Parties to the Covenant: UN Doc. CCPR/C/21/Rev.1/Add. 13' (2004), at para. 8.

[165] UN Human Rights Committee, *supra* note 164, at para. 8.

[166] Chinkin, *supra* note 75, at 97 ff; Monnheimer, *supra* note 73, at 258 f.

[167] Wheatley p. 122; Committee on the Elimination of Racial Discrimination, 'General recommendation no. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, UN Doc. CERD/D/GC/32' (2009), at para. 5; European Court of Human Rights, 'Case of Tyrer v. The United Kingdom (Application no. 5856/72), Judgement', at para. 31; Inter-American Court of Human Rights, 'Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement', at para. 146.

[168] Cf. Tomuschat, *Human Rights, supra* note 68, at 47 f; Shaw, *supra* note 79, at 266.

perception of Human Rights protection and its substantive interpretation. Societal values and moral standards, however, are not a fixed constant, but in themselves flexible factors in a state of continuous change. Particularly in light of their characteristics and inherent natural law components, Human Rights as legal concept may be referred to as a set of moral entitlements endowed with legal force.[169] In any field of law, the legislator must keep pace with, react and respond to actual developments, for instance technical progress, environmental evolution, as well as to changing societal perceptions and demands.[170] The strong reliance and need to respond to rapidly changing societal developments may also be one of the reasons why soft law instruments and voluntary commitments, which can usually be created more quickly, often play an essential role in IHRL.[171] Decision-makers and legislators in charge must regularly take action to a much broader extent and in a more frequent manner than necessary in any other field. What seemed unacceptable a few years ago, and perhaps even offended against society's general sense of decency, may already be commonplace today. For instance, a democratic and industrialised state like Switzerland enshrined equality between men and women in its constitution as late as in the 1980s, and it was not until the end of 1990 that the last canton in Switzerland, by means of a decision of the Federal Supreme Court, was practically forced to grant women the political right to vote. Already in the year 2000, an industrialised country in the middle of the European continent, which does not provide all women with the right to vote in politics, was arguably unimaginable to most. However, differences and changes within the living organism of societal morals and ethics do not only arise over time but have their origins in geographical locations. An additional and considerable challenge of IHRL is therefore to determine a common denominator that does justice to the high standard of protection of Human Rights, despite differences specific to some countries and cultures, that generally might be worthy of protection as well, and to create binding law on this basis.[172]

Human Rights that reflect the values of the community the most, must and will be the rights most likely to be successfully implemented.[173] However, since the ethical and moral views of society are very flexible, largely dependent on unstable external circumstances and are in a constant state of motion, it is only a logical consequence that such fluctuation and dynamism

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[169] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 205; Wettstein, *CSR and the Debate on Business and Human Rights, supra* note 37, at 740 f.

[170] Decken and Koch, *supra* note 14, at 9.; See also Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 3 ff.who associates the emergence of new economic and social phenomena with the need for legislative action.

[171] Deva, 'From 'business or human rights' to 'business and human rights': what next?', *supra* note 38, at 10 f.

[172] Cf. Tomuschat, *Human Rights, supra* note 68, at 47 f.

[173] Shaw, *supra* note 79, at 211.

must be inherent in IHRL itself. Consequently, the application and progress of IHRL provides numerous examples of '*paradigm shifts*' initiated by this field of law, proving its innovative character, which will be referred to in more detail below.[174]

II. Business Corporations in PIL

IHRL applied according to its traditional approach exclusively covers states as addressees and obligated parties, as has been found above. Consequently, IHRL is a weak or rather inapplicable and inadequate legal tool whenever actors other than states interfere with the protection of Human Rights and jeopardise their realisation.[175] Acts of non-state actors are in principle only relevant in IHRL if they can in some way be attributed to the state, e.g. as the exercising of sovereign authority, or where the state is to be held responsible for the conduct of a non-state actor due to other circumstances, e.g. the conduct in question was not diligently regulated in accordance with IHRL standards.[176]

According to the state-centric approach, non-state actors are not addressed by IHRL, thus, they cannot, technically, breach IHRL.[177] In reality, however, the substantive content of Human Rights and their protected goods and interests are regularly harmed by non-state actors, including businesses. Unsurprisingly, there are efforts at the international level to remedy this situation. Regarding individuals, this has happened with the creation of ICL.[178] Moreover, there are debates, concepts, efforts, and regulatory progress regarding the Human Rights impacts of NGOs as well as non-state militant groups, especially in armed conflicts.[179]

In the context of this chapter, it shall be examined how the emergence and increase in power of industrial business actors, particularly – but not limited to – TNCs,[180] accelerated by globalisation and accompanied by severe Human Rights infringements caused by businesses, has exposed the existing IHRL regime and its traditional state-centric approach as ineffective to meet the challenges of Human Rights protection in a contemporary manner, and how it has thereby increased the concern over governance gaps.[181] Principally, even according to the state-centric approach, Human Rights obligations of states include the creation of a legal and administrative order in which Human Rights violations at the

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[174] Appea Busia, *supra* note 91, at 43 f; cf. Monnheimer, *supra* note 73, at 47.

[175] Ratner, *supra* note 45, at 461.

[176] See Monnheimer, *supra* note 73, at 56, 116 ff.

[177] Cf. Carrillo, *supra* note 99, at 59. See also footnote 155 above.

[178] Cf. above at Sect. **B.III.1.b)i.**

[179] See for a general illustration Clapham, 'Challenges', *supra* note 143.

[180] Although transnational corporations certainly have a special significance in the BHR debate and require special consideration in scientific debates and legislative decision-making processes, this paper argues that the transnationality of a business should not be an exclusion criterion for its consideration in the BHR debate, see Sect. **C.I.**

[181] Suárez Franco and Fyfe, *supra* note 48, at 140.

horizontal level are prevented, i.e. also in the relationship between businesses and individuals, providing means to control the dangers posed by non-state actors already.[182] However, this obligation to regulate has proven to be insufficient in its implementation with regard to businesses and their Human Rights impact. Accordingly, either the state-centric approach must be reinvented and reinforced with regard to BHR or an entirely new approach must be evaluated. While the influence of business actors on Human Rights realisation and political relations has increased, legislative attempts by the international community to resolve the situation have failed, both of which have made the governance gaps in IHRL grow.

Before the main part of this paper examines the material aspects of the future BHR treaty, the following section shall briefly illustrate the ratio between business conduct and Human Rights realisation; to provide awareness for the subject matter of regulation, its regulatory objectives and reasons giving rise to regulation by means of the future BHR treaty in the first place. For this purpose, a juxtaposition of the development of the factual problem shall be given, i.e. (1.) the actual adverse impacts on Human Rights caused by businesses combined with (2.) rising corporate influence on state's economies and policies as well as (3.) hurdles faced during previous attempts to resolve challenges posed by BHR by means of regulation.

1. Corporate Human Rights Abuses – Business Conflicting with Right Holders

In addition to political and economic power imbalances that underlie the subject matter of BHR,[183] the most urgent reason for regulation is arguably the fact that actual impairments and violations of Human Rights frequently occur, caused directly and indirectly by businesses – and that in many cases there is a lack of legal means to prevent and remedy such situations. Remediation is particularly challenging when long and complex transnational supply chains play a role.[184] The argument that businesses should be held responsible for Human Rights violations, as they are regularly at the inception of them, is ultimately based on the idea that whoever creates a source of danger by way of a previous act is responsible for controlling it and its consequences.[185] The following sections shall provide some prominent examples proving the threat businesses might impose on various different types of

[182] van Ho, *supra* note 151, at 122 ff.; Monnheimer, *supra* note 73, at 56 ff.

[183] See Sect. **B.II.2.** below.

[184] On transnationality as an essential, however not constitutive factor in BHR cases, see Sect. **C.I.**

[185] So-called ‚*Ingerenz*', a common principle of German Law, Gómez-Aller, 'Criminal Omissions: A European Perspective', 11 *New Criminal Law Review: An International and Interdisciplinary Journal* (2008) 419, at 426, 449.

Human Rights, most frequently the right to life, personal integrity, health, equality, human dignity, property, and privacy.[186]

To some, corporate infringements of Human Rights might even appear *common* in a globalised world.[187] As the examples provided below demonstrate, the issue of BHR in the context of international Human Rights protection is not of a purely academic nature, but rather a real and actual problem with high practical relevance. Frequently, current legislation fails not only to create effective preventive mechanisms that would avert Human Rights violations by businesses, it also fails with regard to the processing of a violation in its aftermath. Businesses might be proven to interfere with the enjoyment of Human Rights but cannot be held accountable due to lack of legal bases, intangible internal structures, or geographical spread of business actions across several jurisdictions. At first sight, one might suppose that access through multiple jurisdictions increases the likelihood of persecution, the exact opposite being the case as the power in businesses is often arranged in ways defying territorial boundaries.[188] If procedural law and liability rules are not harmonised between the jurisdictions concerned, the worst-case scenario is that there is no ascertainable liability at all in the event of victims seeking redress. If responsibility is distributed among too many shoulders it fades. In BHR scenarios involving TNCs, there is usually a home state, where a business has its main office, and a host state on the other hand, where subsidiaries are operating. The latter is most frequently the place and jurisdiction in which corporate Human Rights violations occur.[189] In such cross-border situations, host states (which are usually economically weaker than home states and equipped with an ailing judicial and executive infrastructure) are unable or unwilling to take action against businesses on which the state economy may depend, while prosecution of parent companies in home states fails due to matters of competence, sovereignty and extraterritorial applicability.[190] The outcome of this legally complex and unresolved situation is that victims of serious and not seldom large-scale violations of Human Rights as well as their relatives are denied access to remedies and compensation. Access to remedies as such is a Human Right on its own.[191] In most cases the rule of law will give rise to the principle of full compensation and require that damage to

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[186] See J. Johansson, 'Holding States Responsible for National Corporates' Extraterritorial Human Rights Violations: Possibility or Absurdity?' (2019) (at Upssala Universitet, Sweden), at 1.

[187] Bialek, 'Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does is Regulate and how Likely is its Adoption by States?', 9 *Goettingen Journal of International Law* (2019) 501, at 503.

[188] Johansson, *supra* note 186, at 1 f.

[189] *Ibid.*, at 2.

[190] See Clapham, 'Challenges', *supra* note 143, at 560; Appea Busia, *supra* note 91, at 24; cf. McCorquodale and Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations in International Human Rights Law', 70 *The Modern Law Review* (2007) 598, at 620 ff., 623.

[191] See, e.g. van Ho, *supra* note 151, at 117.

legally protected interests, especially if these are directly linked to human dignity, ought to be punished and compensated appropriately. Thus, victims of corporate Human Rights violations should be legally entitled to access to justice and, in theory, are so, according to the laws of most jurisdictions of democratic states.[192] However, the corporate, transnational and frequently political dimensions of BHR matters thwart this legal protection in practice.

a) The Infant Formula Controversy of the 1970s – Market Responsibilities with Respect to Consumer Harm and Behaviour

Around the 1970s, businesses from the food sector, first and foremost the large and globally operating TNC *Nestlé*,[193] became subject to controversy regarding the decline in breastfeeding by mothers, especially in Third World countries, which critics claimed to be due to aggressive commercial marketing of infant formula.[194] Mothers increasingly tended to feed their infants with milk substitution products or so-called *'infant formulas'*.

The use of infant formula is safe – and may even be necessary and beneficial to infants in particular cases – in most developed countries if done according to instructions.[195] However, infant formula as a powdered milk product can be prepared and used safely only if it is dissolved in clean drinking water and, above all, if it is fed to the infants in the specified and prescribed quantities.[196] These requirements have been difficult to fulfil by consumers in many developing states of the Global South.[197] The population often had and still has no or only unreliable access to clean drinking water and appropriate sanitary conditions, which means that infant formula is often prepared with contaminated water, causing health problems and diarrhoea in infants, which can often be lethal.[198] In addition, large parts of the population suffer from poverty and illiteracy, which carries the risk that too small quantities of

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[192] On the principle of full compensation, see van Wijck and Winters, 'The Principle of Full Compensation in Tort Law', 11 *European Journal of Law and Economics* (2001) 319.

[193] Already at that time Nestlé was one of the largest food companies in the world and until today it could maintain this position. 98% of Nestlé´s business is outside it`s home-state Switzerland (headquarters), see Monteiro and Cannon, 'The role of the transnational ultra-processed food industry in the pandemic of obesity and its associated diseases: problems and solutions', 10 *World Nutrition Journal* (2019) 89, at 99.; Address by R.F. Domeniconi, Executive Vice President of Nestlé S.A., U.S. Presentation (June 22, 1989).

[194] Ermann and Clements, 'The Interfaith Center on Corporate Responsibility and Its Campaign against Marketing Infant Formula in the Third World', 32 *Social Problems* (1984) 185, at 190; J. Krasny, *The Business Insider,* 25 June 2012; Scott, 'Innocents Abroad: Infants Food Technologies and the Law´s Frontier', 20 *Virginia Journal of International Law* (1980) 617, at 619.

[195] Zelman, 'The Nestle Infant Formula Controversery: Restricting the Marketing Practices of Multinational Corporations in the Third World', 3 *The Transnational Lawyer* (1990) 697-758, at 705.

[196] Ermann and Clements, *supra* note 194, at 189.

[197] Zelman, *supra* note 195, at 699.

[198] Ermann and Clements, *supra* note 194, at 189; I. M. Lampe, 'Does Infant Formula Availability Reduce Breastfeeding?' (2016) (Master Thesisat University of San Francisco, San Francisco, USA), at 2 f; Scott, *supra* note 194, at 619.

formula are purchased and fed to the infants or the preparation instructions are not understood correctly, which can lead to incorrect formula feeding.[199] The consequence of this is infant malnutrition, which in the worst case can lead to death or permanent health damage and physical underdevelopment. Particularly diarrhoea occurs frequently in this context and is dangerous for small children, as it causes the loss of many important nutrients which are often not replaced within the diet of the children.[200] Studies have examined the correlation between the substitution of breastfeeding by infant formula and infant malnutrition in Third World countries and found a connection to child mortality and morbidity.[201] Moreover, a causal link between the importation and promotion of infant formula to Third World countries and a decrease in the breastfeeding behaviour of mothers in Third World countries can be identified.[202] Despite all societal trends towards usage of infant formula nutritional substitutes, medical experts have always considered natural breastfeeding as by far the best method of feeding infants, having incomparable and irreplaceable protective, nutritional and positive functions for the child.[203]

In the course and in response to the aforementioned developments and findings, the World Health Organisation ('***WHO'***), through its decision-making body the World Health Assembly, acknowledged several times that the decline in natural breastfeeding constitutes a matter of concern as it contributes directly to child mortality and malnutrition in developing countries.[204] In 1981, the WHO adopted a Code of Conduct for corporations, containing certain rules and restrictions for the distribution and promotion of milk substitutes.[205] This reaction was necessary, as methods of businesses distributing infant formula were found to have a direct and immeasurable impact on parental nutrition-decisions, discouraging mothers to breastfeed.[206]

Particularly the extensive use of unconventional and somewhat aggressive advertising methods, such as the presence of '*milk-nurses*' in hospitals, employed by formula-

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[199] Ermann and Clements, *supra* note 194, at 189; Zelman, *supra* note 195, at 709.

[200] See Scott, *supra* note 194, at 618 at footnote 4.providing further evidence.

[201] *Ibid.*, at 619; Zelman, *supra* note 195, at 699; Knodel and Kintner, 'The Impact of Breast Feeding Patterns on the Biometric Analysis of Infant Mortality', 14 *Demography* (1977) 391, at 407 ff; Jelliffe and Jelliffe, 'The Uniqueness of Human Milk', 24 *The American journal of clinical nutrition* (1971) 968.

[202] Based on a study comparing the development of breastfeeding habits in 11 developing countries during the time before and after market entry of infant formula by Nestlé, Lampe, *supra* note 198, at particularly at 16 ff.

[203] See Scott, *supra* note 194, at 631.; Zelman, *supra* note 195, at 701ff.

[204] World Health Assembly, 'The role of the health sector in the development of national and international food and nutrition policies and plans, with special reference to combating malnutrition: Thirty-first session, Doc. No. WHA31.47' (1978); World Health Assembly, 'Infant nutrition and breast-feeding: Twenty-seventh session, Doc. No. WHA27.43' (1974); Scott, *supra* note 194, at 632.

[205] Word Health Organization, 'International code of marketing of breastmilk substitutes'.

[206] Scott, *supra* note 194, at 618; Zelman, *supra* note 195, at 713 f.

manufacturers, promoting the infant formula, as well as free samples, which naturally are unlikely to be rejected in high poverty regions by parents in developing states were characteristic of the marketing strategies used by this industry.[207] Less informed and educated consumers in developing states are uniquely susceptible to such marketing strategies and, additionally, they have fewer possibilities to deal with the risks and consequences of a diet based on infant formula.[208] Ultimately, making an informed and sufficiently reasonable decision on the nutrition of their children may constitute an extremely difficult task for parents in developed countries exposed to such marketing strategies. Studies indicate that only an estimated one third of health care workers and consumers fully understand the health risks accompanied by infant formula use.[209]

And the consequences of improper formula use are tragic, especially for the most vulnerable infants as the end consumers of the product who are nevertheless incapable of acting and protecting themselves. There are various scientific studies exposing the link between the use of infant formula and infant malnutrition and mortality. For instance, research in Indonesia uncovered a high contamination of drinking water with faecal organisms.[210] Since the same water is used as major ingredient for the preparation of the infant formula, all bottle-fed babies throughout the country are at 'high risk' of getting seriously ill.[211] A study of Filipino paediatrics from 1985 regarding the effects of formula feeding on infant mortality and morbidity showed that almost 90% of babies diagnosed with diarrhoea in hospitals were formula-fed babies.[212] And 100% of all lethal diarrhoea cases taken into account in the study were formula-fed infants.[213] An estimate of over 10 million cases of infant malnutrition and infectious disease is directly related to the use of infant formula.[214] Researchers further conclude that the three major diseases correlating with formula-feeding, diarrhoea, clinical sepsis and death were drastically reduced as soon as breastfeeding policies were introduced in the researched hospitals.[215]

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[207] See Scott, *supra* note 194, at 625.

[208] Zelman, *supra* note 195, at 709 ff.

[209] *Ibid.*, at 712.

[210] Solomon, 'The Controversy Over Infant Formula' *The New York Times Magazine* (1981) 92, at 92.

[211] *Ibid.*; Zelman, *supra* note 195, at 710.

[212] Clavano, 'Mode of Feeding and its Effect on Infant Mortality and Morbidity', 28 *Journal of Tropical Pediatrics* (1982) 287, at 288, 291.

[213] *Ibid.*, at 291.

[214] Post and Baer, 'The international code of marketing for breastmilk substitutes: consensus compromise and conflict in the infant formula contriversy', 25 *International Commission of Jurists, The Review* (1980) 52, at 53. Zelman, *supra* note 195, at 710.

[215] Clavano, *supra* note 212, at 293.

Unfortunately, the relevant companies have not complied with the WHO Code of Conduct. This was certainly due to controversy regarding the interpretation of its ambiguous provisions, but also equally because of its purely voluntary nature, and the revenues that the industry generates in the Third World, amounting to an estimated one billion USD in 1980.[216] Manufacturers have refused to acknowledge responsibility for the improper use of their products and its deadly consequences. While businesses manufacturing and distributing infant formula acknowledged the associated severe health risks posed by the misuse of their products, they argue that they do not bear responsibility for conditions of poverty or poor hygiene and that their intentions are only to sell to consumers who need and understand the use of their products.[217] However, the advertising and promotion measures implemented in the developing countries do not indicate any limitation to such a narrow target group.

Nestlé in particular has been the target of criticism and a global boycott for failing to implement a conscious marketing strategy in the Global South, as it is the biggest food company in the world and controls the majority of the infant formula market in developing countries.[218] *Nestlé´s* unique and powerful position on the global market, and especially in developing states, put the corporation in a kind of pioneering role regarding marketing and promotional strategies. It is very likely that a change in *Nestlé´s* marketing and promotion of infant formula would have a pull-along-effect or *'leverage'*[219] on other suppliers.[220] Even more so, if one corporation controls the majority of the market, competitors willing to change certain business and marketing strategies will hardly be able to do so on their own, as this would be an economically unreasonable decision. However, in contrast to all criticism and findings regarding the dangers of improper use of infant formula in developing states, *Nestlé's* marketing strategy gave consumers the impression that the formula was safe and easy to use, as well as being endorsed by the medical profession, since milk-nurses were handing out free samples in hospitals and promoting the formula.[221]

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[216] See Post and Baer, *supra* note 214, at 54f.; Zelman, *supra* note 195, at 700.

[217] Post and Baer, *supra* note 214, at 54.; Zelman, *supra* note 195, at 708.at footnote 51.

[218] Zelman, *supra* note 195, at 697, 718; Lampe, *supra* note 198, at 2 f.

[219] *Leverage* is a notion introduced by the UNGP, referring to the potential influence and pressure a business can exercise towards other businesses in order to persuade the latter to change their Human Rights compliance strategies, see UNGP, principle 19 and commentary (at p. 20 f.). See also United Nations Working Group on Business and Human Rights, 'The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: Corporate human rights due diligence - emerging practices, challenges and ways forward (A/73/163)' (2018), at 4.

[220] Zelman, *supra* note 195, at 718 f.

[221] Finkle, 'Nestle, Infant Formula, and Excuses: The Regulation of Commercial Advertising in Developing Nations', 14 *Northwestern Journal of International Law & Business* (1994) 602, at 603.

However, it was not only the alleged responsibility of *Nestlé* deriving from its dominant market position that has led to outrage within society, but rather *Nestlé`s* explicit statements on the matter, which clearly revealed the company`s position on BHR. The company claimed that since the WHO Code of Conduct was a mere recommendation and mainly targeted governments, the industry itself was under no legal obligation to observe those recommendations due to lack of immediate effect.[222] In time, as the social pressure on *Nestlé* continued and the worldwide boycott – lasting seven years in total – of the company started to have financial effects, *Nestlé* increasingly made efforts to implement the WHO Code of Conduct.[223] Meetings with NGO´s and UNICEF took place, and the company made various assurances, such as to provide explicit information on its products regarding the medical superiority of breastfeeding and the abandonment of free samples as an advertising measure.[224]

However, the actual implementation strategy of the WHO Code of Conduct by *Nestlé* turned out to be much less ambitious than its prior announcements. *Nestlé* continued to find, for instance, that there was no explicit prohibition in the Code on the distribution of free supplies, and evidence shows that health care workers and hospitalised mothers were continuously given free formula samples.[225] The chairman of the back then newly launched *Nestlé* Infant Formula Audit Commission, *Edmund Muskie*, said that *"The agreement (…) does not require Nestlé to terminate supplies. If the World Health Assembly wants manufacturers to terminate free supplies, it should say so."*[226]

Obviously, the years of boycott and social pressure on the corporation did not lead to a rethinking regarding corporate responsibilities towards consumers and society. What is more, the WHO Code of Conduct, as an instrument without any legally binding effect on companies, did not lead to a change in market behaviour. In fact, alleged violations of advertising and distribution restrictions regarding infant formula especially in the Third World still exist today.[227] But even in cases where legally binding national laws exist, manufacturers, including *Nestlé*, keep inventing strategies to circumvent national regulation of the marketing of products for infants, such as '*cross-promotion'*.[228]

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[222] Zelman, *supra* note 195, at 732.

[223] *Ibid.*, at 735f.

[224] *Ibid.*

[225] *Ibid.*, at 737; see also A. Chetley, *The politics of baby foods* (1986), at 128, 135.

[226] L. Duncan, *Los Angeles Times,* 17 November 1988.

[227] Constance Ching, 'Overview: Breaking the Rules, Stretching the Rules 2017', 8 *World Nutrition* (2017) 323, at 323ff.

[228] World Health Organisation / UNICEF, 'Information Note: Cross-promotion of infant formula and toddler milks', 1.

b) Bhopal 1984

One of the most prominent and severe examples of corporate Human Rights violations is the so-called Bhopal disaster, from 1984.[229] Arguably, this event constitutes a turning point with regard to BHR as a legal notion of international concern.

In the night of the 2nd December 1984, in the Indian city of Bhopal, a storage tank at a chemical plant facility, containing a toxic gas called methyl isocyanate ('*MIC*'),

leaked as water entered the tank.[230] MIC is known to be a highly toxic chemical leading to various horrible diseases in humans, such as blindness, lung damage, emphysema and tuberculosis.[231] The deaths of thousands of people who were in the vicinity of the factory at the time of the leakage were its mandatory and tragic consequence. There is no official or precise number available for those who died, but according to *Amnesty International* around 7,000 to 10,000 people died within only three days of the incident.[232] Thousands more still suffer from health damage and will continue to do so for their lifetime.[233] The facility was operated by the *Union Carbide of India Ltd*., a company which was mainly owned by the *Union Carbide Corporation,* with headquarters in the United States at that time.[234]

The legal remediation of the Bhopal disaster was more than unsatisfactory for the injured parties. The *Union Carbide Corporation* immediately claimed that sabotage was the only possible explanation for the leakage, and it laid the responsibility on Sikh extremists as well as disgruntled workers, though never provided sufficient evidence to support this theory.[235] *De facto*, most scientists who examined possible causes for the Bhopal disaster found that human and technical failure during cleaning operations most certainly lead to an overflow of water in the storage tank and ultimately the leakage of the MIC.[236]

Attempts by the Indian government to sue the *Union Carbide Corporation* – which was more promising than suing the Indian affiliate of the company because of greater assets and the more developed US tort law – on behalf of the victims before United States' courts failed. The case was dismissed due to a lack of competence of the US Courts.[237] In 1989, the *Union Carbide Corporation* and the Indian government resolved a settlement agreement in which

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[229] For a detailed exploration of the incident, its causes and consequences, see Amnesty International, 'India: Clouds of Injustice: Bhopal Disaster 20 Years on' (2004).

[230] Cassels, 'The Uncertain Promise of Law: Lessons from Bhopal', 29 *Osgoode Hall Law Journal* (1991) 1, at 3.

[231] *Ibid.*

[232] Amnesty International, *supra* note 229, at 12.

[233] Dinham and Sarangi, 'The Bhopal gas tragedy 1984 to? The evasion of corporate responsibility', 14 *Environment and Urbanization* (2002) 89, at 89.

[234] Varma and Varma, 'The Bhopal Disaster of 1984', 25 *Bulletin of Science, Technology & Society* (2005) 37, at 39.

[235] Cassels, *supra* note 230, at 4.; K. Fortun, *Advocacy after Bhopal* (2001), at 101.

[236] Cassels, *supra* note 230, at 4.

[237] D. Baumann-Pauly and J. Nolan (eds), *Business and human rights*: *From principles to practice* (2016), at 23.

the corporation pledged itself to pay 470 million USD to the Indian government.[238] However, to date the corporation never admitted responsibility or accountability for the incidents.[239] The *'compensation'* was only paid while continuously holding on to the sabotage-theory and acknowledging a mere *'moral responsibility*' towards the victims, as *Warren M. Anderson*, former chairman of the corporation, phrased it.[240] To sum up, no proceedings against the *Union Carbide Corporation* have ever been successful, and the settlement agreement explicitly denies any accountability or substantial negligence on behalf of the corporation and so does the corporation itself, which is now operated by *Dow Chemical*.[241]

As noted above, the Bhopal disaster has given new impetus to the BHR debate and led to an overall increase in awareness of the issue. Not least of all, particularly the legal debate has arguably been fuelled by the fact that there has been neither adequate legal reappraisal of the events nor adequate – including non-material – compensation for the victims and their relatives. However, more than 35 years later there is still no legally binding international legislation passed to resolve comparable issues and BHR complexes. Even today, demonstrably negligent violations of the right to life and physical integrity by businesses are not remedied at all in the worst cases, and in less serious cases only at considerable expense to the victims, as the following examples show. It provides a fatal signal for the validity and authenticity of Human Rights that the worst and most tragic incident in the history of industrial activities which lead to the loss of life and health disadvantages of thousands cannot trigger the implementation of a feasible legal framework even after 35 years, which would allow victims to enforce their rights to satisfaction and compensation in a feasible way.[242]

c) Kik in Pakistan 2012

One of the most recent and prominent examples of Human Rights violations attributable to business and resulting in impunity is the case of *KiK* sued before a German court by Pakistani workers. The court declared the case admissible and held that it had jurisdiction to decide the case.[243] This alone might be considered somewhat of a breakthrough, as it was the first case of this kind to be litigated in Germany and, thus, triggered ambitious

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[238] *Ibid.*

[239] Dinham and Sarangi, *supra* note 233, at 90.

[240] Fortun, *supra* note 235, at 98.

[241] *Statement of the Dow Chemicals company regarding the Bhopal tragedy*, available online at https://corporate.dow.com/en-us/about/issues-and-challenges/bhopal.

[242] On all of this, see Deva, 'Bhopal: The sage continues 31 years on', in D. Baumann-Pauly and J. Nolan (eds), *Business and human rights*: *From principles to practice* (2016), 22 at 22 ff.

[243] Business and Human Rights Resource Centre, *The Kik lawsuit (re Pakistan)*, available online at https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan.

expectations.[244] However, the court rejected the claims on 10th January 2019 due to an expired statute of limitations.[245]

In September 2012, 258 people died in a fire in a textile factory in Pakistan. By its own admission its main customer was the German company, *KiK*.[246] Four Pakistani plaintiffs then accused *KiK* of failure to initiate at least the minimum necessary safety measures at its supplier's factory. According to the plaintiffs, the corporation bears responsibility for the fire and the death of the workers.[247] The plaintiffs argue that *Kik* knew, or at least ought to have known about and influenced various fundamental and structural safety deficiencies. The fact that fire safety measures in the factory were inadequate, including emergency exits being blocked and warning systems being inoperable, was forensically demonstrated in court.[248] According to *Kik's* own submissions, *Kik*-representatives visited the relevant factory regularly.[249]

Despite the evidence presented, and the euphoria after the case was admitted before court, it was ultimately dismissed on formal grounds. Pursuant to Art. 4 (2) of the Rome II Regulation,[250] the court had to decide according to Pakistani law, under which the claims – which were brought to court only two and a half years after the incident – were time-barred.[251] Originally, *Kik* had agreed to waive any objections based on the statute of limitations but refrained from doing so in court.[252]

The corporation continues to deny any legal responsibility. *KiK* agreed to pay a total sum of five million USD to the victims and their families as a gesture of goodwill, which is provided in

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[244] Cf. L. Nowak and J. Poell, 'Supply chain liability under the law of negligence: What does Jabir and other v Kik Textilien und Non-Food GmbH mean for European companies with supply chains in the sub-continent and other common law countries?' (2018); C. Müller-Hoff & C. Terwindt, *Anyone can make claims* (2018), available online at https://ohrh.law.ox.ac.uk/anyone-can-make-claims-is-the-kik-case-proof-of-access-to-remedy-against-corporate-human-rights-violations/.

[245] Business and Human Rights Resource Centre, *supra* note 243.

[246] European Centre for Constitutional and Human Rights, *KiK: Paying the price for clothing production in South Asia* (2019), available online at https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/.

[247] European Centre for Constitutional and Human Rights, *Factory fire at KiK supplier in Pakistan: minor fire safety improvements could have saved lives* (2018), available online at https://www.business-humanrights.org/sites/default/files/PR_KiK_Pakistan_ForensicVideo_20180201.pdf.

[248] *Ibid;* O. Shahid, *The Nation (Pakistan),* 11 January 2019; Business and Human Rights Resource Centre, *supra* note 243.

[249] European Centre for Constitutional and Human Rights, *supra* note 247.

[250] Regulation (EC) No. 864/2007 on the law applicaple to non-contractual obligations (Rome II), 11 July 2007, Official Journal of the European Union.

[251] Shahid, *supra* note 248.

[252] European Centre for Constitutional and Human Rights, *supra* note 246; Shahid, *supra* note 248.

pensions.[253] However, it still claims that the fire was caused by arson and no fire safety issues occurred or were reported to its representatives.[254] This constitutes an unsatisfactory absence of discernment for the victims, who demand *"liability, not voluntary giving"*.[255]

d) Rana Plaza 2013

On 24 April 2013 an industrial factory building called *Rana Plaza* collapsed in Bangladesh, leading to the death of 1,134 people and injuring more than 2,000.[256] Most of those who died were female apparel workers. The building housed at least five garment factories supplying global brands.[257] The catastrophe is regarded as the biggest accident in the history of the international garment industry.[258] Whereby the tragic incident is arguably more of a human-made disaster than an accident in the original sense of the word.[259]

During an audit on the day before the collapse, government authorities discovered cracks inside the building and issued a warning towards all shops, banks and factories inside it not to use the building due to danger of collapse.[260] According to witnesses, workers at the textile factories located inside the building were forced to enter anyway on the following day.[261] They had been threatened by their supervisors with a loss of earnings if they refused to start work.[262] Investigations in the aftermath of the collapse identified insufficiencies in worker safety compliance as the main reason for the collapse of the building.[263] The supervisors acted primarily under contracts from large European fashion companies such as *Primark*, *Benetton*, *Mango* and *C&A*.[264]

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[253] European Centre for Constitutional and Human Rights, *supra* note 246.

[254] Business and Human Rights Resource Centre, *supra* note 243.

[255] European Centre for Constitutional and Human Rights, *supra* note 246.

[256] Gläßer and Kück, 'The Hague Rules on Business and Human Rights Arbitration: A Balancing Act', 18 *Zeitschrift für Schiedsverfahren* (2020) 124, at 125.

[257] Business and Human Rights Resource Centre, *Sixth anniversary of Rana Plaza factory collapse in Bangladesh* (2019), available online at https://www.business-humanrights.org/en/sixth-anniversary-of-rana-plaza-factory-collapse-in-bangladesh.

[258] Bundeszentrale für politische Bildung, *Vor fünf Jahren: Textilfabrik Rana Plaza in Bangladesch eingestürzt* (2018), available online at https://www.bpb.de/politik/hintergrund-aktuell/268127/textilindustrie-bangladesch.

[259] SeeAkhter, 'Endless Misery of Nimble Fingers: The Rana Plaza Disaster', 20 *Asian Journal of Women's Studies* (2014) 137, at 141.

[260] *Ibid.*

[261] Bundeszentrale für politische Bildung, *supra* note 258; Human Rights Watch, *Whoever raises their head suffers the most*: *Worker´s Rights in Bangladesh´s Garment Factories* (2015), available online at https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment.

[262] Akhter, *supra* note 259, at 141.

[263] Gläßer and Kück, *supra* note 256, at 125.

[264] Bundeszentrale für politische Bildung, *supra* note 258.

In April 2015, three survivors and relatives of the victims filed a class action lawsuit in Canada against a contractor and a social auditing bureau involved.[265] The court found that the claims brought forward were time-barred under the applicable Bangladeshi law and dismissed the case in July 2017, which was confirmed by the Court of Appeal in 2018.[266] Between the collapse of the building and the filing of the lawsuit lie almost exactly two years. In a case like this, it is hardly possible to speak of an accident. It is rather a case of conscious acquiescence in injuries and loss of lives of thousands of subordinated people, for whose safety the ones issuing orders were supposed to be responsible. Sadly, the perceived danger of the doomed building materialised only a few hours after the start of the shift.

e) The Covid-19 Pandemic as an Accelerant

The outbreak of the Covid-19 pandemic in 2019 and its consequences for trade and economy, which became perceptible in 2020, have shone a particularly clear light on the ubiquity of BHR issues, especially within global supply chains of transnationally operating businesses.[267] Furthermore, they showed that BHR as a regulatory concern of IHRL has not lost its relevance and need to be put into action.

The garment industry and its large production facilities in Asia and other developing countries has again proven to be a particular hotspot of crisis in BHR.[268] Mass cancellations of orders and the termination of contracts on the basis of *force majeure* have left millions of workers unemployed,[269] and they have caused the suppliers of many major international companies to abruptly suspend payments to employees.[270] In Bangladesh alone, a conservative estimate of approximately 1,100 factories have been affected by Covid-19 responses of this nature from global apparel retailers.[271]

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[265] Business & Human Rights Resource Centre, *Loblaws & Bureau Veritas class action lawsuit (re Rana Plaza collapse, Bangladesh)*, available online at https://www.business-humanrights.org/de/neuste-meldungen/loblaws-bureau-veritas-class-action-lawsuit-re-rana-plaza-collapse-bangladesh/.

[266] *Ibid.*

[267] Cf. Bright *et al.,* 'Towards a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?', 22 *Business and Politics* (2020) 667, at 669.

[268] Cf. 'Guides for garment factories to build resilience during and after COVID-19: Fact sheet' (2020).

[269] In Bangladesh only, approximately four million garment industry workers have been left at least temporarily unemployed in relation with the Covid19-outbreak, see M. Robinson and P. Bloomer, *OpenDemocracy,* 8 April 2020; M. Anner, S. Nova and L. Foxvog, 'Unpaid Billions: Trade Data Show Apparel Order Volume and Prices Plummeted through June, Driven by Brands' Refusal to Pay for Goods They Asked Suppliers to Make' (2020).

[270] Bright *et al., supra* note 267, at 669. P. Bloomer & M. Zorob, *Another Step on the Road? What does the "Zero Draft" Treaty mean for the Business and Human Rights Movement?* (2018), available online at https://media.business-humanrights.org/media/documents/files/documents/Zero_Draft_Blog_Compilation_Final.pdf.

[271] 'Recommendations for garment manufacturers on how to address the COVID-19 pandemic' (2020), at 3.

Research by the NGO's *Center for Global Workers' Rights* and the *Worker Rights Consortium* found that global brands and retailers responded to the sudden collapse of demand for apparel from consumers with retroactive cancellation of orders which had been – at least partly – produced already, postponed payment for orders on an indefinite basis, or demands for a large retroactive price discount in exchange for agreeing to accept delivery and pay for goods.[272] In this way, influential businesses at the beginning of the supply chain, often established in the US or Europe, exercised leverage – a concept initially envisaged in the UNGP as a method for collective improvement of BHR compliance in particular branches[273] – on their suppliers in economically weak regions, but in a way severely detrimental to the rationale of IHRL. Naturally, operators of factories subject to order cancellations or withheld payments will try to reduce costs to keep the factory operating in a most profitable way. Usually, this will either result in mass unemployment, as a reduced volume of orders no longer requires a workforce at the same capacity, or in reduction and withholding of wages for workers who continue to be employed.[274] In times of crisis, this is particularly tragic for the people affected in unstable and poorly supplied regions. Even before the pandemic, there was a structural problem of underpayment in the garment industry, meaning that only very few workers have savings to fall back on – the sum of all this is ultimately poverty, limited access to nutrition and hunger among those affected, who receive little help from the states involved.[275]

The ILO has reacted to these socio-economic consequences of the pandemic by publishing "*Guides for garment factories to build resilience during and after COVID-19"* to remedy the situation.[276] These guidelines are primarily concerned with safeguarding the economic existence of a business and neglect the handling of Human Rights issues during a crisis. Furthermore, the guidelines are addressed mainly to the local factory operators, who find themselves in their predicament solely because of the at least socially and morally irresponsible as well as often noncontractual behaviour of their overseas retailers. Although

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[272] Anner, Nova and Foxvog, *supra* note 269, at 1.

[273] Cf. Principle 19 UNGP.

[274] According to a survey issued by the NGO Workers Rights Consortium, an estimate of one fourth of garment workers in diverse developing countries (garment workers from nine countries, mostly Asian, have participated in the survey) might have permanently lost their jobs due to Covid-19 responses of retailers, additional 11% were temporarily supended. Out of the surveyed workers, 60% did not experience a change of their employement status, however, the amount of payed wages had decreased by an average of 21%. See P. Kyritsis, G. LeBaron and S. Nova, 'Hunger in the Apparel Supply Chain: Survey findings on workers' access to nutrition during Covid-19' (2020), at 4.

[275] *Ibid.*, at 2.

[276] See International Labour Organization, *supra* note 268 the Guides itself are available at https://www.ilo.org/asia/publications/issue-briefs/WCMS_748040/lang--en/index.htm (last access 16 March 2021).

this is not intended to protect the locally responsible, an effective solution strategy is hardly conceivable without the participation and involvement of the parties behind the problem.

These developments took place while employees of the same withdrawing companies in their home states, especially in Europe, were sent on short-time work or otherwise protected, mostly with a secure income, despite poor order volumes, enjoying employment protection. Few lost their source of income completely, without replacement, from one day to the next. In the vast majority of northern or western home states, abrupt terminations of employee contracts would have been illegal due to obligations for the protection of employees. This illustrates the double standards within one and the same supply chain regarding the protection of economic and Human Rights. Indeed, what counts is what is opportune for the respective businesses.

In sum, the Covid-19 pandemic, and the economic and social crisis it has triggered has exposed the still existing weaknesses and dangers of international supply chains, particularly in relation to low wage countries, and has further damaged victims who are already especially disadvantaged in the BHR context.[277] Many people at the ends of these supply chains, which partially broke off abruptly, were left completely to their own fate from one day to another. The pandemic turned out to not be a great equaliser, as was initially proclaimed. Rather, it has contributed to the intensification of existing inequalities and injustices, affecting socio-economically weak sections of society particularly badly.[278] One would assume that these observations would have accelerated any legislative progress in the states concerned.[279] After all, any previously defined time frames and agendas in relation to BHR were greatly shortened by the acute need for action that had been exposed by the pandemic outbreak. Unfortunately, the opposite has proven true. Although the crisis acted as an accelerant for deterioration of the Human Rights situation in many states and for many populations globally, sadly it did not lead to correspondingly accelerated legislative action. Responsive legislation would have demanded progress; however, developments have rather been delayed by the crisis. For instance in Germany – one of the world's most prosperous and economically stable, as well as influential states; a state recognising Human Rights standards prominently and endorsing the UNGP – business associations instrumentalised the crisis in order to lobby against the enactment of a proposed legislation to regulate BHR standards in supply chains. The argument behind this being that businesses should not have

[277] United Nations Human Rights Council, 'Draft Report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Forty-sixth session of the Human Rights Council, UN Doc. A/HRC/XX' (2020), at 2.

[278] F. Zakaria, *The Washington Post,* 16 October 2020.

[279] The fact that the pandemic and its consequences have particularly highlighted the need for a BHR treaty was also noted at the sixth meeting of the OEIGWG, cf. United Nations Human Rights Council, *supra* note 277, at 4.

such additional burdens imposed on them in times of an economic crisis.[280] And indeed, the legislative process in Germany seemed to have been delayed at least temporarily.[281] Just to be clear: the additional burden referred to here is the observance of basic Human Rights standards, and the implementation of procedures to protect them. It seems that in the eyes of some, Human Rights omissions may still be justifiable if they are economically reasonable or profitable. Whenever businesses are put at economic risk, in situations of crisis, they are protected. If individuals, on the other hand, are threatened by the very same crisis, they obviously become subject to neglect quite easily.

2. Corporate Power – Business Conflicting with State Sovereignty

As early as the very beginning of the 1980s, *Biersteker* noted that TNCs, at least in the Global South, severely curtail the sovereignty and exercise of power of the states hosting them[282] and that this trend is not going to disappear in the near future, thus, contradicting a trend prevailing in the academic discussion at that time, which predicted a power shift in favour or resurgence of the state.[283] He made this early finding despite the fact that the influence of business at that time, measured by economic and financial strength, was far from the level and developments we are facing nowadays.[284] The rise of power of businesses limits state sovereignty to a considerable extent.[285] This business-related restriction of state sovereignty manifests itself in effects on various state obligations and tasks. These include legislation, investment decisions, budget and resource planning, as well as adverse effects

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[280] 'Briefing - Globale Lieferketten in der Corona-Krise: Menschenrechte auf dem Abstellgleis?' (2020), at 8 f.

[281] For details with regard to the German legislative initiative see further below, as well as under Sect. **C.II.1.a).**

[282] So-called *'host states*' are states in which an internationally operating corporation conducts business and/or maintains a branch office or subsidiary, but which is not the home state to that corporation. The home state to a corporation, in turn, is the state where the principal place of business of a corporation is located, where the headquarters of the corporation are and from where the business activities performed by subsidiaries in all host states are coordinated. To put it in a nutshell, it is usually the state that hosted the corporation at its birth hour.

[283] Biersteker, 'The Illusion of State Power: Transnational Corporations and the Neutralization of Host-Country Legislation', 17 *Journal of Peace Research* (1980) 207, at 207, 219f.

[284] In 2015, the 100 biggest Transnational Corporations only held assets amounting to roundabout 13 billions US-Dollars, which amounts to 17% of the worldwide total GDP that was about 75 billion US-Dollars in 2015 see the records of Statista, *Weltweites Bruttoinlandsprodukt (BIP) in jeweiligen Preisen von 1980 bis 2020 und Prognosen bis 2026* (2021), available online at https://de.statista.com/statistik/daten/studie/159798/umfrage/entwicklung-des-bip-bruttoinlandsprodukt-weltweit/; Bundeszentrale für politische Bildung, *Vermögenswerte von 20 ausgewählten Multinationalen Unternehmen (MNU) im Vergleich mit dem Bruttoinlandprodukt (BIP) ausgewählter Staatenn* (2017), available online at https://www.bpb.de/nachschlagen/zahlen-und-fakten/globalisierung/256262/vermoegenswerte-mnu-bip-staaten .

[285] Strahovnik, 'Corporations as Agents of Global Justice', in J. L. Cernic and T. L. van Ho (eds), *Human Rights and Business*: *Direct Accountability for Human Rights* (2015), 161 at 164.

on the state's task of protecting and guaranteeing the Human Rights of its citizens, including responding to violations, as has been illustrated in the preceding section.

Foreign businesses deciding to invest in and to move their business operations to certain states are likely to open windows of opportunity for these selected states. States can benefit heavily when they become hosts to respective business units.[286] The potential benefits for national economies are obvious: states gain at least employment opportunities and a source of tax income as soon as businesses expand their subsidiaries to their territories.[287] All these effects are, to a great extent, consequences of globalisation. Globalisation has contributed considerably to the realignment of power relations in the international order, i.e. granting developing states some economic independence as investment locations.[288]

Naturally, such investments by private businesses are more important and, hence, most attractive and relevant to developing states with originally weak economies. Unfortunately, these are usually also states with an unstable political situation, weak governmental and administrative infrastructures as well as underdeveloped legal procedures and laws regarding Human Rights. These states are not only the most attractive to business investments, they are also particularly vulnerable to Human Rights abuses, as well as to failure in administrative prosecution and legal redress when Human Rights violations occur, as basic institutional and legislative preconditions are often lacking. In addition, the economic dependability of such states on foreign investment bears the risk of a '*race to the bottom*' for Human Rights.[289] The notion refers to competing host states, tempted to issue particularly permissive legislation with regard to businesses in order to acquire investments, allowing low minimum wages, high weekly working hours, cheap overtime pay, poor judicial remedies, or low health protection standards at the workplace.[290]

Thus, the dangers associated with such investments are at least as obvious as the possible benefits, since monopolies of power are always vulnerable to abuse by those in dominant positions. Due to their economic, social, and political power – at times making them more

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[286] Nolan and Frishling, 'Human Rights Due DIligence and the (Over) Reliance on Social Auditing in Supply Chains', in S. Deva and D. Birchall (eds), *Research Handbook on Human Rights and Business* (2020), 108 at 108.

[287] J. Ahiakpor, *Multinational Corporations in the Third World: Predators or Allies in Economic Development?*: *2 Religion & Liberty* (2010), available online at https://www.acton.org/pub/religion-liberty/volume-2-number-5/multinational-corporations-third-world-predators-o; M. Langford (ed.), *Social rights jurisprudence*: *Emerging trends in international and comparative law* (2008), at 613.

[288] See Sect. **B.III.1.a)** for further details on the phenomenon of globalisation.

[289] Garrido Alves, *supra* note 39, at 13; cf. 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities: UN Doc. E/C.12/GC/24' (2017), at 11 f.with regard to permissive tax legilsation undermining realisation of Human Rights; Börzel and Deitelhoff, *supra* note 1, at 252.

[290] Garrido Alves, *supra* note 39, at 13 f., footnote 38; cf. International Commission of Jurists, 'Needs and Options for a New International Instrument in the Field of Business and Human Rights' (Geneva, 2014), at 34 f.

powerful global players and cooperating partners to states than other state governments[291] – it is regularly not easy to enforce national regulations and policies against the will of TNCs. They constitute a difficult regulatory target.[292] State governments which might seem to profit from investments by TNCs in the first place are likely to find themselves in a subordinate position. Businesses might even try to influence internal state politics.[293] This is particularly evident in the context of trade and investment treaties, which are concluded to facilitate foreign investment and whose beneficiaries are businesses. In this context, there are concerns and indications of businesses directly interfering with the legislation of states, leading to a so-called '*chilling effect'* as a consequence of investments.[294] However, even on a purely national level, here regarding economically strong states, businesses hold the potential to influence policies and legislation. For instance, investigations have shown that a German draft law on a Supply Chain Act ('*Sorgfaltspflichtengesetz*', more commonly known as *'Lieferkettengesetz'*) – a law that specifically intended to address Human Rights compliance and the liability of businesses in supply chains, part of the German UNGP strategy – was significantly influenced by the business lobby.[295] A published draft of the law showed that the legislator had deviated quite substantially from many originally planned features. Even more so, it almost entirely implemented demands previously formulated by the business community: for example, the originally envisaged civil liability was removed and attribution within supply chains greatly limited.[296]

The power of a business and its ability to influence a state are unmeasurable. However, the dependence or weakness of will of a state in relation to BHR regulation and enforcement is often based on its economic situation in comparison to the economic strength of a business.

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[291] Baumann-Pauly and Nolan, *supra* note 237, at 31; cf. Stephens, *supra* note 6, at 49 ff.

[292] Stephens, *supra* note 6, at 54.; Vitzthum, Proelß and Bothe, *supra* note 77, at 489.

[293] Vitzthum, Proelß and Bothe, *supra* note 77, at 489.; K. Ipsen and H.-J. Heintze, *Völkerrecht* (7th ed., 2018), at 385.

[294] See in more detail under Sect. **C.I.3**.; see also Moehlecke, 'The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty', 64 *International Studies Quarterly* (2020) 1.

[295] M. Bank, *Lieferkettengesetz*: *Der lange Arm der Wirtschaftslobby in die CDU* (2020), available online at https://www.lobbycontrol.de/2020/10/lieferkettengesetz-der-lange-arm-der-wirtschaftslobby-in-die-cdu/; A. Paasch and K. Seitz, 'Verwässern – Verzögern – Verhindern: Wirtschaftslobby gegen Menschenrechte und Umweltstandards' (2020).

[296] L. Shafagh & N. Steiner, *Lieferkettengesetz - Meilenstein oder Papiertiger?* (2021), available online at https://www.tagesschau.de/investigativ/monitor/lobbyismus-lieferketten-gesetz-101.html; D. Krebs, *Immerhin ein Kompromiss*: *Der Entwurf für ein Lieferkettengesetz* (2021), available online at https://verfassungsblog.de/immerhin-ein-kompromiss/; cf. also J. Ruggie, *John Ruggie writes to German Ministers welcoming draft due diligence law while seeking stronger UNGP-alignment* (2021), available online at https://www.business-humanrights.org/en/latest-news/john-ruggie-writes-to-german-ministers-welcoming-draft-due-diligence-law-while-raising-need-to-ensure-ungp-alignment/ in particular with regard to the envisaged limited attribution relating to Tier 1 suppliers only.

Thus, corporate assets, market value, and sales all serve as strong indicators of the level of power and influence that businesses can exercise towards state governments. If one wanted to measure corporate power in numbers, one would probably do so based on these. Therefore, academic discussions regarding the power relationship between states and businesses often refer to the state's gross domestic product and budgets in comparison with business turnover and assets.[297]

The turnovers and assets of large corporations regularly exceed the financial budgets of states.[298] According to these criteria, there were 17 TNCs amongst the 100 biggest 'national economies' in 2011 – the year the UNGP were released and endorsed.[299] According to the United Nations Conference on Trade and Development ('***UNCTAD***'), in 2020, the Japanese corporation *Toyota Motor* was the world's top non-financial, transnationally operating corporation, with total assets of 561,991 million USD, followed by the British *Royal Dutch Shell* with total assets of 378,630 million USD.[300] Out of these assets, 336,609 and 323,240 million USD respectively were *foreign* assets.[301]

All the aforesaid may not trigger an acute need for regulation with respect to BHR autonomously: a high corporate turnover in itself does not constitute a threat to Human Rights, nor do a strong political lobby or foreign investment ambitions. However, it does illustrate the distorted power relations between states and businesses, which many original concepts of PIL and IHRL no longer do justice to.

3. Legislative History of BHR in PIL – Business and the Legislators

Before turning to an evaluation of the future BHR treaty and its normative impacts, the legislative *status quo* and the developments leading up to this point shall be briefly illustrated. A chronological view of previous legislative developments regarding the subject matter is arguably always useful when assessing ongoing legislative projects. In the case of BHR, however, the legislative history is of particular relevance as it is relatively eventful and marked by setbacks, illustrating the gap between what ought to be required from a normative perspective and what has been considered feasible by the legislator under pragmatic considerations and in the face of political interests. To strike a balance between what is

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[297] Cf. Martens and Seitz, *supra* note 40, at 21; S.-M. Neumair, D. M. Schlesinger and H.-D. Haas, *Internationale Wirtschaft* (2012), at 13; M. Coni-Zimmer & A. Flohr, *Transnationale Unternehmen*: *Problemverursacher oder Lösungspartner* (2013), available online at https://www.bpb.de/apuz/175496/transnationale-unternehmen-problemverursacher-und-loesungspartner?p=all#footnode5-5.

[298] Martens and Seitz, *supra* note 40, at 21.

[299] Coni-Zimmer and Flohr, *supra* note 297; Neumair, Schlesinger and Haas, *supra* note 297, at 12 f.

[300] United Nations Conference on Trade and Development, *World Investment Report Annex Tables*: *Annex 19: The world's top 100 non-financial MNE's ranked by foreign assets, 2020* (2021), available online at https://worldinvestmentreport.unctad.org/annex-tables/

[301] *Ibid.*

legally necessary or rather desirable from the perspective of normative analysis on the one hand, and political feasibility on the other hand, is indeed at the core of the entire regulatory problem of BHR in PIL.

The main sources of PIL are its international treaties, which create rules that are binding upon its signatories, as well as unwritten customary PIL, consisting of state practice and *opinio iuris.*[302] Generally, all regulatory developments in PIL are, to an even greater extent than in national law, the results of an interplay of political developments and events.[303] In PIL, multinational treaties or *'law-making'* treaties are considered the counterpart to institutional national legislation.[304] A multinational treaty is also the regulatory instrument of choice for future BHR regulation. However, PIL in the form of multinational treaties applies across geographical borders. Thus, most actors involved directly or indirectly in the law-making process come from the most diverse political and legal origins and cultures, so it is not at all uncommon for them to pursue contradictory interests or believe in different societal and economic patterns.[305] In other words, the legislator in PIL does not, as in national law, represent a relatively heterogeneous group of people who have legitimised said legislator to pursue their interests. Rather, at the international level, there is no such thing as 'the legislator' in a literal sense.[306] Various autonomous states come together as legislators, each of which is individually legitimised to best represent the interests of citizens under its authority.[307] This interaction means that, under certain circumstances, the divergent interests of other individual population groups must be countered, which inevitably requires the willingness of the parties to compromise, but also, in individual cases, the willingness to set aside one's own interests in order for international legislation to be successful.[308] The outcome of this international system is a common denominator with regard to a regulatory matter.[309]

Additionally, PIL is more extensive than most national legal systems in that it allows the creation of unwritten laws without any formal legislative processes, merely by legal opinion and practical implementation of PIL subjects. The resulting customary PIL is on the same

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[302] See Shaw, *supra* note 79, at 4 ff.

[303] *Ibid.*, at 8 f.

[304] Allott, 'The Concept of International Law', 10 *European Journal of International Law* (1999) 31, at 42 f; cf. Shaw, *supra* note 79, at 94.

[305] This does also follow from the finding that International Law constitutes the law of 'international society' which is the collective of all different societies, see Allott, *supra* note 304, at 32.

[306] See H. Lauterpacht, *International Law* (1970), at 13.

[307] Cf. Shaw, *supra* note 79, at 4 f.; Cf. Shaw, *supra* note 79, at 6; cf. Wheatley, *supra* note 29, at 11.

[308] Cf. Allott, *supra* note 304, at 43, 46 f; Shaw, *supra* note 79, at 2.

[309] Cf. Shaw, *supra* note 79, at 5 f.

hierarchical level as formal written law, or rather treaty law and may even take precedence over the latter in case of conflicting laws.[310]

Since legislative developments in PIL are closely linked to political, economic, and societal issues as well as to the academic debates that accompany them, the legislative milestones are illustrated in the context of any such accompanying circumstances.

a) *Rise of Awareness for Corporate Social Impact and Early Beginnings of BHR Regulation*

The history of BHR regulation in PIL is long and marked by several setbacks – some would even deem it '*tortuous'*.[311] The origins of regulatory initiatives for BHR on an international level date back at least to the 1970s.[312] One of the first attempts to regulate transnational corporate activities on an international level was initiated in 1973, when the Economic and Social Council of the UN requested the Secretary General to establish a group of eminent persons to research and evaluate the impact of TNCs on economic development, especially regarding developing countries and international relations.[313] The driving forces of these regulatory initiatives were mostly developing member states of the UN, particularly the so-called Group of 77,[314] which formulated demands regarding a restructuring of the international economic order.[315]

The group of eminent persons of the Economic and Social Council identified a vacuum in PIL regarding the regulation of corporate activities, and consequently highlighted the need for international machinery and action in this regard.[316] It was found that although there is a legislative responsibility for state governments at a national and regional level, a lot of national measures would most likely prove to be insufficient. They would therefore have to be accompanied by international regulation and harmonisation in order to achieve a regulatory

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[310] Rules arising from a treaty which a state party has explicitly refused to ratify may still oblige the latter in case they also represent Customary PIL, see *ibid.*, at 94 f.

[311] Cassell and Ramasastry, 'White Paper: Options For a Treaty on Business and Human Rights', 6 *Notre Dame Journal for International and Comparative Law* (2016) 1, at 4.

[312] Backer, 'Multinational Corporations, Transnational Law: The United Nations Norms on Responsibilities of Transnational Corporations as a Harbinger of Corporate Socila Responsibility in International Law', 37 *Columbia Human Rights Law Review* (2006) 287, at 292; Cassell and Ramasastry, *supra* note 311, at 4.

[313] Bilchitz and Deva, *supra* note 41, at 474.; Secretary-General to the United Nations Economic and Social Council, 'Report regarding the impact of multinational corporations on development process and on international relations: UN Doc. E/5500/Rev.1 ST/ESA/6' (1974).

[314] The Group of 77 was founded in 1964 by developing countries, many of which had only recently become members of the UN. The purpose and aim of this group of 77 states was to unite and enable those economically and politically weak states to meet the industrialised countries within the UN on an equal footing, especially regarding possible negotiations. This ought to be achieved by a bundle of power and influence of the developing countries and the raise of a common voice. See S. Pal, *The Group of 77 in a Changing World* (2014), available online at https://www.un.org/en/chronicle/article/group-77-changing-world.

[315] P. Muchlinski, *Multinational enterprises and the law* (1999), at 592f.

[316] Secretary-General to the United Nations Economic and Social Council, *supra* note 313, at 2.

state that does justice to the complexity and significance of the subject matter.[317] Considering that such expert findings based on scientific research were presented to the international community as early as in the 1970s, it is all the more remarkable that as regards the institutional level of law-making by means of binding treaties, the state of PIL has not changed significantly since then. One of the final recommendations of the Secretary General was the establishment of a specific UN Commission to draft a Code of Conduct for TNCs and control it´s implementation, as well as to assess the possibility of the conclusion of a binding regulatory instrument, such as an international treaty.[318]

According to these recommendations the UN established a Commission on TNCs as well as the UN Centre on TNCs in 1974, both of which contributed to the creation of the 1990 *Draft Code of Conduct for Transnational Corporations*.[319] Member states of the UN were given the opportunity to participate within the drafting process. It lasted over a decade, until a final draft version of the Code was submitted in 1990.[320] However, in 1992 the process to create an international Code of Conduct for TNCs was suspended.[321] Although the Code of Conduct did not focus very much on the social responsibility of TNCs, but was rather intended to preserve economic state sovereignty, there was major disagreement between the industrialised states of the Global North and the developing states of the Global South regarding the legal status, nature and content of the Code, which the states in charge apparently could not overcome.[322] The divergence in the political interests pursued by the Global South vis-à-vis the Global North with regard to TNC regulation – which continues to be apparent to this day – is probably because, on the one hand, the TNCs addressed by the regulation are located primarily in the opposing states of the Global North, making the latter hesitate to expose their economic motors to authority of foreign states beyond the necessary minimum, while on the other hand, it is primarily the population of the Global South that is affected by the adverse Human Rights and environmental consequences of the business operations of these TNCs in developing states.[323]

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[317] *Ibid.*, at 3.

[318] *Ibid.*, at 4f.; See also Bilchitz and Deva, *supra* note 41, at 474f.

[319] Bilchitz and Deva, *supra* note 41, at 475.

[320] For the 1990 version of the draft see World Trade Organization, *The Draft United Nations Code of Conduct on Transnational Corporations and the OECD Guidelines for Multinational Enterprises, WT/WGTI/W/52* (1998), available online at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=58138,43748,5615,103554,50198,5022,7448,6918&CurrentCatalogueIdIndex=4&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[321] Bilchitz and Deva, *supra* note 41, at 475.

[322] Muchlinski, *supra* note 315, at 594, 597.

[323] Garrido Alves, *supra* note 39, at 45 f.

Nevertheless, the failure of the Code of Conduct did not suspend the legislative journey towards international BHR Regulation *per se.* Concerns regarding the rise of the power of businesses as well as the ability of states to regulate corporate responsibilities by merely national means grew and have been raised frequently in the 1990s.[324]

b) *The UN Norms on TNCs – BHR as a Regulatory Subject Matter of IHRL*

In 2003, the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (***'the Norms'***) were submitted.[325] This event was one of the outcomes of the first '*high tide'* and marked the beginning of another high tide for regulation of BHR, after its failed initial attempt under the Economic and Social Council.[326] It started in 1998, when the Sub-Commission in resolution 1998/8 decided to establish a working group to examine the methods and activities of TNCs, which led to the decision to draft another Code of Conduct to regulate BHR in 1999.[327] Thus, this second initiative followed only seven years after the definite failure of the Code of Conduct in 1990.

In contrast to the first initiative, this time the focus was clearly on the Human Rights concerns in relation to TNCs, as provided by the title of the Norms. The Norms have been approved by the UN Sub-Commission on the Promotion and Protection of ***Human Rights***, not an economic department such as the Economic and Social Council, and were designed as binding regulations, which particularly led to euphoria within the academic debate, where the Norms were partially proclaimed to be a 'breakthrough'.[328] And they indeed could have been considered a breakthrough, in the sense that business conduct and responsibility were officially recognised somewhat prominently as a regulatory matter of IHRL. BHR as a legal regulatory concern was thus elevated from just an idea to some kind of formal recognition.[329] However, despite the approval of the Sub-Commission, the UN Commission on Human Rights affirmed in 2004 that the draft Norms had not been requested by the Commission in their presented form, that they had no legal standing and the Sub-Commission should not

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[324] Backer, *Multinational Corporations, Transnational Law:, supra* note 312, at 290.; Grossman, Adams and Levenstein, 'Taking Care of Business: Citizenship and the Chartes of Incoporation', 3 *New Solutions: A Journal of Environmental and Occupational Health Policy* 7, at 7f.; A. McGrew (ed.), *The transformation of democracy?*: *Globalization and territorial democracy* (1997), at 153f.

[325] United Nations, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2'.

[326] Bilchitz and Deva, *supra* note 41, at 476.

[327] Weissbrodt and Krueger, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights', 97 *The American Journal of International Law* (2003) 901, at 903f.

[328] See only *ibid.*, at 902f.speaking of a landmark step for Human Rights Law and especially highlighting the binding force of the Norms.

[329] Cf. the different stages of the emergence of law as described by Decken and Koch, *supra* note 14, at 9 ff.

exercise any monitoring functions in this regard.[330] Ever since then, no further actions by the UN on the Norms have taken place.[331]

Thus, the progressive approach of legally binding regulation regarding TNC conduct under IHRL was clearly and officially rejected by the UN. The Commission thereby followed the claims and concerns of mostly industrialised states, which had been opposing any approaches towards binding Norms on international corporate responsibilities. Opposition was mainly based on hesitation to make TNCs a subject of PIL.[332] The same dichotomy of political interests between Global North and Global South, which characterised the efforts surrounding the 1990 Code of Conduct, continued during the processes behind the Norms. In sum, the first decade of the 2000s passed by just as unsuccessfully as the three preceding decades regarding international BHR regulation.[333]

c) *With Zest for Action: The Compromising Solution of 2011*

After the failure of the Norms of 2003, the international community did not entirely give up upon the issue of BHR as a regulatory matter. In 2005, the UN Human Rights Council asked the Secretary-General, *Kofi Annan,* to appoint a Special Representative on the issue.[334] The choice fell on the Harvard political scientist *John G. Ruggie*, who was subsequently mandated to draft a framework of norms or rather principles and standards on the issue.[335] This personnel decision alone was reputed to express the will of the international state community to find a minimally progressive solution to the issue of BHR: Professor *Ruggie* was considered an advocate for '*business partnerships'* rather than their global regulation and therefore this choice of Special Representative was perceived as rather a political one.[336] And indeed, some of the main and loudest supporters of *Ruggie´s* appointment were to be found in the business lobby, namely within the International Organisation of Employers and the International Chamber of Commerce.[337]

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[330] United Nations Office of the High Commissioner on Human Rights, 'Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights, UN Do. E/CN.4/2004/116'; Suárez Franco and Fyfe, *supra* note 48, at 142.

[331] United Nations Office of the High Commissioner on Human Rights, *supra* note 330.

[332] Backer, *Multinational Corporations, Transnational Law:, supra* note 312, at 288.at footnote 2.

[333] Bilchitz and Deva, *supra* note 41, at 477.

[334] Cassell and Ramasastry, *supra* note 311, at 4.

[335] Bialek, *supra* note 187, at 509; Cassell and Ramasastry, *supra* note 311, at 4.

[336] Martens and Seitz, *supra* note 40, at 12.

[337] In a joint statement, they even expressed concrete expectations regarding the outcome of the work of the Special Representative, such as *"reinforce the extent to which business already makes a contribution and move the debate away from anti-business rhetoric to create a more effective partnership approach"* and *"explicitly recognize that there is no need for a new international framework"*, International Chamber of Commerce & International Organisation of Employers, 'Initial IOE-ICC views on the mandate of the UN Special Representative

In 2008, the Special Representative presented his elaborated '*Protect, Respect and Remedy*' framework, and on this basis, the international community finally succeeded in agreeing and commonly adopting an international instrument regarding corporate activities with respect to Human Rights. The UNGP define principles for the operationalisation of the framework and were unanimously endorsed by the UN Human Rights Council in 2011.[338] Presently, the UNGP constitute the most representative and tangible instrument PIL provides to regulate the Human Rights obligations of businesses.[339] They are the first instrument to formally recognize corporate responsibilities in relation to Human Rights, and thus represent a breakthrough in the history of BHR, confirming the latter as a regulatory matter of IHRL. The UNGP provide fertile ground and are the starting point for all further developments in this area.[340] Yet, the UNGP merely constitute non-binding *soft law*.[341] As such, they are rather voluntary principles and recommendations and do not have any legally binding effect on neither states nor businesses. Some states have nevertheless tried to implement the voluntary standards of the UNGP domestically and have introduced so-called National Action Plans on Business and Human Rights (***'NAPs'***) as envisaged in Principle No. 1 UNGP.[342]

The UN Working Group on Business and Human Rights defines a NAP as "*evolving policy strategy developed by a state to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights"*.[343] Thus, NAPs are strategy plans and the main tools for states to implement the UNGP. They are further of a purely national effect. A NAP shall first determine and provide answers on how the state is planning to implement their own Human Rights obligations – arising out of PIL instruments binding states, for instance the ICCPR – and further set out what the state *expects* businesses within its jurisdiction to undertake to comply with the UNGP, thus, in order to respect Human Rights and provide remedies in the event of infringements.[344]

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on "business and human rights"', available online at https://iccwbo.org/content/uploads/sites/3/2005/10/ICC-IOE-views-on-UNSG-mandate-on-business-and-human-rights.pdf; Martens and Seitz, *supra* note 40, at 12.

[338] 17/4 Human rights and transnational corporations and other businesses, UN Doc. A/HRC/RES/17/4, 6 July 2011.

[339] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', in S. Deva and D. Birchall (eds), *Research Handbook on Human Rights and Business* (2020), 62 at 63; van Ho, *supra* note 151, at 114.

[340] Cf. Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', *supra* note 339, at 64; J. Ruggie, 'Presentation of Report to United Nations Human Rights Council Professor John G. Ruggie Special Representative of the Secretary-General for Business and Human Rights' (2011), at 7.

[341] See van Ho, *supra* note 151, at 116.

[342] Cassell and Ramasastry, *supra* note 311, at 8 f.

[343] United Nations Working Group on Business and Human Rights, 'Guidance on National Actions Plans on Business and Human Rights' (Geneva, 2016), at i.

[344] *Ibid.*, at 3.

According to the UN, in October 2021, only 26 states from six continents have already introduced NAPs and another 20 states are reported to have initiated the implementation of NAPs, which are currently still in progress.[345] It is not disputable that the UNGP, due to their broad and prominent acceptance, constitute a landmark development or rather a milestone in the legislative history of BHR.[346] After several failed attempts and a *tortuous* pursuit for consensus, the UNGP succeeded. Such a form of consensus can be the source of *opinio iuris* within the community of states and constitute a crucial element on the path of legislative evolution.[347]

While the broad recognition of the UNGP provides them with a great legitimising effect, they do not have any legally binding effect and are not capable of bringing about a change in BHR issues on their own. Rather, they require further legislative and executive steps by states. The decisive difference regarding a binding treaty is that the UNGP leave it up to states whether and how the UNGP are implemented. States will define this at their own discretion within their NAPs. A non-implementation or a purely formal implementation has no legal consequences and, due to the non-binding nature of the UNGP, creates only a limited exposing effect and no adverse effect comparable to treaty breaches or violations of binding law.[348] The UNGPs thus seem closer to the concept of CSR described above and do not yet embody the shift to BHR as regulatory issue.[349] Consequently, despite the normative significance and legitimacy of the UNGP, frustration has remained in practice.[350]

d) The Window of Opportunity of the Present

In the legislative history of BHR, the initiation of the OEIGWG treaty negotiations mark the most recent milestone, constituting the major foundation of this work.

At the 24th Conference of the UN Human Rights Council in September 2013 – only two years after the widespread unanimous endorsement of the UNGP – the delegation of Ecuador insistently stressed the necessity of a binding international instrument on Human Rights and Business within the UN system.[351] Ecuador submitted its statement to the Human

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[345] United Nations Office of the High Commissioner on Human Rights, *State National Action Plans on Business and Human Rights*, available online at https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

[346] McBrearty, 'The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity', 57 *Harvard International Law Journal* (2016) 11.

[347] Dahlmann, 'The Function of Opinio Juris in Customary International Law', 81 *Nordic Journal of International Law* (2012) 327.

[348] See Shaw, *supra* note 79, at 5 ff. Evaluating why states adhere to internetional legal obligation despite lacking sanctions.

[349] See the differentiation at Sect. **B**.

[350] Cassell and Ramasastry, *supra* note 311, at 9.

[351] Bilchitz and Deva, *supra* note 41, at 477f.

Rights Council on behalf of several other states, such as the African and the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru, amounting to a total of more than 80 states.[352] Once again, this initiative for legally binding regulation of BHR issues was led by the states of the Global South, and once again a dichotomy of political interests on this regulatory matter became apparent. Besides the broad support among developing state goverments, the treaty approach was also broadly welcomed by civil society. Hundreds of NGOs, as well as society movements joined the initiative, advocating in favour of a binding international treaty and formatted the *'Treaty Alliance'* in the aftermath.[353] Among the founders of the Treaty Alliance, there are organisations such as the International Commission of Jurists, the International Network for Economic, Social and Cultural Rights, connecting NGO´s around the globe as well as the International Federation for Human Rights.[354]

Not least under the impression of the – in contrast to the previous attempts – greatly increased general public interest around the globe, the UN Human Rights Council adopted its resolution 26/9 on 14 July 2014. By virtue of this resolution, the UN Human Rights Council established the OEIGWG, granting it a mandate *'to elaborate an internationally binding instrument to regulate the activities of transnational corporations under PIL*'.[355] The resolution was adopted with 20 votes in favour, 13 abstentions and 14 votes against it.[356] The division of votes illustrates the continuation of a split between the positions of developing states of the Global South and industrialised states, particularly the European Union and the US.[357] While the former predominantly supported the resolution, the latter generally voted against or abstained. Ecuador and South Africa, who initiated this resolution, are both states that have had experiences with abusive businesses within their jurisdiction in the past.[358] This is reminiscent of the initiatives and attempts of the Group of 77 in the 1970s, which preceded the Code of Conduct[359] and reveals that, at least in this respect, political and economic

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[352] See Business and Human Rights Resource Centre, *Statement on behalf of a group of countries at the 24th session of the Human Rights Council, Republic of Ecuador* (2013), available online at https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf.

[353] Bilchitz and Deva, *supra* note 41, at 478; Deva, 'Alternative Paths to a Business and Human Rights Treaty', *supra* note 7, at 21.

[354] The Treaty Alliance, *Online presence of the Treaty Alliance - About us -*, available online at https://treatymovement.com/about-us.

[355] United Nations Human Rights Council; Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to Human Rights, UN Doc. A/HRC/RES/26/9, 14 July 2014.

[356] *Ibid.*, at 3.

[357] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 204.

[358] *Ibid.*

[359] See above, under Sect. **B.II.3.a).**

conditions and interests have not changed significantly. However, the forces involved that have contributed significantly to the failure of the previous initiatives in the past, namely the industrialised states and their business lobbies, are likely to feel themselves to be in a much worse negotiating position today than in the past.

The international community has witnessed rapid digitalisation in the past two decades. One of its most meaningful contributions to society is information flow and distribution within seconds, often at a real-time equal speed. Society today is frequently informed, making individuals and consumers more competent, empowered, and critical than ever. Political decisions are, thus, often taking place under increasing pressure, since nowadays politics cannot take place behind closed doors. This applies to the negotiation process on the future BHR treaty as well. Both states as well as businesses must expect that every policy inconsistency reaches the public immediately and will eventually be sanctioned by society. For instance, consumers boycotting the products of certain commercial enterprises because of their shady business practices are commonplace, and Human Rights issues have become one of the main reasons for such boycotts.[360] The *Treaty Alliance* has fought for the adoption of a BHR treaty in an unprecedented global campaign, which has led to widespread public attention being focused on the treaty negotiations and further increased public awareness of BHR issues, putting the involved state actors in a particularly unpleasant position: it is hardly feasible to maintain the image of an advocate of democracy and Human Rights and at the same time decelerate or even sabotage the process of BHR treaty-making.[361] Events such as the European Union leaving the negotiations of the OEIGWG unable to compromise, has an unmasking effect and exposes states which are mainly driven by economic interests when it comes to BHR issues.[362] In addition to this potential loss of face, failure of the OEIGWG negotiations might call into question state authority as well – is the Global North losing its power of political determination to its own businesses?

After the long and unsuccessful legislative process concerning BHR, great hopes are placed in the negotiation process for the future BHR treaty. Despite the evident political obstacles,

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[360] Makarem and Jae, 'Consumer Boycott Behavior: An Exploratory Analysis of Twitter Feeds', 50 *The Jounral of Consumer Affairs* (2016) 193, at 193ff.

[361] Bilchitz and Deva, *supra* note 41, at 480.

[362] Accordingly the EU's only passive participation in the negotiations on the future BHR treaty has caused critical reactions and disputes with the EU BHR policy, see for instance Friends of the Earth Europe, *EU to back out of UN treaty on business and human rights* (2019), available online at https://friendsoftheearth.eu/news/leak-eu-to-back-out-of-un-treaty-on-business-and-human-rights/; M. Krajewski, *BHR Symposium: Aligning Internal and External Policies on Business and Human Rights*: *Why the EU Should Engage Seriously with the Development of the Legally Binding Instrument* (2020), available online at https://opiniojuris.org/2020/09/11/bhr-symposium-aligning-internal-and-external-policies-on-business-and-human-rights-why-the-eu-should-engage-seriously-with-the-development-of-the-legally-binding-instrument/.

many are confident that, due to the favourable overall external circumstances, there will be a successful outcome, word being of another, even more promising '*high tide'* for the adoption of a BHR treaty.[363] However, it is not the mere adoption, but rather the concrete content of the future BHR treaty that is important. So far, four official drafts of the OEIWG have been adopted, the *Zero Draft* from July 2018, the *Revised Draft* of July 2019, the *Second Revised Draft* from August 2020 as well as the *Third Revised Draft* from August 2021.[364] These already allow concrete conclusions about the will and intention of the legislators and the direction the future treaty could take, which will be evaluated further below in the main part of this paper.

III. Businesses as Anomalous Regulatory Targets of IHRL

Before turning to the concrete content of the future BHR treaty in the next chapter, this section will briefly raise and address a few rather general challenges to the regulation of BHR issues under PIL, which appear within the legal debate and contribute to the polarisation of the subject matter. State-centrism of IHRL is the source of most controversies. Additionally, it might be doubted whether PIL, which was originally supposed to regulate inter-state relations, is the appropriate legal field in the first place to address BHR issues. After all, the mere fact that Human Rights are affected is not an automatism sufficient to qualify as a matter of PIL. Rather, many Human Rights-related matters are primarily regulated at the national level, such as criminal law, employment law or social security law. These are all legal fields that in essence concern Human Rights claims, though within the purely private sphere.[365] Following this train of thought, state-centrism constitutes somewhat a differentiation criterion in the assignment of Human Rights-related regulatory matters to national law or PIL. As for now, only the most serious conceivable Human Rights violations by an individual are formally regulated at the international level, within the Rome Statute of the ICC, as these are considered matters of relevance and concern to the whole international community. However, BHR regulation attempts to regulate a broad range of Human Rights issues in relation to businesses internationally, and not merely the most *gross Human Rights violations*.[366]

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[363] Deva, 'Conclusion - Connecting the Dots: How to Capitalize on the Current High Tide for a Business and Human Rights Treaty', in D. Bilchitz and S. Deva (eds), *Building a treaty on business and human rights*: *Context and contours* (2017), 472 at 477 ff.

[364] See the complilation of documents and summary of developments of the negtoitiation process so far at United Nations Human Rights Council, *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* (2021), available online at https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx.

[365] Such as 'simple' manslaughter, which is always a deprivation of the right to life.

[366] Although some, most notably the former Special Representative of the Secretary-General on the issue of Human Rights and transnational corporations and other business enterprises, John Ruggie, have explicitly

As regards businesses, there are some features and circumstances that argue for their classification as a special category of non-state actors worthy and in need of regulation in PIL.[367] Some of these have already crystallised, for example the shifting balance of power between state and business, and the negative practical impact on the regulatory purpose of IHRL that businesses might exercise. The origin of the regulatory necessity behind the notion of BHR in PIL can be summarised as follows: the realities and power relations of the world order have shifted fundamentally since Human Rights were initially codified, albeit developments in economic, social, and political spheres. Nevertheless, the notion that the state is the principal duty-holder has gone largely unchallenged and unimpressed by these developments for an unreasonable period of time.[368] Yet it is precisely a function of law to be responsive when social realities and needs change so that the law does not become outdated, unfair, or marginal.[369]

However, there are two major reasons why addressing business actors might be considered fundamentally incompatible with the initial concept of IHRL to. First, the material content of particular Human Rights and claims was originally understood and perceived in a way that they could only be *fulfilled* by states, and, in turn, could only be denied, violated, and fundamentally endangered by states as well.[370] Second, non-state actors in general and private entities, such as corporations, were, and still are, not perceived as capable subjects of PIL according to the traditional doctrine of subjectivity in PIL. However, subjectivity is considered necessary in order to qualify as an addressee of international legal norms; thus, non-subjects such as businesses cannot be directly covered by international legal regulations, such as treaties of IHRL.[371]

Additionally, due to the original focus of PIL on intergovernmental relations, questions of legal doctrine, legal methodology and practical application arise, even if a normative necessity for regulation of non-state actors exists. For example, whether businesses can and should be directly addressed by PIL, and whether there should be any restrictions on the personal scope of application in this regard. Or how extensive regulation should be designed,

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argued that a future BHR treaty should also be limited to Human Rights violations that classify as international crimes, the legislative initiative of the OEIGWG does not follow this restricting approach. See Karp, *Responsibility for human rights, supra* note 47, at 26.

[367] Cf. *ibid.*, at 27.

[368] Appea Busia, *supra* note 91, at 12.

[369] See Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 45; Cf. Strahovnik, *supra* note 285, at 164.pointing out that justice must keep pace with changing centres of influence and power; Nowak and Januszewski, *supra* note 38, at 117.

[370] Cf. Clapham, 'Challenges', *supra* note 143, at 558.

[371] See Pentikäinen, 'Changing International 'Subjectivity' and Rights and Obligations under International Law: Status of Corporations', 8 *Utrecht Law Review* (2012) 145, at 152.

considering the legitimate interests of businesses, which might be protection-worthy from a Human Rights perspective as well. The international legal framework, its institutions, and international legal science are not initially geared towards such a regulatory direction. Since the present situation regarding IHRL and its application was specifically adapted for the state as addressee, many of the existing standards and principles are not necessarily suitable for non-state actors. This is especially relevant for businesses, which serve a very different purpose in society than states and are not responsible for the common good; at least according to the original perception. No obligations of actors other than states can be derived from IHRL as it stands today. The recognised and codified sources of IHRL simply do not provide for this. This is unsurprising, however, since something that was demonstrably not foreseen cannot be implicit in the law – rather, the law would have to be explicitly adapted.[372] This must be differentiated from the question of whether the ratio of the law allows for a corresponding reform or, conversely, whether the existing limits of law are normatively justifiable considering the telos of IHRL.

1. State-Centrism as Inadequate Pillar of IHRL

It has been noted that IHRL is characterised by state-centrism, a two-dimensional approach containing a horizontal and a vertical level of Human Rights protection required of the state and excluding other entities from respective obligations.[373]

The vertical level concerns the relationship between state and individual, while the horizontal dimension of Human Rights protection covers issues relating to non-state actors, albeit only indirectly, with the state as a necessary intermediate agent required to protect holders of Human Rights from infringements by third parties.[374] It is widely accepted that the Human Rights obligations owed by states contain such a horizontal component requiring the state to protect individuals within its jurisdiction from violations by third parties, *inter alia* by virtue of legislative means.[375] Therefore, in debates about BHR regulation, the question is not so much whether IHRL and its state-centrism offer a solution for dealing with non-state actors already, but rather whether the solution offered is sufficient or is applied in a sufficient manner with regard to present developments.[376] When considering this question, it must be taken into account that according to the state-centric approach, the state responsibility for the implementation and enforcement of Human Rights protection is exclusive. Where the latter

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[372] Monnheimer, *supra* note 73, at 13 ff.

[373] Cf. Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 25; Wheatley, *supra* note 29, at 11.

[374] Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 25.

[375] Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 31; Appea Busia, *supra* note 91, at 11.

[376] Cf. van Ho, *supra* note 151, at 114, 136 f.

fails to comply with IHRL – no matter how far its obligations are constructed to apply – there is generally no backup mechanism provided for those affected at the horizontal level, regardless of the losses and injuries they might experience. In case of doubt, victims remain unprotected and claimless *vis-à-vis* non-state actors, such as businesses, due to the absence of an adequate legal order created by the state. IHRL itself, though applicable to a situation *rationae materiae* and to a violated person, will be inapplicable *rationae personae*, leaving victims of the occurred violations of material IHRL without realistic possibilities for remediation.[377] Such an outcome strongly contradicts the very idea and edifice of universal and unconditional Human Rights.[378] Moreover, such a scenario cannot be considered an aberrant and rare, anomalous situation, for which one could eventually *accept* or justify a regulatory gap, because states are actually notoriously inconsistent in fulfilling the horizontal dimension of their Human Rights obligations when it comes to businesses in particular, as the latter are their engine of economic growth and investment.[379] Thus, there is a practical need for a fall-back protective mechanism as legal response in cases where diligent actions of states prove insufficient.[380]

The state-centric doctrine is widespread and persistent in IHRL. Interestingly enough, neither the idea of Human Rights nor the substantive content has initially been exclusively limited to states as norm addressees *per se*; at least not explicitly.[381] In sum, there is no reason in IHRL as such, why a treaty cannot create individual liability.[382] Even more so, the UDHR as the first formal international document which filled the notion of Human Rights with content,[383] expressly refers to *'every organ of society'* when it calls for contribution to the realisation and recognition of Human Rights in its preamble.[384] It thereby illustrates the fact that there are more potential agents of justice envisaged by the founding idea of IHRL, which

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[377] Cf. Černič, 'An Elephant in a Room of Porcelain: Establishing Corporate Responsibility for Human Rights', in J. L. Cernic and T. L. van Ho (eds), *Human Rights and Business*: *Direct Accountability for Human Rights* (2015), 131 at 155.

[378] Carrillo, *supra* note 99, at 66 f.

[379] Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 31. See Section A.II.2. above, illustrating the relationship between business and States.

[380] Cf. Carrillo, *supra* note 99, at 54.

[381] Cassell and Ramasastry, *supra* note 311, at 14. cf. Mishra, 'State-Centric Approach to Human Rights: Exploring Human Obligations', Special Issue December 2019 *Quebec Journal of International Law* (2019) 49, at 57 f., 61. illustrating that actually, the inclusion of individual duties and responsibilities with regard to Human Rights was deliberated upon during the drafting process of the UDHR; cf. Strahovnik, *supra* note 285, at 165; O'Neill, 'Agents of Justice', 32 *Metaphilosophy* (2001) 180, at 183.

[382] Cryer, 'The Doctrinal Foundations of International Criminalization', in M. C. Bassiouni (ed.), *International Criminal Law*: *Sources, subjects, and contents* (3rd ed., 2008), 107 at 108. For an evaluation of the pacta tertiis rule with regard to non-state actors see Sect. C.II.3.

[383] Wheatley, *supra* note 29, at 78 ff.

[384] Cassell and Ramasastry, *supra* note 311, at 14.

are required to contribute to its promotion and fulfilment.[385] In its Art. 29 and Art. 30, the UDHR even explicitly recognises the duty of private entities to respect Human Rights and refrain from any engagement in activities infringing the Human Rights of individuals, which due to its general nature must be considered to include private businesses as well.[386] Although the UDHR is not legally binding, or at least controversial with regard to its nature, it is nevertheless a fundamentally influential instrument for the interpretation, application and examination of the contents and functions of IHRL.

As already briefly mentioned above, the protection of Human Rights has also found its way into various treaties of diverse regulatory sectors outside the legal field of IHRL, above all the UNCh, which somewhat represents the constitution of PIL.[387] The Human Rights related provisions of the UNCh do not contain any explicit restriction of the circle of duty bearers either. These relevant provisions of the UNCh are primarily its preamble, as well as Art. 1 Sec. 3 and Art. 55 UNCh.[388] The notion of 'Human Rights' was initially introduced within the UNCh and the International Bill of Rights was only created on its soil.[389] According to the UNCh, it is the very end and *raison d'etre* of the whole organisation of the UN as such to universally promote and protect Human Rights and, thus, international peace and well-being.[390] The UNCh's allocation of Human Rights protection in the regime of PIL is thus strongly related to Kantian considerations on perpetual peace referred to above.[391]

A restriction to states as exclusive addressees in the UDHR and UNCh as sources of IHRL derives primarily from the fact that they have been agreed upon by states and are generally qualified as having an effect primarily between the same. The UNCh addresses only its members, which are states. However, from a normative perspective, Human Rights by their very nature have an effect that goes beyond the state. For although they are addressed to states, they create corresponding rights for non-state actors, the individuals protected by IHRL. It is at least conceivable that IHRL bears the potential to oblige third parties beyond the state where this becomes necessary, in order to achieve its regulatory purposes, particularly given the very general nature and design of the UDHR.[392] However, an explicit and strict restriction of duty bearers *rationae personae* was established in the later course of the evolution of IHRL, within its first two binding treaties, namely the Convention on the

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[385] Strahovnik, *supra* note 285, at 165; O'Neill, *supra* note 381, at 183.

[386] Černič, *supra* note 377, at 147.

[387] Cf. Appea Busia, *supra* note 91, at 11, 34.

[388] Wheatley, *supra* note 29, at 68.

[389] *Ibid.*, at 11.; see the preamble of the UNDHR, para. 5, as well as in para. 1, 4 of the preambles of the ICCPR and the ICESCR.

[390] See Art. 1 para. 3, Art. 55 of the UN Charter; Appea Busia, *supra* note 91, at 43.

[391] See Tesón, *supra* note 66, at 54 f., 74 ff.

[392] Cf. Nowak and Januszewski, *supra* note 38, at 139.

Elimination of All Forms of Racial Discrimination as well as the ICCPR. Both instruments exclusively address states within their provisions and usually introduce the obligations set out in the treaties with the formulation '*state Parties shall/undertake/condemn'*.[393] Thus, state-centrism appears to be mainly a self-imposed phenomenon of treaty law on Human Rights protection and not necessarily a rationale of the concept of IHRL as such.

Neither the material content of Human Rights nor the principle of universality call for an automatism regarding a restriction of obligations to states in any given case. It was stated above that Human Rights were originally understood as rights of defence against the state, and that this legislative design assumed that states pose the greatest threat to human dignity and related individual interests. However, in terms of material content, it has been shown that this can be equally abridged or promoted by states and non-state actors, and as regards universality, state-centrism might even be detrimental to this principle.[394] However, most of the existing and codified standards of IHRL refer to states only and oblige states to use their domestic legislative, administrative, and executive capacities in order to give effect to the Human Rights of individuals within their jurisdiction, which basically includes relations with third parties, such as businesses.[395] States shall, thus, create a legal order that obliges third parties to refrain from Human Rights violations and also to take active measures to promote Human Rights in particular situations, such as implementing safety measures in the workplace or paying a certain minimum wage.[396] State-centrism thus provides for a means to handle non-state actors. The first pillar of the UNGP builds on this traditional state-centric approach, identifying the so-called 'duty to protect' of states.

In sum, state-centrism is a feature of IHRL created by states which does not necessarily follow from considerations regarding content, teleological, or dogmatic foundations of Human Rights protection but is arguably mainly a concomitant of the classification of IHRL as part of PIL, which is principally construed as the law of cooperation between states.[397] Transferring this concept to the legal field of IHRL in an unmodified way creates state-centrism, since there are simply no actors besides states to be considered. Thus, for IHRL to fit within PIL states must have been necessarily instructed as intermediaries between law and individuals as beneficiaries. It is probably also due to this reasoning that many of the discourses concerning BHR in IHRL deal with the subjectivity in PIL, precisely concerning the question

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[393] See for instance Art. 1 Sec. 3, Art. 2, Art. 3 ICCPR and Art. 2 Sec. 1, Sec. 2, Art. 3, Art. 4 Convention on the Elimination of All Forms of Racial Discrimination.

[394] Cf. Carrillo, *supra* note 99, at 67. Who even concludes that the exclusion of non-state actors rationae personae contradicts the very edifice of Human Rights.

[395] Cf. Art. 2 ICCPR; See van Ho, *supra* note 151, at 123 ff.

[396] Cassell and Ramasastry, *supra* note 311, at 14.

[397] Shaw, *supra* note 79, at 6.

whether PIL allows for responsibilities of actors beyond the state.[398] However, if state-centrism cannot be identified as a mandatory pillar of Human Rights protection, it appears redundant or at least in need of reform as soon as it counteracts the regulatory goals of IHRL.

Arguably, sate-centrism is also rooted in the nature of the state itself and its role on the national and international stage. The state alone holds a monopoly of sovereign authority, and it is incumbent upon the state to carry out all actions on behalf of society under its jurisdiction, including the realisation of the rights of individuals, for example by the collection of taxes and the investment of state funds in order to promote Human Rights.[399] Additionally, the state is originally considered the sole entity within society holding the authority to exercise legitimate means of violence and is, thus, the sole authority able to enforce laws and maintain the public order, and the only entity able to effectively protect individuals within its jurisdiction from third party violations of their rights.[400] However, the one-sided power and authority position that the state holds makes it not only the most promising law enforcement agent and protector, but also susceptible to abuse of this position, and thus the greatest threat to Human Rights at the same time.[401] The state has therefore, naturally, been considered the sole capable entity to serve as the guarantor of Human Rights and as practically the only actor on whose will the realisation of Human Rights depends.[402] And indeed, the state is the pivot and turning point of Human Rights protection; its cooperation, commitment and willingness to enforce IHRL is the most important factor in Human Rights protection and indispensable for its success. IHRL has been drawn and developed across these state-centric lines, designed by states as sets of obligations for themselves, accompanied by monitoring mechanisms which also operate on the assumption of state accountability only, and which are founded on the classic rules of state responsibility.[403] However, the mandatory consequence of this, that state-centrism will result in defencelessness against businesses in case of state failure, is no longer adequate in view of the role businesses play in societal order nowadays. In recent years, states have increasingly ceded some of their own authority and sovereignty to businesses and, particularly, some of the characteristics that determine the state and its role as sole Human Rights guarantor, not to mention risk, have decreased. It has already been mentioned above that globalisation is a factor that has considerably contributed to this development and is at

[398] Cf. Pentikäinen, *supra* note 371, at 147 ff.

[399] Appea Busia, *supra* note 91, at 13.

[400] *Ibid.*, at 12.

[401] Clapham, 'Challenges', *supra* note 143, at 558.

[402] Cf. Mishra, *supra* note 381, at 51 f.

[403] Clapham, 'Challenges', *supra* note 143, at 558.

least one of the main causes of the shift of power at the expense of states and in favour of the business community. Concomitantly, globalisation and its aftermath effects have pushed state-centrism to the edge of its effectiveness and validity.

State-centrism is based on the premise that the actors to be regulated at the horizontal level and to be encouraged to respect Human Rights are inferior to the state. If this premise is no longer valid, there is a risk that states will not be able to implement their duties at the horizontal level against businesses acting on an equal or even a superior footing. States that are able and willing to do so run the risk that investments will go to other states with more permissive laws regarding Human Rights protection.[404] Victims of Human Rights violations are then exposed to an increased risk and an increased vulnerability precisely in the same states in which high hurdles often have to be overcome when requesting redress, e.g. lacking resources or corruption in state judiciary systems.[405] Even if a BHR treaty is adopted and accepted by the international community, there is a risk that, without a backup mechanism for state failure, corporate Human Rights violations will continue to slip through the net. In addition to all this, the question arises whether the prosecution of partly deliberate, large-scale, and systematic Human Rights violations should fail, solely on the basis that the provisions protecting the violated and legally recognised rights are directed only at states, and that these have failed to comply with their obligations in a timely or sufficient manner. This is an outcome incompatible with the basic idea of Human Rights protection laid down in the UDHR, granting individuals a claim to a legal and social order in conformity with Human Rights and allowing for their best possible realisation.[406]

a) The Missing Legal Response to Globalisation

Change in PIL is generally prompted by events which give its creators, the states, reason to assess and change their behaviour with regard to a particular regulatory subject.[407] An example of such events is the launch of the *Sputnik 1* rocket, which led to the emergence of a completely new field of law, International Space Law.[408] The accumulation of interferences with Human Rights by economic actors as described in the previous section, as well as shifts in the balance of power in favour of businesses and to the detriment of states, are circumstances that have been set in motion primarily by globalisation. This should have prompted states to change the existing regime of PIL, particularly regarding IHRL. *John Ruggie* has put it as follows:

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[404] See Garrido Alves, *supra* note 39, at 13 f., 33; Bright *et al., supra* note 267, at 668.

[405] This is not a problem directly related to state-centrism, but also an issue to be solved within the framework of BHR regulation, see below Sect. **C.IV.**

[406] See Art. 28 UDHR.

[407] Wheatley, *supra* note 29, at 57.

[408] *Ibid.*, at 58.

'The root cause of the business and human rights predicament today lies in the governance gaps created by globalization — between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge'.[409]

Chronologically, it was decolonisation that first led to a shift in the balance of powers that had prevailed until then. Many countries of the Global South were decolonised and, thus, *in theory,* became equal to the North. In accordance with the UNCh, the post-colonial states were granted sovereignty and a guarantee of equality was created in Art. 2 UNCh to ensure that no state will be able to lawfully subordinate another.[410] However*, in reality,* those states were far from meeting the Global North on an equal footing. Rather, the consequences of years of colonial rule manifested themselves in the fact that southern states faced ailing economies and lacked the necessary resources and knowledge to overcome and change this situation by their own efforts. Thus the subordination of the former colonies and the dependence of the Global South on the Global North, *de facto,* remained. This was recognised by the international community, and attempts were made to counteract postcolonial inequality, e.g. by unilaterally granting expropriations rights to host states in relation to foreign investors.[411] However, the ultimately most effective and sustainable means to help states in economic distress help themselves, without neglecting the interests of the Global North, was promotion of investments by the private sector. Globalisation itself can be qualified as a means of counterreaction to the imbalances and problems of the postcolonial era.[412]

Globalisation was promoted almost equally by both states and the business community, as it was accompanied by advantages for both parties. The international community realised that post-colonial states would need foreign investments in order to establish a balance.[413] Businesses, in turn, recognised that various advantages for their business models existed in the different jurisdictions of other states, and that geographic fragmentation of business operations could increase the profitability of their businesses by outsourcing certain production steps and services.[414]

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[409] Ruggie, *supra* note 8, at 3.

[410] Ratner, *supra* note 45, at 454 f.

[411] *Ibid.*, at 455 f.

[412] *Ibid.*, at 458.

[413] *Ibid.*

[414] Bright *et al., supra* note 267, at 668; Börzel and Deitelhoff, *supra* note 1, at 252.

Many developing states were originally rather sceptical about foreign investors and the influence of multinational businesses, but abandoned this attitude especially during the 1980s, downright desperately trying to attract investors in order to improve their economic standing.[415] While the liberalisation of trade has granted unprecedented economic and political opportunities to businesses, it has also brought many benefits to society and states. Jobs have been created, technology and knowledge shared, tax revenue sources and infrastructure established.[416] The recognition of the benefits of foreign investments has lead to the rise of global value chains[417] and an increase of bilateral investment agreements concluded by states undertaking significant obligations to protect foreign investments.[418] At least at first glance, this approach has granted economically weak states independence, which they arguably would not have been able to achieve autonomously in the short term, allowing them to catch up and compete with industrialised states over the years.[419] Global supply chains now *"account for 450 million jobs worldwide"* [420], and both small and large businesses increasingly rely on various contractors, suppliers and manufacturers in different countries in order to produce, transport or distribute goods.[421] However, usually there are two sides to the coin. States have put themselves in a position where they depend on the will of business industry and must offer something in return within a competition for investment.[422] The states therefore inevitably find themselves in an inferior negotiating position.[423] There is even a resolution of the UN General Assembly that, at least indirectly, confirms this trend. It calls on states for the creation of 'favourable conditions for domestic and foreign investments'.[424] Accordingly, businesses were granted numerous investment protection rights in investment agreements, such as the right to fair and equitable treatment, most favoured

[415] E. M. Graham, *Fighting the wrong enemy* (2010), at 172.

[416] Nolan and Frishling, *supra* note 286, at 108.

[417] Cf. Bright *et al., supra* note 267, at 668; Nolan and Frishling, *supra* note 286, at 108.

[418] Ratner, *supra* note 45, at 458.

[419] Cf. The World Bank, 'Trading for Development in the Age of Global Value Chains: World Development Report 2020' (Washington, DC, 2020), at Foreword, xi.

[420] G20 Labor and Employment Ministers Meeting 2017, Ministerial Declaration, *Towards an Inclusive Future*: *Shaping the World of Work* (2017), available online at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/meetingdocument/wcms_554414.pdf; Nolan and Frishling, *supra* note 286, at 108.

[421] Nolan and Frishling, *supra* note 286, at 108.

[422] See Massoud, *Menschenrechtsverletzungen im Zusammenhang mit wirtschaftlichen Aktivitäten von transnationalen Unternehmen, supra* note 422, at 195 ff. Providing a very detailed elebarotion on the issue of state competition for investments.

[423] Cf. Brune, *supra* note 1, at 129; Ratner, *supra* note 45, at 462.

[424] Resolution S-18/3, Declaration on International Economic Co-operation, in particular the Revitilization of Economic Growth and Development of the Developing Countries, UN Doc. A/S-18/15, 1 May 1990 5, at para. 23.

nation treatment, the right to hire their own senior personnel and the right to compensation of full economic value in the event of expropriations.[425] Businesses were empowered to judicially enforce these rights directly against the host states of investment and on an international arbitrational level, even against the will of the host state, thereby bypassing the domestic judiciary entirely.[426] To what extent the states actually gained independence or whether their economic dependence merely appeared in a new light – from dependence on colonial states to direct dependence on private businesses originating from them - will have to be left to one side here. However, it can be ascertained that the new role and power of the business industry in international affairs inevitably led to the emergence of new sources of danger for society in general and for Human Rights protection in particular. Additionally, the geographical distribution of business activities among global value chains has made it difficult to make individual companies legally tangible, because often non-transparent and entangled corporate legal structures and power relations exist within these supply chains. Moreover, a legal intervention across jurisdictions and entities is often not possible, e.g. because of the principle of separate legal personality.

Globalisation has put states under continuous pressure to abolish trade barriers, liberalise economic controls and reduce the size and influence of the public sector by means of privatisation.[427] Economies easily become dependent upon the positive effects produced by business investments. Additionally, the phenomenon of increasing privatisation has had a direct influence on the enforcement of Human Rights guarantees of many, since traditionally state-related tasks, such as health, education, water provision and even the operation of prisons, are being outsourced to private business actors that, by nature, other than the state are deemed to operate more efficiently and in a profit-oriented manner.[428] This necessarily and inevitably requires businesses to make a cost-and-benefit calculation in order to ensure the profitability of their business; even if it concerns the exercise public functions de facto delegated to them. Thus, the focus is naturally not that the greatest possible benefit for society will be served. Private actors hence become guarantors of Human Rights, but often do not create the framework conditions for the best possible Human Rights fulfilment. This development puts Human Rights under the condition of profitability, which contradicts their very nature and essence. As a consequence of the privatisation of public sectors, states can no longer be perceived as the sole agents able to fulfil Human Rights.[429]

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[425] Ratner, *supra* note 45, at 458.

[426] *Ibid.*

[427] J. R.-M. Wetzel, *Human Rights in Transnational Business* (2015), at 3.

[428] Appea Busia, *supra* note 91, at 14.

[429] The general tension between privatisation of the public sector and Human Rights protection will be addressed only in a very marginal way within this paper, as it goes beyond the scope of this work and is a topic

Globalisation has also led to radically changing power dynamics within the global order beyond economic dimensions, particularly regarding principles such as state primacy and their horizontal equivalence.[430] As has been illustrated above, some businesses generate revenues larger than the GDP of many states and can thereby greatly influence the legislative choices of governments. Thus, they are actively contributing and influencing the state of the legal order in which they operate and to which many individuals in the various states are subjected. To a certain extent, businesses exercise control over the everyday lives of these people, which are determined by law. Of course, this applies disproportionately often to internationally operating and transnationally influential businesses, but it is not necessarily limited exclusively to such. National businesses may also subject the operation of a state to their influence. This shift of power would have required a legally stipulated counterweight.[431]
The potential disadvantages and dangers for society associated with the rise and increase in the number of large, predominantly transnational businesses has slowly become clearer. A sceptical attitude towards the rise of business materialised in anti-globalisation movements in the 1990s, arguing that through the many facilitations for international trade and investment, large corporations would be empowered to take advantage of the weaker Human Rights situations in certain states, e.g. low wage states and states with low standards of labour law, or to reprehensibly exploit the dependence of economically weak states on investments for their own benefit.[432] This kind of exploitation generally proves to be economically reasonable for businesses as it allows them to reduce and avoid production costs, tax expenses or costly controls and audits. For instance, the Swedish clothing company *H&M* could not employ garment workers for eleven hours a day at a monthly wage of 85 Euros in its home country, though it is a common corporate practice in its textile factories in India, or even in Bulgaria, where employees are forced to work 12 hours and seven days a week to earn the legal and necessary existential minimum wage.[433] Swedish employment and Human Rights standards would not allow the corporation to offer its products at low prices to a large mass of consumers and, thus, generate profits at the heights as it currently does at the expense of Human Rights protection. To outsource production to dependent and weak business partners in states (i) with a questionable Human Rights situation but (ii) trade laws that are all the

worthy of detailed treatment in its own. See for instance K. de Feyter and F. Gómez Isa (eds), *Privatisation and human rights in the age of globalisation* (2005).

[430] Backer, 'Considering a Treaty on Corporations and Human Rights: Mostly Failures but with a Glimmer of Success', in J. L. Černič and N. Carrillo-Santarelli (eds), *The Future of Business and Human Rights*: *Theoretical and practical considerations for a UN treaty* (2018), 89 at 92, 94.

[431] See Wetzel, *supra* note 427, at 3 ff.

[432] Bellace and Haar, 'Perspective on labour and human rights', in J. Bellace and B. P. t. Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (2019), 2 at 3.

[433] See M. Rösgen, *Wirtschaftswoche,* 26 September 2018.

more conducive to foreign investment, is a deliberate business decision – and one that is common practice in the international garment industry.[434]

At the time of the anti-globalisation scepticism, Human Rights abuses by businesses were no longer a novelty, as the abovementioned examples show, but it was foreseeable that the economic and political reorganisation of the business environment that would occur with the further progress of globalisation would intensify this phenomenon even more. Even though society has recognised the dangers of globalisation and has explicitly demanded countermeasures, the legislators have failed to respond. Law must respond to changing social, political, and economic circumstances and translate new public demands and needs into legal texts in order to stay relevant and not to become an obsolete set of antiquated standards.[435] Therefore, it seems particularly odd and paradoxical that the responsiveness of the law with regard to BHR has failed to materialise – given the rather explicit demands for regulation.[436] The legal *lacunae* flowing from globalisation is descriptively illustrated by *Ratner.* He identifies four actors directly affected by international investments, namely the host state, the home state, the investor, and the citizens of the host state, placed in the corners of a quadrangle, the lines between them marking the legal relationships among them.[437] In principle, these lines of legal relationships need to be adjusted as soon as there is a shift of the position in one of the corners. Through the acquisition of investors and the strengthening of their legal position in the host state, their influence in relation to the host state as well as in relation to its citizens grew immensely. While the conclusion of investment agreements regulated the line connecting the business investors with the host states, it is questionable whether an equivalent legal framework for the relationship with citizens has been established.[438]

The influence of business actors is recently also materialising at the level of law-making in PIL, as corporate influence in the UN is rising.[439] For example, the International Chamber of Commerce has been granted observer status in the General Assembly since 2016.[440]

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[434] Cf. Clean Clothes Campaign, *Poverty Wages*: *Clean Clothes Campaign - what we work on*, available online at https://cleanclothes.org/poverty-wages.

[435] Cf. Cassese, 'Introduction', in A. Cassese (ed.), *Realizing Utopia*: *The Future of International Law* (2012), xvii at xviii; Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 45; Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 230.

[436] Wetzel, *supra* note 427, at 4.

[437] Ratner, *supra* note 45, at 452, at footnote 17.

[438] *Ibid.*, at 460.

[439] Deva, 'From 'business or human rights' to 'business and human rights': what next?', *supra* note 38, at 6.

[440] Observer status for the International Chamber of Commerce in the General Assembly, UN Doc. A/RES/71/156, 21 December 2016; Deva, 'From 'business or human rights' to 'business and human rights': what next?', *supra* note 38, at 6.

Generally, it can be observed that businesses have not only long since taken on an influential role in their relationship with single nation states, but recently this trend also seems to be continuing at the international political level in the UN, taking a more general and broad dimension, which offers businesses unprecedented access to global influence.[441] Businesses have also made a significant contribution to the absence of a solution to the governance gaps that exist in the field of BHR. They have long since built a strong lobby exerting influence at all levels and have contributed to the softening and watering down of Human Rights towards desirable moral goals and away from the legally justiciable entitlements they should be.[442]

To sum up, in the course of progressing globalisation, states have relinquished some of their control and power for the direct benefit of businesses.[443] Some even proclaim a decreasing relevance of the sovereign state in the new global order.[444] Noteworthy is that such findings were made long before corporate empowerment reached its present level. The emergence of such new fragmented centres of power on the side of businesses mandatorily leads to individuals facing new sources of authority, repression, and alienation.[445] Nowadays, businesses can be as equally powerful in terms of economical and political influence as some sovereign state governments.[446] This shift of power has resulted in a new public order in terms of economy, society, and politics on global scale and, thus, requires a shift of rights and obligations as well.[447]

Individuals find themselves confronted with businesses in relationships that did not exist before, at least not in this form. Obviously, there will always be a relationship of subordination between business and civil society. This circumstance must not be regarded as unilaterally negative, however. Nor is it the aim to eliminate the existing power imbalances between business industry and civil society. Nevertheless, it should be regulated in a way that is adjusted and balanced to the current extent of these power asymmetries. The demand to fill the regulatory gap caused by the missing Human Rights response to globalisation is still upheld today, as it has not been satisfied sufficiently yet.[448] One might categorise the attempt

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[441] On this issue seeDeva, 'From 'business or human rights' to 'business and human rights': what next?', *supra* note 38, at 6 f.

[442] Suárez Franco and Fyfe, *supra* note 48, at 158 f.

[443] Wetzel, *supra* note 427, at 3.

[444] G. J. Andreopoulos, Z. F. Kabasakal Arat and P. H. Juviler (eds), *Non-state actors in the human rights universe* (2006), at Introduction, xvi.

[445] Clapham, *Human rights in the private sphere, supra* note 445, at 137.

[446] Fasciglione, *supra* note 36, at 33; Ratner, *supra* note 45, at 461.

[447] See Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 45.

[448] The Treaty Alliance, *supra* note 354; Corporate Accountability Global Campaign, *Online Presence of the Corporate Accountability Global Campaign*: *Approach - What We Do - Our Strategies*, available online at

to regulate BHR in IHRL as '*humanising globalisation'*, which would have been necessary for an effective protection of Human Rights in this new social and economic order.[449] Indeed, the hope that this is still going to happen is the *raison d'etre* behind the OEIGWG negotiations on the future BHR treaty.

b) Human Rights Responsibility and Non-State Actors other than Businesses

The abovementioned examples of corporate Human Rights violations vividly demonstrate that the role of the state as the sole or greatest threat to Human Rights is no longer valid. Thus, the state cannot claim absoluteness and exclusivity with regard to Human Rights, neither for its role as guarantor nor for its role as a threat to Human Rights. Under these circumstances, the question necessarily arises as to whether the role of the state as the sole legally obligated party in terms of the state-centric approach is still appropriate. Interestingly the issue of BHR is not the first phenomenon challenging the traditional state-centric notion of IHRL regarding non-state actors. In fact, corresponding paradigm shifts have already occurred in connection with individuals and international organisations.

Individuals are able to commit serious Human Rights violations, which in the worst case remain without consequences if the state fails to create appropriate prevention and remedy mechanisms on the horizontal level. However, regulatory gaps that may exist with respect to such individuals are of a different quality than with respect to businesses: because of the influence, power, and position of the business industry. In fact, in particular business sectors and particular corporations Human Rights violations attributable to businesses appear *a structural problem of international relevance.*

It is important to note that not every material Human Rights infringement calls for international regulation beyond general IHRL and general state-centrism. The usual case is regulation at the national level via criminal and regulatory law. For instance, there are still countries that contain so-called '*marry-your-rapist*'-provisions within their national criminal laws.[450] These laws allow rapists of women to escape penalties for the committed criminal offence, if they offer to marry their victim, thereby often leaving the victim with no realistic chance to deny this 'offer' due to social, cultural or familial pressure.[451] The mere existence of such laws within the legal order of a state amounts to a Human Rights violation, as it fails to

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https://www.corporateaccountability.org/what-we-do/#:~:text=Corporate%20Accountability%20activates%20people%20power,communities%20to%20international%20democratic%20institutions.&text=These%20corporations%20feed%20and%20exacerbate,economic%20inequality%20to%20systemic%20racism.

[449] Schutter, 'Foreword', in D. Bilchitz and S. Deva (eds), *Human rights obligations of business*: *Beyond the corporate responsibility to respect?* (2013), xv at xxii.

[450] Y. Hassan, 'The World's Shame: The Global Rape Epidemic' (2017), at 18.

[451] Cf. the illustration of the problem at *ibid.*, at 16 ff; see also United Nations Entity for Gender Equality and the Empowerment of Women, *Progress of the World's Women 2019-2020* (2019), at 171 ff.

create a legislative order preventing and redressing violations of physical integrity and constitutes a violation of provisions of the *Convention Against all Forms of Discrimination Against Women 1979*.[452] States should be held accountable for such violations of IHRL and be mobilised to adapt their laws in accordance with IHRL. However, there is arguably no urgent regulatory need to fill the regulatory gaps provided by these laws by virtue of an international legal instrument, which could be compared to the regulatory needs regarding BHR issues. Albeit rape constitutes a severe violation of rights of the affected women, may amount to torture or cruel and degrading treatment[453] and can be regarded a global problem, the rapists exploiting such laws and avoiding criminal prosecution cannot be qualified to constitute a structural Human Rights problem of international relevance, which can no longer be adequately solved on a purely domestic level. The main difference to BHR is that in these cases there is no structural power imbalance or dependency relationship between the state failing to adopt appropriate legislation and the perpetrators it ought to regulate. States that are unwilling to change such laws are not driven by economic and political pressure. Instead, they typically take this attitude contravening their Human Rights obligations, based on cultural valuations, and entirely autonomously.[454]

In the past, a structural problem of international relevance has been identified in relation to Human Rights violations committed by individuals, but only to the extent that *core crimes* were concerned. With the creation of ICL and the Rome Statute, the regulatory gaps existing in this regard have been closed by deviation of state-centrism. While the primary responsibility to prevent and punish crimes in terms of ICL remains with the state, there is a safeguard mechanism where states cannot or do not want to comply with this responsibility. The crimes covered by ICL are considered to be of such a serious nature that there is a general interest on the part of the international community to legally address and prosecute them.[455] Such an outstanding regulatory interest also exists with respect to BHR issues and corporate conduct. As regards the latter, the outstanding regulatory interest is not necessarily justified by the nature of the violations and crimes in question, but rather by the *nature of its perpetrators.* The economic strength of businesses, the mere fact that Human Rights violations traceable to business conduct occur repeatedly, and their position of power, not

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[452] Cf. Committee on the Elimination of Discrimination, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: UN Doc. CEDAW/C/GC/35' (2017), at para. 33.

[453] *Ibid.*, at para. 16.

[454] The question of the extent to which international Human Rights are compatible with cultural, social, and legal differences between states would justify an own discussion paper, see for instance Cruft, Liao and Renzo, *supra* note 99, at 31 ff.

[455] Bassiouni, 'International Crimes: The Rationae Materiae of International Criminal Law', in M. C. Bassiouni (ed.), *International Criminal Law*: *Sources, subjects, and contents* (3rd ed., 2008), 129 at 157.

only economic but also political, are all factors that render businesses a special category of non-state actors from the perspective of the telos of IHRL and interests of the people protected by it. If there is no international regulation allowing for the monitoring of Human Rights compliance by these perpetrators and, if necessary, sanctioning violations of law, states will be deprived in the long term of their general control and authority to decide whether and how Human Rights are complied with by actors under their jurisdiction.

It has previously been briefly mentioned that non-state responsibility relating to Human Rights protection has already been recognised and partly codified in PIL, namely with respect to individuals and International Organisations. In both cases, special circumstances exist which justify regarding these cases as beyond state discretion. Rather, it is required to ensure legal processing by means of international regulation, which shall be elaborated in further detail below. Nevertheless, the regulation of BHR should be understood as a fundamentally separate subject, and comparisons with both state and individual responsibility for IHRL can only be made to a limited extent. Since PIL already provides for rules on Human Rights protection with regard to states and individuals, one can naturally raise the question whether these rules can be transposed to businesses as well.[456] However, this must be negated. With regard to all three actors, different regulatory goals and rules apply. The need for regulation with respect to businesses arises precisely from the fact that in their relationship to both the state and individuals, they occupy a role not yet expressly envisaged by IHRL. By their very nature, therefore, the means made available by existing law cannot be adequately mobilised. In principle, this also means that a future BHR treaty must incorporate a certain degree of creativity at the material level to do justice to its regulatory object and purpose.[457]

The provisions of IHRL that are binding on states are, in their scope of application and content, generally too broad and diverse to simply be transfered to businesses, whereas the primary rules binding on individuals are too narrow to make transferring them to businesses sufficient.[458] Due to its inherent role and nature, the state has to meet broader and stricter Human Rights obligations than businesses; whereas the very limited scope of individual accountability, focused on the most serious core crimes of PIL, is not broad enough in relation to corporate activities. Since businesses by nature hold a superior position to individuals – not identical but somewhat comparable to the position of a state – they arguably may be subjected to a broader range of obligations and requirements than individuals. In sum, businesses in their capacity as actors of IHRL can be categorised to be more than the

[456] Ratner, *supra* note 45, at 492.

[457] On this issue, see Sect. **C.III.** below.

[458] Ratner, *supra* note 45, at 493 ff.

individual but less than a state.[459] This classification requires an autonomous legal regime that will sufficiently reflect it.

i. Individual Criminal Responsibility under PIL

The origins of international criminal responsibility trace back at least as far as the *Nuremberg Trials*, where the Tribunal prominently established that PIL provides a general capability to extend legal responsibilities beyond the state, to individuals.[460] With regard to certain acts, such as piracy or slave trading, it was recognised long before that there must be a possibility to hold individuals accountable at the international level.[461] Nowadays, there are conventions that codify the responsibility of individuals for specific Human Rights violations, regardless of any ties to the state or any other official role of those responsible persons. For instance, the four Geneva Red Cross Conventions 1949 of International Humanitarian Law establish individual international responsibility for certain actions within armed conflicts.[462]

The main body of legislation dedicated to the regulation of individual international responsibility is the Rome Statute.[463] It stipulates the agreement of states that for certain crimes and under certain circumstances identified therein, individuals can be held accountable at an international level and directly by means of PIL, thereby bypassing domestic legal systems.[464] According to Art. 5 Rome Statute these crimes are namely genocide, crimes against humanity, war crimes and aggression. The Rome Statute establishes directly enforceable material criminal law on an international level, which establishes the criminal responsibility of individuals without depending on mediation by state legislation.[465] Apart from the offence of aggression, the main object of protection, which is peaceful coexistence of states, all of the 'international crimes' identified within the Rome Statute essentially concern Human Rights issues.[466] At their core, they concern the substantive content of IHRL, the protection of human dignity and, in particular, the protection of life and physical integrity as well as the right to self-determination.[467] These international crimes identified in the Rome Statute are often referred to as *core crimes* of PIL.[468]

According to Art. 25, 27 of the Rome Statute, it applies to every person and consequently to all individuals, regardless of their official role or position or any other affiliation with a state

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[459] *Ibid.*, at 496.

[460] International Military Tribunal at Nuremburg, 'Trial of the Major War Criminals', 22, at 465.

[461] Shaw, *supra* note 79, at 397.

[462] *Ibid.*, at 401.

[463] *Rome Statute of the International Criminal Court* (2011).

[464] Cryer, 'The Doctrinal Foundations of International Criminalization', *supra* note 382, at 108.

[465] A. von Arnauld, *Völkerrecht* (4th ed., 2019), at 597.

[466] *Ibid.*, at 608.

[467] Cf. Bassiouni, 'International Crimes', *supra* note 455, at 157.

[468] *Ibid.*, at 133. Cf. Cryer, 'The Doctrinal Foundations of International Criminalization', *supra* note 382, at 108.

government. Therefore, there is no general limitation *rationae personae*. But it follows from Art. 17 of the Rome Statute that persecution before the ICC is only complimentary and comes to effect only if the primarily applicable state jurisdiction fails.[469] The relationship between Rome Statute and domestic criminal laws is one of complementarity, meaning that the former complements the latter in case of insufficiencies, and not one of subsidiarity.[470] Thus, ICL can be considered a kind of international guarantee: it is a fall-back mechanism of PIL that guarantees that particularly serious Human Rights violations amounting to international core crimes – which are unanimously considered to require legal reappraisal – will be dealt with and will not slip through the cracks due to external domestic circumstances only.

If necessary, ICL will be enforced against the will of a sovereign state involved in the matter, and its enforcement does not depend on an intermediary act of a state.[471] The regulatory need regarding ICL was identified when the international community realised that the existing practice to hold only states accountable for such acts is inadequate and does not do justice to the wrongful content of the acts in question.[472] Thus, ICL can be regarded as partly a response to the shortcomings of state responsibility in relation to international crimes.[473] With its focus on the individual as addressee and the creation of individual international criminal responsibility, ICL breaks or at least modifies the originalist state-centric approach of IHRL.[474] It is based on the idea that certain legally protected interests are so important that their violation requires criminal liability as a matter of PIL and cannot be regarded solely as a matter of domestic jurisdiction.[475]

The mere existence of ICL is proof for the general potential of IHRL to deviate from state-centrism. State-centrism is no irrevocable maxim of IHRL and not necessarily required by law. However, the mere reference to ICL cannot suffice as justification for a comprehensive regulation of BHR in PIL, as international responsibility and liability of individuals is very limited. As can be seen from the above, ICL criminalises only those Human Rights violations

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[469] Wagner, 'The ICC an its Jurisdiction: Myths, Misperceptions and Realities', 7 *Max Planck Yearbook of United Nations Law* (2003) 409, at 505 f. Shaw, *supra* note 79, at 414 f. M. M. El Zeidy, *The principle of complementarity in international criminal law* (2008), at 157 ff.

[470] El Zeidy, *supra* note 469, at 157 f.

[471] According to Art. 13 lit. b) ICC Statute, a case can be brought before the Prosecutor of the ICC by the Security Council, even if the relevant offence did not occur on the territory of a State party to the ICC-Statute and the defendants are not nationals of a State party. SeeShaw, *supra* note 79, at 412.

[472] Arnauld, *supra* note 465, at 597; Cf. Ratner, *supra* note 45, at 464.

[473] C. Stahn, *A critical introduction to international criminal law* (2018), at 119.

[474] Arnauld, *supra* note 465, at 597; Stahn, *supra* note 473, at 10.

[475] Arnauld, *supra* note 465, at 597; Cryer, 'International Criminal Law', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (3rd ed., 2018), 521 at 521.

that are classified as particularly serious and of international concern. The willingness to break through the state-centric notion of IHRL is limited to these crimes that are particularly worthy of emphasis. Thus, ICL does not simply transfer Human Rights obligations to individuals.[476] Rather, it emphasises the few crimes considered to be so severe that they require exceptional handling. According to Art. 5 Rome Statute, the jurisdiction of the ICC shall be limited to the '*most serious crimes of concern to the international community as a whole'*.

This limitation *rationae materiae* of individual international criminal responsibility has served as a template for some BHR-related approaches to recognise and encourage a regulation of only those Human Rights issues that amount to international crimes with regard to businesses as well.[477] Some conclude from the material limitations of ICL that a need for regulation of private actors in PIL generally exists only with respect to core crimes.[478] However, it is not possible to draw conclusions about the content of ICL and BHR without further ado, since both notions are based on different regulatory reasons.

In some domestic jurisdictions there are crime-related and perpetrator-related characteristics that e.g. upgrade a 'simple' manslaughter to murder;[479] likewise, crime-related and perpetrator-related characteristics can turn a subject of national regulation into a subject of regulation under PIL or IHRL. In ICL, only crime-related characteristics, e.g. the severity and the atrocity of the crime or the significance of the violated interest, play a role.[480] This follows from Art. 27, 28 Rome Statute, which limit the relevance of perpetrator-specific characteristics. As has been pointed out above, individuals may have a seriously detrimental impact on the Human Rights of other individuals, but normally they do not pose a fundamental or structural threat to the enjoyment of Human Rights by third parties. Therefore, it is usually sufficient to regulate their interference with the Human Rights of third parties on a purely national level, i.e. by means of civil and criminal law. The framework of ICL, in turn, identifies an exemption to this assumption *rationae materiae*.

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[476] Ratner, *supra* note 45, at 467 f.

[477] Macchi, 'A Treaty on Business and Human Rights: Problems and Prospects', in J. L. Černič and N. Carrillo-Santarelli (eds), *The Future of Business and Human Rights*: *Theoretical and practical considerations for a UN treaty* (2018), 63 at 75; cf. Clapham, 'Challenges', *supra* note 143, at 570; see Special Representative of the Secretary-General, 'Promotion and Protection of Human Rights: Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: UN Doc. E/CN.4/2006/97' (2006), at para. 60.

[478] Cf. Carrillo, *supra* note 99, at 76.

[479] See for instance § 211 of the German Criminal Code ('*StGB*'), Art. 148 § 2 of the Polish Criminal Code ('*Kodeks Karny'*) or 18 U.S. Code § 1111.

[480] In the case of International Humanitarian Law, on the other hand, it is the exceptional external circumstances, and therefore also rather crime-related considerations, that call for international regulation beyond national legal orders.

With regard to businesses, in turn, the regulatory need arises from perpetrator-related considerations: It is mainly the power of businesses and the role they play in society that enables them to commit Human Rights violations, partly large-scale - and to avoid the consequences - which has led to scepticism and demands to regulate business conduct. Due to their nature, the immanent potential to cause dangers for Human Rights will usually be higher in the case of businesses than in the case of individuals. Businesses may gain the ability to make both, people, and the state dependent on them and thus acquire a superior position in an unbalanced relationship.[481] In comparison to individuals, businesses usually will have greater possibilities to access resources, harm human dignity and avoid the control of, not to mention punitive sanctions by, the state.[482] Thus it is their capabilities that qualify them as a structural problem to the protection of Human Rights. Whereas the nature of the violation or the way a corporate Human Rights violation is committed is less relevant to the founding problem of BHR, and it is hardly ever discussed in academic discourse. The essential factors lie in the businesses as perpetrators themselves. Therefore, the limited nature of ICL does not imply a necessary limitation of any BHR regulations, since the limitation *rationae materiae* of the Rome Statute results from its regulatory purpose, which differs in comparison to BHR regulation. Thus, recognition of corporate obligations within the range of international core crimes should be regarded as '*the very leas*t' rather than the utmost of BHR regulation.[483]

The above-mentioned differences between individual international criminal liability as provided for in the Rome Statute and the initiatives to regulate BHR indicate that the regulatory issue underlying BHR cannot be solved by means of reference to ICL.[484] There are several developments in PIL pointing towards a trend to establish international corporate criminal responsibility.[485] However, they are to be assessed separately from BHR regulation. ICL is severely limited *rationae materiae,* within its codification in the Rome Statute and beyond.[486] Most matters exclusively regarding individuals can be regulated at the national level. However, a restriction *rationae materiae* to the most severe crimes of international concern in connection with businesses is not reasonable, because it would lead to the exclusion of the multitude of potential cases of application, the regulation of which is precisely one of the main concerns of the BHR initiatives. This applies particularly to the

[481] See Sect. **C.I.2.**

[482] Ratner, *supra* note 45, at 494 f.

[483] Carrillo, *supra* note 99, at 76.

[484] Cf. Monnheimer, *supra* note 73, at 10 f.

[485] Clapham, 'Challenges', *supra* note 143, at 569 ff.

[486] See for a comprehensive illustration and analysis of the general rationae materiae of International Criminal Law Bassiouni, 'International Crimes', *supra* note 455.

protection of such rights which are rather to be rooted in ICESCR rights and cannot be assigned to ICL without further ado.

Furthermore, the regulation of BHR does not focus on the idea of penalties, but rather on prevention and reparation. Criminal law can be an instrument for effective implementation and creation of corporate criminal liability for particularly serious and cruel violations. Most certainly, this will be a necessary step after the general liability of businesses for Human Rights violations has been recognised. However, in the short term, a basis must be created that primarily includes the protection of victims and the possibility of compensating for damages suffered, thus, civil liability in IHRL.

ii. Human Rights Responsibility of International Organisations

The ICJ recognised the international responsibility of International Organisations in a case between the WHO and Egypt as early as 1980.[487] In the course of this, it has become widely accepted in PIL that International Organisations have Human Rights obligations.[488] The necessity to subject International Organisations to Human Rights obligations in order to enhance the regulatory purposes of IHRL has been recognised, it has been identified by way of a further development of the law and increasingly regarded as customary law by now.[489] Although not explicitly envisaged from the outset, a responsibility under PIL was thus responsively created alongside that of the state. However, International Organisations do not offer a suitable standard of comparison for the general examination of international responsibilities of non-state actors, and the recognition of their responsibilities under PIL is not representative for a shift away from state-centrism, as envisaged in the context of proposals for BHR regulation.

Formally, International Organisations are frequently qualified as non-state actors and are often dealt with in one breath together with non-state actors such as individuals, businesses, or armed groups.[490] However, International Organisations are organisations formed and operated by states and represent a collective of states, used for a specific common purpose.[491] As regards the relationship to individuals protected by IHRL, they are thus not actually inferior to states. From the point of view of individuals, the authority emanating from such organisations is likely to be perceived as similar in both cases. And the power that such International Organisations can exercise as a collective of states is likely to establish a relationship of subordination to individuals, which in turn would require compensation through

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[487] Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 73, 89-90.

[488] Clapham, 'Challenges', *supra* note 143, at 567; Tomuschat, *International law, supra* note 488, at 134 f.

[489] Monnheimer, *supra* note 73, at 14 f.

[490] See for instance Clapham, 'Challenges', *supra* note 143, at 566 ff.

[491] Monnheimer, *supra* note 73, at 15; Tomuschat, *International law, supra* note 488, at 134 f.

IHRL. While states limit the powers of organisations, the exact extent of power granted to International Organisations is at the state's discretion, which in itself is an expression of sovereignty and should not lead to circumvention of IHRL.[492] Thus, the acknowledged responsibility and subjectivity of International Organisations in PIL can arguably be regarded as a natural extension of state responsibility and accountability, and thereby an extension to state-centrism, rather than an actual deviation from this approach.[493] In other words, if a state is regarded as the responsible entity for the maintenance of IHRL individually, this will still have to apply if a state joins a community and thus – at its own discretion – diverts its power. The responsibility for Human Rights designated to the state, according to the state-centric approach, is not thwarted by its association with other states, it is only modified. It is unreasonable to suddenly deny the responsibility or personality of states - which undoubtedly exists while they are acting independently - when they associate with each other.[494] This would create an enormous opportunity for states to evade their inherent Human Rights obligations.

c) Concluding Remarks on State-Centrism in IHRL

Parallels between the demands for regulation of BHR issues and the existing regime of individual responsibility in ICL exist insofar as the accumulation of corporate Human Rights violations, growing economic and political business influence, underpinned by international treaties, and the concomitant weakening of the state's monopoly of power must necessarily lead to the realisation that the intermediary solution of state-centrism in relation to businesses is not sufficient in its current form and, thus, needs reform.[495] The observation that state-centrism practiced in IHRL is insufficient in certain situations or with regard to certain non-state actors has already been made and remedied in the past, as shown by the example of ICL. State-centrism should not be regarded as an indispensable maxim of IHRL. Rather, this notion neither stems immediately from the idea of Human Rights protection, nor does it seem to be mandated by the telos or dogma of IHRL.[496] State-centrism is rather founded in the original approaches to general PIL as the law of coordination of inter-state relations, which did not yet anticipate IHRL in its current content and significance.[497] State-centrism appears like a concept that existed before the codification and emergence of IHRL. It was blanketly applied and transferred to IHRL as a natural pillar of PIL. Hence, state-

[492] Cf. Clapham, 'Challenges', *supra* note 143, at 566.

[493] Cf. Shaw, *supra* note 79, at 261. using the term 'derivative subjects of international law'.

[494] Lauterpacht, *supra* note 306, at 136.

[495] Cf. Ratner, *supra* note 45, at 464.

[496] Cf. Carrillo, *supra* note 99, at 56.

[497] See Shaw, *supra* note 79, at 1 ff, 8 ff., in particular at p. 4 f.; see also Bassiouni, 'The Discipline of International Criminal Law', *supra* note 140, at 33.

centrism and IHRL appear as a marriage of convenience that, nonetheless, did not always lead to the best results with respect to the protected legal interests and purpose of IHRL.

The developments described in this Section, which to a large extent have their origins in advancing globalisation, create a new status quo. The community of states, as legislators of PIL, should have processed this information and reflected it in the international legal order.[498] In the course of this, the application of state-centrism to IHRL, in particular, should have been challenged.

2. Subjectivity as a Constitutive Requirement

An element strongly associated with state-centrism in Human Rights protection is the question of subjectivity in PIL. According to traditional views on PIL, states alone are the original subjects of PIL and, because of this exclusive subjectivity, they are considered the sole legally relevant actors, i.e. capable of possessing rights and duties in PIL as well as to assert legal claims.[499] Subjectivity is also often equated or conflated with legal personality. While both terms are used as synonyms in order to identify the legitimate subjects of PIL, the concrete distinction between the two notions is rarely clear and will not be elaborated at this point.[500] However, according to a strict interpretation of the conventional doctrines of subjectivity and international legal personality, they are regarded a *conditio sine qua non* in order to oblige actors under PIL.[501] States are considered the only actors bearing international subjectivity *by nature*.[502] All actors other than states are not subjects of PIL in the latter sense, and it requires extensive justification to establish their subjectivity and subject them to international regulation, e.g. as in the case of International Organisations, which derive their subjectivity from their member states.[503]

The dogma of subjectivity is regularly invoked in debates about BHR regulation, especially by sceptics.[504] The (supposed) lack of and need for corporate subjectivity under PIL, in order to subject businesses to IHRL, seems to be the linchpin of some scholarly disputes about the

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[498] Cf. Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 45.

[499] Pentikäinen, *supra* note 371, at 145.Shaw, *supra* note 79, at 197.

[500] For a differentiation of both notions see Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 240 ff. Here subjectivity is understood to mean the posession of international rights and duties, whereas international personality is supposed to be the capacity to have international capabilities and is largely determined by the national laws of the states.

[501] Klabbers, 'The Concept of Legal Personality', 11 *Ius Gentium* (2005) 35, at 37.

[502] Shaw, *supra* note 79, at 206 f.

[503] See *Reparation for injuries suffered in the service of the United Nations* International Court of Justice (1949) I.C.J. Reports 1949, 174-220, at 177 ff.

[504] Ratner, *supra* note 45, at 475. Pentikäinen, *supra* note 371, at 147.

possible scope of BHR regulation at the international level.[505] Maintaining a strict dogma of subjectivity frustrates all approaches to oblige businesses *directly* by way of a future BHR treaty, and it raises the question as to what extent this subject is regulatable by way of PIL at all. However, the question of what the actual implications of subjectivity in PIL – or rather of its absence – are is raised increasingly, especially in the BHR context.[506] As the scope of content of PIL grows, its substantive expansion progresses to include regulatory matters beyond traditional cooperation between states, whereas PIL originally was not required to accommodate actors other than the state.[507] Is subjectivity a *conditio sine qua non* of PIL necessary in order to legally bind or benefit certain actors?

The presumption that states alone could be the direct subjects of PIL has long been crumbling. As early as in the 1970s, the decade most often identified as the birth period of BHR initiatives, *Lauterpacht* noted that a conservative interpretation of the notion of subjectivity, at least when applied in IHRL, is reaching its limits rather quickly.[508] The dogmatic approach and legal concept was not always maintained by states and legal practice in a clear and strict way.[509] Within the current legal discourse on BHR, the whole value of the notion of subjectivity is challenged, especially as there are no common criteria to determine when subjectivity exists and what exactly its legal consequences are.[510]

However, the notion of subjectivity, in turn, is far from being clear.[511] How to distinguish subjectivity from notions such as legal capacity, legal personality or standing has not been consistently clarified, and it is probably the main reason for the increasing rejection of subjectivity as a constitutive element.[512] Sometimes, subjectivity is associated with legislative capacities in PIL, which would clearly exclude businesses.[513] However, this may challenge the ability to bear obligations in PIL only if PIL is understood as the law of coordination of

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[505] Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 234.; Cf. Pentikäinen, *supra* note 371, at 147.

[506] See Chetail, 'The Legal Personality of Multinational Corporations, State Responsibility and Due DIligence: The Way Forward', in D. Alland, V. Chetail, O. de Frouville and J. E. Viñuales (eds), *Unité et diversité du droit international/Unity and Diversity of International Law*: *Ecrits en l'honneur du professeur Pierre-Marie Dupuy/Essays in honour of Professor Pierre-Marie Dupuy* (2014), 105 at 120; Pentikäinen, *supra* note 371.

[507] Shaw, *supra* note 79, at 32 f.

[508] Lauterpacht, *supra* note 306, at 147 ff., 280 f.; See Chetail, *supra* note 506, at 109.

[509] Shaw, *supra* note 79, at 156 f.

[510] Pentikäinen, *supra* note 371, at 151.

[511] N. Carrillo-Santarelli, *Corporate Huma Rights Obligations*: *Controversial but Necessary* (2015), available online at https://www.business-humanrights.org/en/blog/corporate-human-rights-obligations-controversial-but-necessary/; D. Alland *et al. (eds)*, *Unité et diversité du droit international/Unity and Diversity of International Law*: *Ecrits en l'honneur du professeur Pierre-Marie Dupuy/Essays in honour of Professor Pierre-Marie Dupuy* (2014), at 107; Chetail, *supra* note 506, at 107.

[512] Pentikäinen, *supra* note 371, at 151.

[513] Chetail, *supra* note 506, at 111.

relationships between sovereign states, which, in turn, at least with regard to IHRL, cannot apply.[514] Moreover, albeit frequently invoked and relied on, subjectivity appears not to be an absolute principle of PIL, especially since there are numerous exceptions made to that principle within the constitution and application of PIL.[515]

Statehood has served as a main criterion of demarcation in the identification of subjects and non-subjects of PIL.[516] Subjectivity, thus, had a descriptive effect in this regard, as it enabled the demarcation of allegedly legitimate subjects of PIL, who have been legitimised to create law, for example, from other actors.[517] However, as non-state actors have increasingly gained relevance in the context of PIL and the question of their subjectivity arose, it has lost its contours. A demarcation of regulatory subjects of PIL based on subjectivity fails nowadays due to unforeseen scope and protective purpose. This became evident arguably for the first time within the ICJ's advisory opinion in the *Reparation for injuries suffered in the service of the United Nations* case.[518] The court noted that subjectivity is a flexible concept that can have different meanings depending on which actor it is used in connection with.[519] It did not interpret subjectivity as a notion allowing or requiring the exclusion of certain actors from the scope of PIL *rationae personae*. Neither did it determine hard criteria by which subjects of PIL could be identified. Rather, subjectivity is regarded to have a flexible scope, subject to re-evaluation and change. It is therefore reasonable to regard subjectivity to be acquired whenever an actor is subjected to international duties, e.g. by means of an international treaty, and is, thus, a legal status created by the law.[520] The law determines the conditions for legal personality, its scope, and consequences; it does not work in reverse.[521]

Due to all ambiguities and inconsistencies of this legal concept and its at least questionable conformity to current times, it can hardly be considered constitutive for the acquisition of legal obligations. For as long as it remains unclarified how the notion of subjectivity outside the sphere of the state is to be filled with content and for what legal consequence it is to be required, an alleged lack of it cannot be convincingly invoked as a counterargument for possible regulatory projects, especially since non-state actors have recently become regulatory targets of PIL in its other areas. An undefined legal obstacle cannot have a constitutive effect for legislation. It would be over-formalistic to thwart necessary regulation

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[514] Regarding the dissimilarities of IHRL as a legal discipline of PIL see **C.II.2.a),3.**

[515] Lauterpacht, *supra* note 306, at 141.

[516] Cf. Chetail, *supra* note 506, at 107 f.

[517] Pentikäinen, *supra* note 371, at 152. Klabbers, Intro Inst. 62

[518] Cf. *ibid.*, at 151.

[519] *Reparation for injuries suffered in the service of the United Nations, supra* note 503.

[520] See Shaw, *supra* note 79, at 262. He even envisaged this to be a possible method by which transnational corporations could be subjected to international duties in future.

[521] Cf. *ibid.*, at 195 f.

on this basis while regulatory gaps exist, i.e. because the prescribed remediation mechanisms are insufficient.[522] Rather, in sum there are many reasons to retain the descriptive function of subjectivity only. If an actor is bound by PIL, it qualifies as a subject of PIL.[523] Whether or not a certain actor may be subjected to PIL and bear international legal obligations, in turn, should be a question of differentiated analysis and normative considerations.[524] This analysis should focus on legal necessity, the perspective of the protected goods or persons, and the actual capacities of the actors to be regulated.[525] Capacity means the abstract ability, i.e. not adapted to concrete favourable or unfavourable circumstances, of a particular type of actor to fulfil the obligations imposed on it by law.[526] In the aforementioned advisory opinion of the ICJ, the court precisely inferred the existence of international subjectivity from the factual circumstances, i.e. the actual exercise of powers by the UN, and stipulated that the subjectivity depends on community needs. [527] It is therefore an inherently flexible concept, and it cannot be applied as a regulatory obstacle that would frustrate such community needs. Thus, the notion was applied rather as a descriptive characteristic regarding certain capacities and not as a kind of threshold to be overcome, as which it could possibly be interpreted.[528]

Businesses, in principle, possess the necessary capacities to contribute or counteract the promotion of Human Rights, as can be seen from the observations in the preceding sections. They thus, from a substantive or normative perspective, qualify as duty bearers of IHRL. Notwithstanding a general obligation to comply with IHRL founded on capacity, the law should additionally allow for differentiation regarding individually affected businesses and differing resources – individual *capability* – so that the scope of an obligation is appropriate to the interests at stake and does not exceed reasonable burdens or require an unaffordable effort in individual cases.[529]

The creation of obligations should not necessarily depend on an abstract qualification as a subject of PIL, which can be associated with any legislative powers and the like, and whose legal effects are indeterminate and possibly even indeterminable. Rather, if there is a

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[522] Cf. Carrillo, *supra* note 99, at 66 f.

[523] Cassell and Ramasastry, *supra* note 311, at 49; Pentikäinen, *supra* note 371, at 152.

[524] Pentikäinen, *supra* note 371, at 152; Klabbers, *supra* note 501, at 62.

[525] See Strahovnik, *supra* note 285, at 166 f; Carrillo, *supra* note 99, at 65, 94 f; Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 77.

[526] Strahovnik, *supra* note 285, at 166.

[527] *Reparation for injuries suffered in the service of the United Nations, supra* note 503, at 178 f.

[528] Cf. Klabbers, *supra* note 501, at 37.

[529] This differentiation is brought up by Strahovnik in Strahovnik, *supra* note 285, at 166 f. The question of differentiation between individual obliged actors is one of concrete legal designs, the framework of which should at least be specified in a BHR treaty, also in order to ensure equal treatment of the companies.

regulatory necessity to subject certain actors to certain obligations, e.g. because the regulatory objective would be at risk or marginalised otherwise, such actors should generally be considered legitimate addressees of the law, unless there are concrete logical or normative objections regarding a particular actor which require otherwise.[530] With regard to the material content and purpose of IHRL, no such normative objections arise. Nor are there logical objections. The objections raised by sceptics regarding BHR issues relate in large parts to the political feasibility and legal policy implications of an allegedly overly broad and overambitious international regulation of BHR, which will be addressed in the following section. However, regarding the lack of subjectivity of businesses, it remains to be noted that in its function as a regulatory barrier, it is over-formalistic and seems to be more of an artificial obstacle rather than serving a purpose of legally required limitation of the group of addressees.[531] Or as *Higgins* has put it: 'We have erected an international prison of our own choosing and then declared it to be an unalterable constraint.'[532]

If one nevertheless upholds subjectivity and classifies it as a constitutive element linked to statehood, it will leave any future BHR regulation with the intermediary – state-centric – approach only. Where the state is obliged to supervise the observance of IHRL among private individuals on a horizontal level and to enforce them by means of the rule of law.[533] As states are already obliged to take such positive legislative action on the domestic level by means of IHRL,[534] the main remaining innovative issue for the future BHR treaty would be how these obligations are to be fulfilled by the state and whether there is an extraterritorial dimension to such obligations. The future BHR treaty would, thus, constitute a kind of interpretative and concretising legal instrument. But its revolutionary and progressive character would probably be relatively limited. Based on the course of negotiations and the drafting process of the future BHR treaty to date, it is likely that the future BHR treaty will indeed remain consistent with the intermediary approach resulting from state-centrism. While in 2017, prior to the start of the drafting process, the possibility to introduce direct corporate obligations was considered within the OEIGWG, it appears to have been entirely rejected at

[530] Carrillo, *supra* note 99, at 64; Cf. Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 238.

[531] Carrillo-Santarelli, *supra* note 511; Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 77; Chetail, *supra* note 506, at 120.

[532] R. Higgins, *Problems and process* (1994), at 49; see also Pentikäinen, *supra* note 371, at 152.

[533] Cf. Bialek, *supra* note 187, at 522 ff.

[534] See van Ho, *supra* note 151, at 123 ff. as well as Sect**. C.II.1.** below.

the time of writing, with the Third Revised Draft being based on the intermediate approach, just as its predecessors.[535]

3. Enforceability as a Constitutive Requirement

In the context of the regulation of BHR issues by means of a treaty, initially only the preconditions for effective international obligation are of importance, not, for example, the ability to become a contracting party or any kind of international legal standing. The latter, however, is brought up in the context of the debate about the expansion of the concepts of subjectivity and legal personality regarding non-state obligations and responsibilities.[536] These are issues to be separated from the mere obligation of businesses as addressees and the claim of victims as a protected group of persons: while legal standing for instance is required in order to enforce a particular claim before a particular court, it is not a condition for the ability to breach law and be bound by it.[537] Naturally, higher requirements are placed upon features such as legal standing or even the exercise of legislative power, than to the mere ability to bear legal obligations.[538] The ability to postulate and the way laws are enforced by the executive powers are factors that affect the core of procedural law and administrative resources. Consequently, it is reasonable to link such features to further prerequisites to ensure efficiency and also to protect those affected, for example if they are not able to postulate their claims autonomously.

Thus, enforcement of any future BHR treaty is a separate issue from the question of regulation *per se*. Nonetheless, in this context, connections have been identified between the way in which obligations are enforced and their legal classification. Some argue that international provisions only ought to qualify as PIL if the corresponding implementation mechanisms are international in nature as well.[539] On an analogous basis, international treaties on Environmental Law, which regularly provide only for *national* implementation by victims of pollution, have been categorised as '*transboundary civil litigation'* because of their lack of an international enforcement mechanism.[540] Such a lack of PIL capacities to enforce provisions against private actors is sometimes considered evidence that, on the level of

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[535] Cf. López Latorre, 'In Defence of Direct Obligations for Businesses Under International Human Rights Law', 5 *Business and Human Rights Journal* (2020) 56, at 71; see United Nations Human Rights Council, ''Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to Human Rights': Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9' (2017).

[536] Klabbers, *supra* note 501, at 36 f.

[537] *Ibid.*, at 37 f.

[538] Cf. *ibid.*, at 37.

[539] Černič, *supra* note 377, at 146; see Vazquez, 'Direct vs. Indirect Obligations of Corporations Under International Law', 43 *Columbia Journal of Transnational Law* (2005) 927, at 940 f.

[540] Ratner, *supra* note 45, at 481.

material law, no claims against private actors exist or can exist at the international level.[541] It is argued that there is no basis in PIL for such claims.[542] However, the fact that the procedural implementation of a claim is outsourced to national mechanisms does not diminish its existence or its assignment to PIL as such.[543] Rather, a legal obligation may exist even if it is not enforceable or the system of enforceability has not yet been determined.[544] A norm may have legal force and binding nature at the level of PIL and nevertheless depend on action and enforcement at the national level if the relevant source of law or treaty provides for such primary or exclusive national enforcement. This will not deprive a legal norm of its quality as such. Legal rights without legal remedies are weak but not conceptually impossible.[545] This is particularly evident in the context of IHRL as a kind of atypical discipline of PIL and undermined by the findings of the ICJ in the proceedings *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*.[546] The ICJ found that the existence and legal force of an obligation are not dependent upon the existence of a judicial enforcement mechanism, and states are therefore bound by obligations under PIL even if there is no court that can enforce them.[547] In IHRL, unfortunately, non-justiciability and legal non-enforceability are no anomaly.[548] To equate law with its consequences may, thus, not serve as an argument against BHR regulation in IHRL.[549]

It is an inherent characteristic of PIL and especially of IHRL that enforcement is complementary to national law, i.e. primarily based on national mechanisms. Victims of violations of Human Rights obligations by states cannot, generally, enforce claims resulting from such violations at the international level, but must first necessarily exhaust all available national remedies.[550] This does not mean, however, that the state's obligation with regard to the Human Rights concerned only comes into existence at the level of PIL after such

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[541] Černič, *supra* note 377, at 145 f.

[542] *Ibid.*, at 145.

[543] *Ibid.*, at 146; Ratner, *supra* note 45, at 481.

[544] López Latorre, *supra* note 535, at 69; Ratner, *supra* note 45, at 481.

[545] Luban, *supra* note 21, at 267.

[546] Chinkin, *supra* note 75, at 63; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* International Court of Justice (2015) I.C.J. Reports 2015, 3.

[547] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), supra* note 546, at para. 86.

[548] Luban, *supra* note 21, at 268.

[549] On to the misconception to equate the legal consequences with the quality of a norm, see *ibid.*, at 268 f.

[550] See for instance Art. 5 Sec. 2 lit. b) of the first Optional Protocol to the ICCPR; on the principle of prior exhaustion of local remedies in PIL and IHRL see S. D'Ascoli and K. M. Scherr, 'The Rule of Prior Exhaustion of Local Remedies in International Law Doctrine and its Application in the Specific Context of Human Rights Protection: EUI Working Paper LAW No. 2007/02' (2007).

exhaustion of local remedies have taken place. Claim incurrence and enforceability are two different matters. Another example is ICL. The ICC has no jurisdiction over a violation of ICL as long as enforcement proceedings take place at the national level, even if the act in question fully satisfies the elements of one of the crimes codified in the Rome Statute.[551] However, even before the ICC acquires jurisdiction, the international obligations to refrain from crimes enshrined in the Rome Statute exist and emanate binding force. Accordingly, legal obligations of any kind do not cease to exist only because the envisaged judicial mechanisms to enforce these laws are disturbed or destructed. However, corresponding outcomes could be derived by recognising an inherent dependency between the existence of legal obligations and the availability of enforcement mechanisms. Therefore, the formulation and codification of obligations in legal sources of PIL cannot depend on the manner in which they are enforced.[552] Businesses are legitimate actors to be addressed by future BHR regulations even if there is no international judicial enforceability mechanism directed at them, namely when enforcement is outsourced to national or non-state grievance mechanisms. The qualification of certain business' conduct as a breach of obligations cannot be affected by this.

[551] Art. 17 ICC-Statute; on the principle of complementarity in the International Criminal Law regime stipulated by the ICC-Statute see El Zeidy, *supra* note 469, at 239 ff. (Chap. 4).
[552] Černič, *supra* note 377, at 146.

C. Particularly Disputed Regulatory Content of the Future BHR Treaty

In one of the most remarkable and early pieces on the allocation of non-state actors in PIL, *Clapham* rightly noted that the way we deal with non-state actors in IHRL will influence our future perception and advancement of Human Rights as a whole.[553] The general necessity to regulate businesses that (potentially) influence the guarantees of IHRL, in particular negatively but also positively, has been presented in the previous sections and is arguably largely uncontroversial nowadays. In general, PIL provides the means to accommodate the subject matter of BHR. With the OEIGWG process, an initiative is underway to realise the regulatory demands regarding businesses' Human Rights performance. The question of *'whether'* there should be a treaty has therefore been largely settled and after the publication of three treaty drafts is no longer openly contested. However, the concrete modalities of how to successfully accomplish the objectives of international BHR regulation within a future treaty remain controversial. In the context of this work, an impression is to be provided whether and how the BHR treaty initiative is suitable to improve the Human Rights situation in connection with business activities noticeably at the points where it is most important, which is in *'the daily life of people'* as SRSG *Ruggie* aptly stated.[554]

The following sections address issues that have been the subject of dispute in the negotiation process of the OEIGWG and the regulation of which will be decisive for the effectiveness of the future BHR treaty. In order to determine in which way certain regulatory contents ought to be designed, a two-step process is required: first, the concrete goal of the future BHR treaty must be identified and formulated. Thus, what is the treaty supposed to achieve?[555] There are tendencies to answer this question not based on normative considerations but rather based on potential to attract as many state ratifications as possible.[556] However, concrete measures which ought to be included in a future BHR treaty should be primarily determined on the basis of its' object and purpose, in order to gain a normatively sound solution. Only after these preliminary considerations have been made is it appropriate to address potential obstacles from outside the law itself and apply further filters

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[553] Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 2.

[554] Special Representative of the Secretary-General, *supra* note 477, at para. 81.

[555] See Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 204 f., who rightly observes that the debate about the BHR treaty is being approached from the wrong side, as it usually starts and is mainly concerned with the counter-arguments to and implementation of the project, not with the regulatory necessities.

[556] Cf. Fasciglione, *supra* note 36, at 32 f.

regarding the necessary regulatory measures, e.g. to filter out those regulatory approaches that would counteract the practical success of the treaty or its so-called *political feasibility*.[557]

In general terms, the future BHR treaty is intended to ensure effective enforcement of the regulatory ambitions of IHRL, particularly as articulated in the International Bill of Rights, at the horizontal level, i.e. in legal and *de facto* relations between private non-state actors. At this level of Human Rights protection, there are effectivity gaps due to genuine legislative loopholes and insufficiencies, *de facto* impossibility, or malfunction of envisaged law enforcement mechanisms. Despite the lengthy legislative history of BHR as well as the OEIGWG negotiations on the future BHR treaty that have been going on for years now, the regulatory necessities regarding BHR are still marginalised, with some stakeholders and observers classifying the treaty initiative as superfluous or even counterproductive in light of the already endorsed UNGP.[558] The UNGP have made a valuable contribution to the protection of Human Rights in the business context, but they have not sufficiently closed the regulatory gaps – for many of those affected, at least, a noticeable change has arguably failed to materialise to date.[559]

When aiming to close governance gaps, one must first define the regulatory ambition of the affected law. For IHRL, it is indisputably the protection of human dignity – all the individually defined Human Rights serve this end.[560] However, IHRL is also about the limitation of power and the balancing of power asymmetries.[561] Monopolies of power generate arbitrariness and can arguably be qualified as natural enemies of absolute and universal human dignity. In addition to the substantive guarantees of IHRL and the protection of human dignity, the balancing of power asymmetries is a regulatory concern of IHRL and a regulatory objective of the future BHR treaty, which should be considered in particular in the design of the personal scope of application.[562] However, traditionally there is only little regulation and custom regarding the protection from commercial powers held by private business entities.[563]

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[557] The term as used by Garrido Alves, *supra* note 39, at 40 ff.

[558] Ford and Methven O'Brien, 'Empty Rituals or Workable Models?: Towards a Business and Human Rights Treaty', 40 *University of South Wales Law Journal* (2017) 1223, at 1227; Cassell and Ramasastry, *supra* note 311, at 11.

[559] B. Faracik, 'Implementation of the UN Guiding Principles on Business and Human Rights' (Brussels, 2017), at 8 ff; see also African Coalition for Corporate Accountability, *Declaration of 27th November 2013* (2013), available online at https://www.accahumanrights.org/en/resources/acca-declaration.

[560] Carrillo, *supra* note 99, at 52 f. See also Sect. B.I. above,.

[561] Strahovnik, *supra* note 285, at 173; see Wetzel, *supra* note 427, at 3 ff.

[562] On this issue see Sect. **C.I.**

[563] Strahovnik, *supra* note 285, at 173. Referring to further evidence.

I. Scope of a Future Treaty – Focus on Transnationality or Applicable to All Businesses?

A highly controversial issue that has accompanied the negotiations on the future BHR treaty from the very beginning is the scope of the treaty *rationae personae*.[564] Namely, whether it shall address *transnational* businesses exclusively or whether it should include all types of businesses in its general scope of application. Originally, the resolution establishing the OEIGWG contained the mandate to elaborate a framework regulation precisely on *transnational* businesses only.[565] A footnote in the resolution establishing the mandate declares explicitly that the resolution, to elaborate *'an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights'* refers to such business enterprises only, which have a transnational character in their business activities and does *'not apply to local businesses registered in terms of relevant domestic law'*.[566]

Until today, no uniform common PIL definition of the term *transnational corporations ('**TNC**')* has emerged.[567] However, there are two identifiable essential criteria that can be found repeatedly within the most common definitions of transnational corporations referred to for PIL purposes.[568] In order to qualify as a TNC, business operations should be spread geographically across borders, covering at least two different jurisdictions.[569] This criterion appears within the definitions of various PIL bodies and institutions, such as the OECD, the ILO and the UN.[570]

The second commonly identifiable criterion is the ability of one corporate unit within a TNC to coordinate and exercise control over other corporate units across borders, or rather

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[564] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 68; A. Ganesan, *Dispateches: A Treaty to end Corporate Abuses* (2014), available online at https://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses.

[565] United Nations Human Rights Council; Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to Human Rights, UN Doc. A/HRC/RES/26/9, *supra* note 355.

[566] See*ibid.*, at 1 at footnote 1; Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 68.

[567] H. Geldermann, *Völkerrechtliche Pflichten multinationaler Unternehmen* (1st ed., 2009), at 28; Krajewski, 'Die Menschenrechtsbindung Transnationaler Unternehmen', 2012 *MenschenRechtsMagazin* (2012) 66, at 68 f; Shaw, *supra* note 79, at 197.

[568] Krajewski, *Die Menschenrechtsbindung Transnationaler Unternehmen, supra* note 567, at 69.

[569] Ipsen and Heintze, *supra* note 293, at 384.; Krajewski, *Die Menschenrechtsbindung Transnationaler Unternehmen, supra* note 567, at 69.; Cf. Stephens, *supra* note 6, at 54.; United Nations Conference on Trade and Development, 'The universe of the largest transnational corporations, United Nations Publications 2007 UNCTAD/ITE/IIA/2007/2'.

[570] International Labour Organization, 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' (2017), at 3.; Organisation for Economic CO-operation and Development, 'Guideleines for Multinational Enterprises' (2011), at 19.; United Nations Commission on Transnational Corporations, 'Draft UN Code of Conduct on Transnational Corporations,' (1983), at 292.

extraterritorially.[571] This criterion arguably ought to address the complexity of corporate structures of transnational businesses and as such is closely related to the issue of *piercing the corporate veil*.[572] This criterion, thus, serves mainly functional purposes. Businesses operating in complex corporate structures, with different units, subsidiaries, and parent companies exercising control over each other are considered a particular danger as regards legal liability and recourse for violations of law, due to their difficult jurisdictional tangibility under the principles of segregation of legal personality.[573] The criterion of control of one corporate unit over another ought to allow for recourse to the parent, for instance, even though the legal entities are segregated.[574] However, to include this restrictive criterion in a definition decisive for the scope of application of a future BHR treaty would grant the possibility of avoiding the application of law through the exploitation of strategies to structure a corporation, even though international business activities are conducted. It would therefore promote the challenges of piercing the corporate veil, rather than resolving it.

In accordance with the original mandate of the OEIGWG, the Zero Draft stipulates in its Art. 3 para. 1 that the proposed treaty shall apply to '*business activities of a transnational character'*. Thus, while sticking to the criterion of transnationality, it does not rely on the transnationality of the business itself but rather of its actions. In Art. 1 para. 4 of the Zero Draft, business activities of transnational character are defined as *'for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions.'* Hence, only the criterion of geographical distribution to more than one state was included in this first draft proposal for a future BHR treaty. The most recent TRD contains a more precise definition of transnationality, or rather the *'transnational character'* of business activity. It explicitly provides for a broad interpretation of this term, enumerating concrete cases of application when a business activity is to be considered transnational in its Art. 1 para. 4, namely

(a) when it is undertaken in more than one jurisdiction;

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[571] Vitzthum, Proelß and Bothe, *supra* note 77, at 182.; Krajewski, *Die Menschenrechtsbindung Transnationaler Unternehmen, supra* note 567, at 69.; Shaw, *supra* note 79, at 197.; Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities', 23 *American University International Law Review* (2007) 451, at 481f.

[572] McCorquodale and Simons, *supra* note 190, at 617. See International Commission of Jurists, *supra* note 290, at 13.

[573] International Commission of Jurists, *supra* note 290, at 13 f.

[574] McCorquodale and Simons, *supra* note 190, at 617.

(b) when it is undertaken in one State through any business relationship, but an essential part of its preparation, planning, direction, control, design, processing, manufacturing, storage, or distribution takes place in another state; or
(c) when the business activity is undertaken in one State but has substantial effect in another state.

In principle, the last two cases of application allow for a wide range of situations, especially if one additionally considers the definition of '*business relationships'* contained in Art. 1 para. 5, which allows for practically any connection based on a contractual relationship (between both natural and legal persons), including in particular supply chains and joint ventures.[575] It follows from this provision that within the framework of the future BHR treaty (provided it will be adopted in accordance with the TRD), a control relationship between different economic units within a business will not be considered necessary in order to classify its business activities as transnational. However, the question of transnationality is only accorded limited importance in the TRD regime anyway.

The TRD adopts a '*hybrid approach'* with regard to the personal scope of a future BHR treaty, i.e. putting a special focus on transnational corporations and, thus, their special role regarding BHR, but nevertheless allowing for application to all kinds of businesses *rationae personae* in its Art. 3 para. 1, even only nationally operating businesses.[576] According to this *'hybrid approach'*, transnationality must be understood as an *indicator* of the abstract as well as concrete Human Rights risk emanating from a business enterprise rather than an exclusion criterion or mandatory prerequisite for application of a future treaty. Thus, at this point in the OEIGWG negotiations, the limited personal scope of the treaty originally envisaged by the UN mandate seems to be off the table.

At first glance, any limitation of scope regarding particular forms of businesses appears detrimental to the objective of BHR regulation. It seems reasonable to define the scope as broadly as possible to cover as many Human Rights issues as possible and thereby reach as many potential victims as possible. An argument which is often brought forward by advocates of a rather broad personal scope of a future BHR treaty, and one that is hardly disputable is that, from the perspective of victims, it makes no difference what type of corporation the

[575] The indeterminate legal terms used in the enumeration, such as 'substantial effect' and 'essential part', are obviously open to interpretation and allow restrictions to the generally broad scope of application. However, this is not fully avoidable and to a certain extent even necessary in order to allow for a flexible and proportionate application of law.

[576] The term ‚*hybrid approach*' was introduced by Surya Deva, who propagated such approach in early phases of the OEIGWG negotiations, see S. Deva, *BHR Symposium: The Business and Human Rights Treaty in 2020*: *The Draft ist "Negotiation-Ready", but are States Ready?* (2020), available online at https://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/.

perpetrator of a Human Rights violation belongs to, nor how its business operations are organised and distributed geographically.[577] Moreover, the question whether a business operation is transnational is limited to economic and private law factors, which are generally at the disposal of the business in question, such as corporate structures and hierarchies, the business model, geographical distribution of business activities and economic participation in different national markets. With regard to Human Rights violations to be regulated, these are external factors and not necessarily decisive circumstances regarding the interests of victims and severity of violations. They are therefore naturally a gateway for abusive legal circumvention strategies as well as the application of double standards in favour of businesses using opaque corporate structures and links to escape liability.[578]

From the first session of the treaty negotiations, the limited personal scope envisaged for the future BHR treaty by the OEIGWG mandate and the Zero Draft was the subject of controversial debates. The European delegation in particular persistently demonstrated against a limitation to transnationality, blocking the negotiations and even making attempts to entirely withdraw therefrom.[579] European Union member states are home to many of the largest transnationally operating businesses, and the proposed limitation of scope to transnationality would *de facto* most strongly affect 'western businesses' compared to businesses located in developing states, which more often tend to not reach beyond a mere regional dimension.[580] Therefore, it appears at least doubtful whether the opposition of the European Union delegation was motivated by Human Rights concerns or rather political interests, especially in light of their general opposition to any binding international BHR regulation prior to the OEIGWG negotiations. However, as the current version of the TRD shows, these efforts have paid off.

Even though indeed, at least from the point of view of victims, a limitation of the personal scope to TNCs alone appears difficult to communicate, the widest possible scope of application must not necessarily lead to fair results. Fair results require a balance of interests. Excessively generalised and undifferentiated regulations are neither required by nor compatible with the rationale of IHRL. It is reasonable to differentiate with regard to the

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[577] Garrido Alves, *supra* note 39, at 19; Suárez Franco and Fyfe, *supra* note 48, at 150; see also Bloomer and Zorob, *supra* note 270, at 2. Highlighting the qual vulnerability of victims and lacking remedial resources with regard to both, national and international corporate actors.

[578] Suárez Franco and Fyfe, *supra* note 48, at 150; S. Deva, *Corporate Human Rights Abuses and International Law*: *Brief Comments* (2015), available online at http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/.

[579] European Coalition for Corporate Justice, *UN Treaty on Business & Human Rights negotiations Day 2*: *EU disengagement & Lack of consensus on scope* (2015), available online at https://corporatejustice.org/news/174-un-treaty-on-business-human-rights-negotiations-day-2-eu-disengagement-lack-of-consensus-on-scope.

[580] Ganesan, *supra* note 564, at Cf.

personal scope of application – especially if comprehensive substantive provisions and obligations are introduced – and to avoid holding small, local corporations with a few employees accountable in the same way as influential businesses that might endanger Human Rights on a daily basis, but rather to apply a more risk-based approach.[581] Thus, for reasons of proportionality, the personal scope of the future BHR treaty should be neither unlimited, nor should it be possible to circumvent its application by a simple reorganisation of corporate structures or business operations.[582] The focus regarding the definition of personal scope of the future BHR treaty should be less on whether any limitation is needed, but rather *whether transnationality is the right criterion for such limitation.*

Although the trend seems to be to subject all businesses to a future treaty regime and thus to retain the approach of the UNGP,[583] there are definitely justifiable dissenting approaches defending a restriction based on transnationality, especially for reasons of proportionality and pragmatism. Some even make the qualification as PIL dependent on this very factor.[584] The more general issue behind such arguments is whether international regulation ought to be regarded as an appropriate instrument for BHR if it does not at all require some form of transnationality or international relevance in its scope of application.

1. International Concern Limited to Transnationality

Generally, enjoyment of Human Rights, as it is based on the absolute right to human dignity, should be protected against any intrusions of power, regardless of their nature.[585] Consequently, it could be argued that this need for protection arises regardless of concrete characteristics inherent in the nature of the intruder and even *a fortiori* if these characteristics are controllable or manipulable by the latter.[586]

According to *Garrido Alves,* the transnationality of corporations and their business activities is what gives rise to the need for *international* regulation in relation to BHR in the first place.[587] To simply remove transnationality as a requirement of application from the future BHR treaty would therefore practically undermine the *raison d'etre* of the entire regulatory project as a

[581] Cf. Deva, *supra* note 576.

[582] Cf. Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 221.

[583] Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 6.

[584] Cf. Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 221 ff. cf. Garrido Alves, *supra* note 39, at 20.

[585] Fasciglione, *supra* note 36, at 40.

[586] See the report of the first session of treaty negotiations, where some panellists noted that all entities yielding power should generally be covered by the scope of the future treaty United Nations Human Rights Council, 'Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument: UN Doc. A/HRC/31/50' (2016), at para. 44.

[587] Garrido Alves, *supra* note 39, at 20, 22.

regulatory matter of PIL. The regulatory gaps identified in IHRL in relation to BHR issues would only arise in the context of TNCs, as only in the case of such corporations would there be a problem with regulation and access due to the applicability of different jurisdictions and regulatory gaps in PIL, and additionally, the potential of a '*race to the bottom'* for Human Rights would only exist in transnational contexts.[588] Even *Bilchitz*, while in conclusion supporting the inclusion of all businesses, as this would be desirable from a normative perspective of IHRL, concedes that the need for international regulation which the future BHR treaty is intended to serve, exists precisely in connection with TNCs.[589] It is especially their business models that are capable of exploiting the lack of uniform international regime, and thus benefit from the weaknesses of PIL and pose a particular danger to IHRL and potential victims.[590] At the core of this argument is the issue of so-called *'forum shopping'*, whereby TNCs relocate and outsource certain business processes to states with laws that are disadvantageous to Human Rights protection, in order to save costs. This reasoning implies that in cases where no transnationality exists, regulation of business impact on Human Rights might adequately take place on the domestic level only.

The problem of corporate impunity, however, does not always have to be rooted in the ramifications of differing legal systems and competences. Rather, there may also be a lack of material obligations and prohibitions or failure of executive mechanisms within single particular states – whether this is due to a lack of capacity or a lack of will.[591] Moreover, it is certainly too short-sighted to reduce the governance gaps with regard to BHR and its regulatory necessities to the problems of '*forum shopping'* and '*race to the bottom'* for Human Rights.[592] Rather, BHR regulation is also intended to address issues such as establishing the right perpetrator's liability, harmonising minimum Human Rights standards internationally and restoring balanced power relations, both vis-à-vis individuals and vis-à-vis affected states (see more on this in the following sections). However, all this is not exclusively relevant in transnational situations, but can also become relevant in the case of nationally operating businesses, e.g. where these operate in critical infrastructure or exercise control over entire economic sectors. Admittedly, transnationality will regularly constitute a decisive factor fuelling the legal and practical challenges related to BHR issues. However, in certain cases, small and only nationally operating businesses might even be more ambitious when it comes to influencing a state's governance activities, because, unlike transnationally operating corporations, they do not have an infrastructure in other jurisdictions to fall back on

[588] *Ibid.*, at 20; See also McBrearty, *supra* note 346, at 13.

[589] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 220 ff.

[590] *Ibid.*, at 221.

[591] Cf. Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 70.

[592] Cf. McBrearty, *supra* note 346, at 13.

and often have more limited financial resources, which makes it necessary to protect their investment in one state. While a TNC might be able to escape a regulatory reform by simply relocating single business processes to a more liberal state, local companies which depend on customers in their home state will have to resort to other means and thereby exert their influence.[593]

Another major issue frequently arising in the context of BHR, which has demonstrably not been significantly improved by the UNGP, are the deficiencies in access to remedy after a corporate Human Rights violation has occurred.[594] Due to different circumstances, which are partly outside the sphere of influence of businesses and partly originate in the relationship between the state and businesses, victims of corporate Human Rights violations are often confronted with obstacles when pursuing their legal rights. These obstacles range from institutional deficiencies in state grievance mechanisms to a factual inequality of arms between individuals and businesses that is not sufficiently balanced by legislation. For example, a victim may not be able to meet his or her procedural burden of proof because he or she does not have access to necessary information withheld by the business, nor does the state provide any relief or assistance in this regard.[595] Or there might be no adequate victim and whistle-blower protection mechanisms provided in the national legal order, especially for matters in the employment relationship, which beyond procedural mechanism ought to provide social and financial protection to affected persons.[596] Finally, judicial bodies can be simply influenced by the business community, especially if there are no sufficient laws and monitoring or control mechanisms in place.[597] All these factors contribute to the need for regulation in relation to BHR and require consideration in relation to both transnational and regional businesses alike. Put simply, there is no reliable evidence or surveys available that would allow one to conclude that Human Rights violations through business activities occur only in transnationally operating businesses, or at least to such a disproportional extent that

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[593] Börzel and Deitelhoff, *supra* note 1, at 257.

[594] See Faracik, *supra* note 559, at 18 f., 60.

[595] An issue arising from the general procedural inequality of arms between businesses and individuals which, inter alia, ought to be addressed by the Hague Rules on Business and Human Rights Arbitration. See Gläßer and Kück, *supra* note 256, at 129 f.

[596] The EU has only recently adopted a directive on this issue, the implementation of which was due for Member States until the end of 2021. See Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law, 23 October 2019; 'Whistleblowing Directive' On the relevance of such legislation for BHR grievance mechanisms and their effectivity see Saloranta, 'The EU Whistleblowing Directive: An Opportunity for (Operationalizing) Corporate Human Rights Grievance Mechanisms?' *European Business Organization Law Review* (2021) 753.

[597] The challenges to the functioning and effectiveness of remedy mechanisms in BHR contexts are discussed in more detail below, at Sect. **C.IV**. The considerations here only serve to illustrate the independence of the various regulatory subject from transnationality.

could justify different legislative approaches for transnational and national business. Rather, complaints regarding corporate abuse of power and Human Rights maltreatment emerge equally against purely national as well as transnationally operating businesses and, notably, the procedural legal situation in many jurisdictions often does not allow for effective action against Human Rights violations from either of these sources.[598] While it is undisputed that transnational cases have the potential to create additional dangers and hurdles for victims of corporate Human Rights violations, an exclusion on the basis of transnationality does not seem justified or in line with the purpose of a future BHR treaty. It is difficult to legitimate such a differentiation, especially from the perspective of the victim, which by default should be the basis for any Human Rights regulation in the sense of *normative individualism*.[599] This term has been introduced in the context of evaluations on group agency and used by *Strahovnik* in order to argue for a comprehensive regulation, adapted to the circumstances of the current time, of BHR issues and restrictive handling of business conduct.[600] Normative individualism means that in order to determine whether group agents should be allowed to exist and what obligations and responsibilities law should impose on them, the rights, benefits and interests of individuals should be decisive.[601] Thus, the outcome of legislative Human Rights initiatives and the content of regulation ought to be determined by ~~means of~~ the needs of individuals and society in the first place. A differentiation in line with the interests of both victims and businesses should be rooted in the potential for abuse and be suitable to accommodate actors who evade legal access and prosecution under the current *status quo*. However, neither of these is objectively an exclusive question of the geographical distribution, transnationality, of business activities.

In this sense, any dependence of the personal scope on external circumstances and factors exclusively in the sphere of the regulated businesses should be considered very critically. This would generate a scope of application that is blind to any particularities and details of the Human Rights violation in question and its underlying relationship between businesses and victims. However, it is precisely the latter two circumstances that are decisive for the severity of a Human Rights violation and its 'scope of injustice', which ought to be countered by a BHR regulation. Such an approach might lead to paradoxical legal outcomes: for instance,[602] if a BHR treaty was in force at the time of the Rana Plaza incident, and its scope was restricted to TNCs exclusively, the multinational retailers behind the textile factories,

[598] Bloomer and Zorob, *supra* note 270, at 2.

[599] Strahovnik, *supra* note 285, at 173.

[600] *Ibid.*, at 173, 177.

[601] See C. List and P. Pettit, *Group Agency* (2011), at 180 ff; Strahovnik, *supra* note 285, at 173.

[602] The following example is based on the example provided by J. Ruggie, 'Closing Plenary Remarks: Third United Nations Forum on Business and Human Rights' (Geneva, 3rd 2014).

such as *Mango* or *C&A*, could be held liable provided that all requirements for liability are met. But regarding the subcontractors acting on their behalf, which may be small local firms, additional effort to justify application would be required – albeit these were the last actors in the chain of events and it were their representatives who presumably forced employees to continue their work despite the visibly bad condition of the building.[603] Not only does this outcome seem unfair, it would also not be conducive to the prevention of corporate Human Rights violations. It would frustrate any deterrent effect for those local businesses at the end of supply chains, who ultimately realise measures that might result in violations of Human Rights. Additionally, such a limitation of scope that is blind to the details of the case at hand could lead to further contradictory outcomes, as the infringement of the same Human Right within the same jurisdiction of a state could be classified and persecuted differently, both at international and national level, only because it concerns a purely national business.[604]

Turning away from transnationality as a threshold of the personal scope of application must not necessarily result in an unreasonable marginalisation of this factor for BHR issues either.[605] Entering into a transnational supply chain and thus outsourcing individual business processes and production steps is a Human Rights risk in itself. Businesses thereby lose control over the Human Rights impact of their outsourced processes. Thus, naturally, TNCs more frequently pose a major threat to Human Rights than purely regionally operating businesses.[606] However, precisely because transnationality so often constitutes a factor contributing to escalation in BHR matters, it will always remain the main case of application or rather the 'natural focus' of the future BHR treaty.[607] Thus, an unreasonable perversion of the BHR treaty only by extension of its personal scope appears unlikely. Moreover, there are other ways and regulatory tools beyond the personal scope by which the special relevance of transnational corporations can be reflected in treaty application to produce fair and balanced outcomes that are in line with the interests of all involved parties. These are already being taken up by the TRD. The distinction between certain types of businesses and individual capacities may become relevant in the application of certain BHR norms, as Art. 3 Sec. 2

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[603] Cf. McBrearty, *supra* note 346, at 13; Bundeszentrale für politische Bildung, *supra* note 258; Clean Clothes Campaign, *Remembering the Rana Plaza workers by continuing the fight for workers' rights during the pandemic* (2020), available online at https://cleanclothes.org/news/2020/remembering-the-rana-plaza-workers-by-continuing-the-fight-for-workers-rights-during-the-pandemic.

[604] Cf. C. Lopez, *Towards an International Convention on Business and Human Rights (Part I)* (2018), available online at http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/.

[605] Cf. *ibid.*

[606] Cf. Nolan and Frishling, *supra* note 286, at 113.classifying global supply chains as "arguably the most ubiquitous human rights risk faced by companies across industries and sectors today".

[607] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 69.

TRD allows states to differentiate in their implementation of the BHR treaty with regard to the concrete obligations and their extent to be imposed on a business on the basis of its size, sector, operational context or severity of the Human Rights violation.[608] Transnationality is a major factor to be considered at this point, especially due to its explicit inclusion in Art. 3 Sec. 1 TRD. The fact that smaller or only nationally operating businesses often pose less of a risk to Human Rights protection and could therefore be exempted from certain precautionary obligations can therefore be used as a corrective within the framework of Art. 3 Sec. 2 TRD within the assignment of concrete obligations.[609] However, as there are other conceivable use cases beyond TNCs, it is not self-evident why transnationality ought to be applied as an exclusion criterion within the personal scope of application of a future BHR treaty.

The more general question behind the argument in favour of a limitation of scope to transnationality is whether corporate behaviour as such constitutes a subject for international regulation at all, which seems to be answered affirmatively by the decisionmakers and legislators.[610] Nevertheless, the question arises as to why IHRL constitutes the appropriate legislative forum, as transnationality of businesses is often considered a decisive factor for their qualification as *international* regulatory subjects.[611]

Objectively, it appears reasonable to require some kind of international relevance for a subject matter to be qualified as a concern of PIL.[612] It is only logical to associate situations, which, due to their cross-border dimensions, exceed the scope of a single jurisdiction with international regulatory subjects. And, undeniably, the fact that businesses are increasingly operating internationally - which may limit governmental access and regulation - is part of the regulatory rationale for the future BHR treaty and the overall legal notion of BHR. The international corporate structure of businesses directly contributes to their independence from state authority, their power and, thus, their potential for Human Rights abuses, exposing gaps in IHRL. However, looking at the purposes of IHRL and the events leading to the recognition of regulatory need in BHR issues, it appears that transnationality is not the decisive prerequisite for the regulation of corporate conduct internationally – transnationality is rather a factor that often correlates with the actual prerequisite, which is the existence of a

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[608] Cf. Deva, *supra* note 576.

[609] Cf. Taylor, 'Human Rights Due Diligence in Theory and Praxis', in S. Deva and D. Birchall (eds), *Research Handbook on Human Rights and Business* (2020), 88 at 92.

[610] Cf. Ratner, *supra* note 45, at 488.

[611] See Karp, *Responsibility for human rights, supra* note 47, at 28.

[612] Transnationality would thus somewhat serve as the BHR pendant to the severity of crimes required by ICL. A similar approach exists in the supranational legislation of the European Union, where treaty law concluded between member states comes into direct effect (i.e. in the private sphere) only if the issue in question is of cross-border relevance, see Lippert, 'Der grenzüberschreitende Sachverhalt: Der Yeti des Europarechts', 17 *Zeitschrift für Europarechtliche Studien* (2014) 273, at 276 ff.

subordination relationship between individuals and businesses.[613] Human Rights are an internationalised regulatory subject by nature, as the origin of their regulation under PIL lies precisely in the recognition that this subject matter of regulation, even if it only takes place within the framework of one jurisdiction, cannot be left to national discretion.[614] It is widely accepted that the protection of Human Rights, by nature, constitutes an international regulatory concern, even if it affects Human Rights treatment on a purely domestic level only.[615]

Historically, it was one of the reasons for the very emergence of the regulatory subject of Human Rights at a PIL level that the lessons of history from the first half of the 20th century taught the international community that the task of Human Rights protection cannot be left to responsibility of nation states alone.[616] It showed that national legal systems are often exposed to regional influences that can have an impact on their material content and violate the rule of law. This is incompatible with core characteristics of IHRL, such as its universality, its association with human dignity, indispensability, and natural law components. Internationality is a consequence of the universality of Human Rights.[617]

Traditionally, the individual nation state is, in simple terms, the sole decision-maker on what is just and what is not. It is not subject to any supervision and control within its own area of sovereignty. Within one jurisdiction, it is therefore easy to deliberately disregard or circumvent laws without consequences from abroad, as long as it concerns purely domestic dimensions and at the national level. The international community has concluded that at least some Human Rights must be guaranteed internationally and beyond the disposition and sovereignty of individual states.[618] By virtue of international Human Rights treaties, a generally applicable standard was introduced, which sets equal minimum requirements for all states and defines precisely when these can be deviated from, e.g. in states of emergency.[619] This prevents solo attempts and derogations of the rule of law motivated by arbitrary regional political or other peculiarities, at least with regard to the protection of Human Rights. Thus, it is precisely the arbitrary exercise of sovereign power by a single superior state that ought to be curbed, and by reducing its permissible scope of action, the state's position of power is weakened and aligned with that of the individual. Concomitantly, national issues that only take place within the jurisdiction of a single state have been internationalised. International

[613] See in more detail in the next section below.

[614] Tomuschat, *Human Rights, supra* note 68, at 2.

[615] Nowak and Januszewski, *supra* note 38, at 113 f; Monnheimer, *supra* note 73, at 259 f., 286 f.

[616] Vitzthum, Proelß and Bothe, *supra* note 77, at 266.

[617] Luban, *supra* note 21, at 263.

[618] Vitzthum, Proelß and Bothe, *supra* note 77, at 266.

[619] See for instance Art. 4 ICCPR.

Human Rights treaties constitute a benchmark by which third states and, eventually, even competent international institutions monitor and control one another. IHRL cases are thus, by their very nature, quasi independent of transnational references. Rather, the initial idea of IHRL is precisely founded on events taking place within one jurisdiction, which, without their explicit regulation, could possibly escape international access and attention.

Therefore, regardless of whether there is transnationality or cross-border relevance of a particular subject matter or not, the material regulatory scope of IHRL nevertheless applies. Provided that a future BHR treaty takes a step away from state-centrism and recognises the Human Rights responsibility of businesses to a certain extent (whether this is to be enforced directly or indirectly), the lack of cross-border relevance alone cannot be a valid argument against international regulation. International relevance exists whenever Human Rights are concerned.

2. Personal Scope Based on Power Asymmetries and Subordination Relationships

The personal scope of application of a future BHR treaty must correspond to the regulatory purposes of such a treaty.[620] PIL is originally considered to regulate inter-state relationships and the coordination between states, as domestic law might be insufficient to regulate the behaviour of another sovereign authority.[621] PIL is therefore primarily considered as a body of rules of conduct between sovereign states or, in other words, the law of the international community.[622] IHRL, in turn, albeit being part of PIL, primarily regulates the relationship between a state and individuals. It is not concerned with the coordination of relationships between equal sovereign subjects, but rather quite the opposite: its main case of application is the regulation of *subordination relationships* in which the individual is inferior and vulnerable.[623] IHRL intends to balance such subordination relationships by granting rights that empower the inferior.[624] IHRL, thus, can be regarded as an anomalous regulatory subject of PIL, which, by means of its rationale, contests much of the basic structure of traditional PIL.[625] The most prominently discussed and also most present protective purposes of IHRL are arguably the protection of human dignity, the equality of people and, in general, the best possible implementation of individual Human Rights. In addition to this moral dimension of Human Rights, which primarily concerns their alignment with natural law concepts and the universal protection of human dignity, there is the political dimension of

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[620] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 220.

[621] See Shaw, *supra* note 79, at 6. Referring to the differentiation made by S. Rosenne, *Practice and methods of international law* (1984), at 2.

[622] Lauterpacht, *supra* note 306, at 9.

[623] Cf. Wheatley, *supra* note 29, at 134; cf. Nowak and Januszewski, *supra* note 38, at 114.

[624] Nowak and Januszewski, *supra* note 38, at 129.

[625] See Monnheimer, *supra* note 73, at 47.

Human Rights, which refers to the legal framework of the relationship between the state and individuals and aims to balance the natural asymmetry of power that exists in favour of the state by limitation of its freedom of action or *'omnipotence'*.[626] This two-fold ambition is partly understood as a dichotomy of approaches to the understanding of IHRL, suggesting two separable and distinct functions.[627] According to the view upheld here, however, the political dimension of Human Rights is rather inextricably intertwined with its moral dimension.

It is inherent to the rationale of IHRL, i.e. the protection of human dignity, and its naturalist legal approaches, that asymmetrical subordination relationships ought to be outbalanced in order to curb abuses of might, by empowering the individual and, thus, protect its Human Rights interests.[628] There is no effective protection of Human Rights interests without containment of monopolies of power and their inherent potential for arbitrariness, which by their very nature have been attributed to the state and only to the state.[629] It has already been outlined above that the idea behind the concept of Human Rights was precisely to challenge the supremacy of the state over its citizens on the basis of human dignity and, thus, legally design a just subordination relationship.[630] While Human Rights are often qualified as rights of defence against the state, they can thus also be considered mediators in social relationships.[631] Individual rights such as Human Rights are power mediators that materially weak actors can invoke in order to alter the power relationship between themselves and superordinate political agents or institutions, which are traditionally sovereign states.[632] This balancing of power asymmetries in subordination relationships is an essential function of IHRL, which is often neglected in the scholarly examination of this legal field but essential for their qualification in the public sphere of law.[633]

The originalist approach to IHRL distinguishes between ordinary violations of rights between private actors, such as murder and theft, which should be subject only to the domestic legal order, the private sphere, and actions of the sovereign state and its organs, which ought to fall into the scope of PIL.[634] On the purely private level, in turn, there is generally no reason

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[626] Mishra, *supra* note 381, at 52.; Lauterpacht, *supra* note 306, at 48 f.; Wheatley, *supra* note 26, at 18.

[627] Wheatley, *supra* note 29, at 202.

[628] Nowak and Januszewski, *supra* note 38, at 114, 135 ff.

[629] *Ibid.*, at 114; cf. Strahovnik, *supra* note 285, at 172 f; Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 39.

[630] Cf. above Sect. B.I., with regard to the approaches of '*the Enlightment'* movement.

[631] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', *supra* note 339, at 77; Reus-Smit, 'Human Rights in a Global Ecumene', 87 *International Affairs* (2011) 1205, at 1210.

[632] Reus-Smit, *supra* note 631, at 1210.

[633] *Ibid;* See also Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies', 5 *European Journal of Comorative Law and Governance* (2018) 5, at 6.

[634] Ratner, *supra* note 45, at 466.

to challenge the suitability of domestic regulation, since all parties to a regulated legal relationship are equal, and there is no blatant power asymmetry that would have to be balanced in favour of one side. By nature, such power asymmetry exists only between the state and individuals, but not between private actors among themselves. This naturally predetermined relationship of subordination between the state and the individual is also to be taken into account in national legal orders. Regularly, matters concerning the relationship between the state and the individual fall under a separate judicial competence, and are subject to special substantive and procedural rules taking into account the power asymmetry and attempting to counterbalance it, by recognition and application of fundamental and constitutional rights which are closely related to Human Rights.[635] Thereby, the existence of a subordination relationship constitutes a delimitation factor by which public law may be distinguished from other areas of law, such as civil and criminal law.[636] These considerations of the distinction between the private and public sphere on the basis of subordination also apply to the concept of state-centrism in IHRL, the distinction between domestic and international regulatory subjects, as well as to the assumption that only the involvement of a state could render an issue 'public' or subject it to PIL.[637] All these international law principles require the participation of a state as sovereign power, and therefore superior actor, which ultimately leads to subordination theory.

IHRL is intended to regulate and define the permissible behaviour of actors in a superior position vis-à-vis individuals. The future BHR treaty will supplement IHRL. For even monopolies of power held by businesses, which are not established by nature or by law but by factual circumstances, such as wealth, political and social influence, and control of essential economic sectors can generate arbitrariness and endanger the inalienability of Human Rights.[638] This might require the inclusion of further actors into the public sphere of law, which is characterised by power monopolies.[639] And precisely this, the increase of power in the private sector vis-à-vis the individual, is a regulatory subject of the future BHR treaty. The decisive point when considering the necessity to regulate certain actors under IHRL should therefore be based on the degree of effective control and power held by the regulatory target.[640]

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[635] Domestic protection of Human Rights normally takes place at the constitutional level. See Bates, *supra* note 60, at 9 f.

[636] See A. Jakab, *European constitutional language* (2016), at 390 f.

[637] Cf. Ratner, *supra* note 45, at 466.

[638] Strahovnik, *supra* note 285, at 173.

[639] Ratner, *supra* note 45, at 472.

[640] Shaw, *supra* note 79, at 262. The protection of individuals in de facto power imbalances results also from the principle of effective control applied in IHRL, see e.g. Report of the Special Rapporteur on the promotion and

While justifying the need for BHR regulation, the increase in the power of businesses and their resulting strengthened position *vis-à-vis states* is often referred to. In that connection, comparisons with the state's position of power are made, or the decrease of state authority with regard to businesses is identified. For regulation in IHRL, however, it is even more crucial that an increase of power has led to a strengthened position of businesses *in relation to the legally protected individuals*, not the state. This is because IHRL ought to regulate and outweigh master-subject relationships which exist to the detriment of individuals.[641] That it is precisely this shift in roles and power relations (*business to individual*) which deems IHRL regulation necessary appears not to have been sufficiently elucidated if it is primarily the inequality of power in relation to states that is highlighted. In fact, the way businesses challenge a state's power is generally of little relevance to the subject matter of IHRL, unless it affects individuals. At its core, IHRL concerns the limitation of the state's legitimate possibilities to interfere with human dignity. What is decisive is that there can be no sufficient protection of human dignity where arbitrary exercise of power by the state is not regulated, not that it is the state challenging dignity. Equally, there is no sufficient protection of human dignity if the arbitrary interference of businesses is not regulated with it. After all, the sovereignty of the state as well as its exercise of power vis-à-vis its citizens, even if limiting individual rights, is usually legitimised to a certain degree by those affected, by way of democratic decision-making and legitimisation processes in accordance with the rule of law. The superior position that businesses exercise vis-à-vis individuals, on the other hand, and the associated interference with Human Rights are not legitimised and, hence, even more worthy of regulation and restriction.

If one assumes that the regulatory targets of IHRL and, thus, also of the future BHR treaty ought to be oriented on the basis of power relations to individuals, and should address actors holding superior positions, the question arises as to whether and to which businesses this applies. As noted above, the relationship between a state and an individual is considered the original and natural relationship of subordination and, therefore, might generally serve as a standard of comparison. As a rule, a subordination relationship exists where the relationship between two parties is rather comparable to the relationship of state-citizen than to a relationship between two equal private actors. The examples illustrated above of how corporate actors are capable of both granting and depriving Human Rights strongly indicate that a subordination relationship between citizens and businesses might exist. Generally,

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protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, UN Doc. A/HRC/29/51, 16 June 2015, at para. 30 f.

[641] Strahovnik, *supra* note 285, at 173; cf. Nowak and Januszewski, *supra* note 38, at 118.

only a superior party is capable of deciding whether Human Rights are realised or systematically denied in a particular situation. But it is not only the phenomenon of increasing numbers of Human Rights violations by businesses that raises the argument for the existence of subordination relationships and power asymmetries between individuals and businesses.

Businesses, as has been pointed out already above, are becoming increasingly powerful and have long since surpassed many states in terms of economic and political influence.[642] In the course of globalisation, states have in various ways voluntarily decreased the control and power they held over businesses, mainly for the purpose of promoting trade, protecting investments, and attracting investors. This has been to the immediate benefit of the business community, which has moved increasingly into a position of equality with states and, on the other hand, increased its distance to the position of individuals. Repeatedly, businesses interfere in state decision-making processes that have a direct impact on the situation and legal position of individuals within a state jurisdiction.[643] This also applies to the decision-making of states regarding the commitment to international Human Rights obligations and, more specifically, BHR regulation.[644] It was probably not least the pressure from powerful businesses based primarily in industrialised states of the Global North that led to the failure of previous attempts to create a binding BHR legal framework.[645] A finding often made in connection with globalisation, liberalisation of trade and the acquisition of investments is that economically weak states in particular are at the mercy of powerful businesses. However, this is only half of the truth. Industrialised states are not automatically in a better position in their own relations and economic dependence on businesses, and they are certainly also susceptible to pressure and oppression, precisely because the businesses are rooted in the inner workings of the state and eventually indispensable for the functioning of their economy. It is a logical consequence that the closer the role and position of businesses align to that of states, by taking over the state's very own tasks, or by frustrating state control and intervention powers, the more the relationship between businesses and individuals

[642] Fasciglione, *supra* note 36, at 33.

[643] See already above under Sect. **B.II.2., C.II.1.a).**

[644] C. Holt, S. Stanton & D. Simons, *The Zero Draft Legally Binding Instrument on Business and Human Rights: Small Steps along the Irresistible Path to Corporate Accountability* (2018), available online at https://www.business-humanrights.org/en/blog/the-zero-draft-legally-binding-instrument-on-business-and-human-rights-small-steps-along-the-irresistible-path-to-corporate-accountability/.

[645] Garrido Alves, *supra* note 39, at 46.

resembles the relationship between states and citizens.[646] At this point, the power relationship between businesses and states becomes indirectly relevant for the telos of IHRL, as it mirrors the subordination between businesses and individuals.

When a horizontal legal relationship between what were originally equal parties becomes a subordinate relationship only over the course of time, it is natural for regulatory gaps to be exposed. There can be no legal balancing mechanisms provided for an unforeseen power asymmetry. Arguably, the function to balance subordination relationships and the emergence of new factual subordination relationships in different contexts (IOs, NGOs, military groups – all of which have in common that they hold a superior position of some form vis-a-vis individuals) is precisely the reason why the need to extend IHRL's scope to actors other than states is raised so frequently.

3. Transnationality as an Indicator for Subordination Relationships Between Businesses and Individuals

Considering the function of IHRL to balance asymmetrical power relations and its consequential orientation towards actors in superior positions as its addressees, the personal scope of application of the future BHR treaty should do justice to this objective. It must therefore be determined which businesses fall into this group of addressees and how they are to be covered by the future BHR treaty. The traditional public-private divide in law is based on the assumption that only state actors, or at least actors authorised by the state, hold an excess of power over individuals and are thus subject to regulation under public law, while the inclusion of private actors would eliminate this division.[647] PIL expresses this divide when private relationships, such as in consequence of a tort between individuals, are anchored in domestic law exclusively and only legal relationships in which a sovereign authority is involved are to be assigned to PIL.[648]

Unlike states, however, the need for regulation of IHRL in the case of non-state actors is not based on their nature but is conditioned by actual and ascertainable circumstances as well as characteristics and capabilities in which the powers they hold and exercise are expressed. Thus, while there is always a relationship of subordination between the individual and the state, it exists between the individual and businesses only under particular circumstances. If a case for IHRL regulation of businesses only arises in the case of a subordination relationship that is based on actual circumstances and capabilities, it follows that, in turn, it ceases to exist as soon as the circumstances constituting the subordination relationship

[646] The phenomenon of relationships between individuals and businesses becoming increasingly comparable to the relationship between the state and the individual has been observed in other areas of law already, such as data protection law, see J. Ausloos, *The right to erasure in EU data protection law* (2020), at 471.

[647] Cf. Ratner, *supra* note 45, at 542.

[648] *Ibid.*, at 466.

terminate, i.e. where a business loses its superior position.[649] These factors must therefore be determinable. Since the superior position of the state is given by nature, there are no comparable predetermined criteria or preconditions that could be used to determine when a subordination relationship exists between a business and an individual.[650] As states are considered the natural addressees of IHRL, businesses presuming to perform their role in relation to individuals in a state-like manner should therefore be covered by BHR regulation.[651]

As has been noted, at the time of emergence of PIL, only a state could meet another state on an equal footing, while all other actors were subordinated to states at a lower hierarchical level. This assumption is no longer valid today.[652] The rapid growth of economic and financial corporate power has long since been transformed into *political power*, which is consequently no longer exclusive to states.[653] Indeed, a range of states are no longer able to compete with some businesses, either in terms of economic strength or in terms of political influence.[654] Some businesses may, thus, become more important partners for many governments than other states are. Arguably, there are conceivable situations where states will be more interested in a balanced and advantageous relationship with certain corporations than in a good relationship with third states. Both multinational as well as local businesses have explored ways to participate in state governance as an *equal partner*, by means of negotiation, persuasion as well as coercion through positive or negative incentives.[655] When businesses find themselves in an equal negotiating position with a state, they might be easily

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[649] Cf. Strahovnik, *supra* note 285, at 167.

[650] Since the state's superior position of power is not linked to certain characteristics, there is no such differentiation. The state derives its *raison d'être* from its role as the representative of its citizens and retains its Human Rights obligations entirely, for example, even in times of crisis (subject to the legally provided states of emergencies and derogation options).

[651] With regard to the necessary legislative response of PIL to the rise of international terrorism and in particular the events of 11 September 2001, *Greenwood* argues that *"Since the events of 11 September showed-if, indeed, the matter were ever in any doubt-that a terrorist organization operating outside the control of any state is capable of causing death and destruction on a scale comparable with that of regular military action by a state, it would be a strange formalism which regarded the right to take military action against those who caused or threatened such consequences as dependent upon whether their acts could somehow be imputed to a state."* Greenwood, 'International law and the 'war against terrorism'', 78 *International Affairs* (2002) 301, at 307 f.; The legality and necessity of an act of defence against a non-state actor under PIL is, thus, measured by whether the actor has previously presumed to engage in state-like conduct that would have justified defence in the case of a state. In principle, this logic can also be applied with regard to the necessity and legality of regulations under PIL to prevent Human Rights violations.

[652] Stephens, *supra* note 6, at 57.

[653] *Ibid.*, at 49, 57.

[654] Garrido Alves, *supra* note 39, at 11.

[655] See Börzel and Deitelhoff, *supra* note 1, at 253 ff.

seduced into creating their own advantage to maximise profits – where necessary in an abusive way.[656]

Outside the field of IHRL, this shift of power is already well reflected legislatively in PIL. For example, more and more rights are being granted to businesses in International Trade and Investment Law, enabling businesses to make claims against states internationally, which they are increasingly making use of.[657] And this development bears fruit: around 48% of all disputes decided by arbitral tribunals under the ICSID Convention and additional facility rules between 1966-2022 have been decided in favor of the investors, upholding the claims – while only in 30% of cases the claims have been dismissed on the merits.[658] Some of these cases even reportedly had impact on legislative developments in the defendant states.[659] There have long been fears that International Trade and Investment Law, which strongly benefits businesses might produce a so-called '*chilling effect'* on state legislation.[660] A chilling effect occurs if legislation is directly influenced by businesses for their own benefit. In other words, when businesses interfere with the rule of law of a state, or foreign corporate investors impose constraints on the basis of international trade and investment treaties and thereby hinder a state's ability to legislate in the public interest.[661] Such effects have been realised as businesses have repeatedly tried to block economically unpleasant or disadvantageous legislative initiatives of states on the basis of bilateral investment treaties, although such legislation is often meant to promote and protect Human Rights.[662] Even more so, as the example of South Africa's Black Economic Empowerment Act has shown, even legislation intended to implement international Human Rights treaty obligations might be deferred in favour of investors' interests.[663] The latter are regularly given priority over Human Rights protection due to the fear of the financial burden coming with a potential investor-state

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[656] Traditionally, maximisation of profits is considered a businesses' overriding objective*, raison d'être* and only tangible accountability to its shareholders. See Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 4; Börzel and Deitelhoff, *supra* note 1, at 250. Albeit this perception might have changed in society, cf. Sect. D below, such change in perception has arguably not yet occured within the entire business community.

[657] See Suárez Franco and Fyfe, *supra* note 48, at 145.

[658] In the remaining 22%, the tribunal declined jurisdiction. In 2022, the win rate for investors was at 56%. See ICSID, The ICSID Caseload-Statistics, Issue 2023-1, Part I - 1966-2022 Statistics, p. 14 Chart 9b; Part II Statistics 2022, p. 27 Chart 7b .

[659] Deva, 'Alternative Paths to a Business and Human Rights Treaty', *supra* note 7, at 23.

[660] Cf. Moehlecke, *supra* note 294; Fasciglione, *supra* note 36, at 36 at footnote 22; Suárez Franco and Fyfe, *supra* note 48, at 145.

[661] Alvarez, 'Are Corporations "Subjects" of International Law?', 9 *Santa Clara Journal of International Law* (2011) 1, at 22.

[662] Cf. Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 214; Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 661, at 21.

[663] Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 661, at 21.

arbitration. In order words, states have long calculated with their own Human Rights negligence for the benefit of their investors. In addition, the rights and claims that corporations are granted by means of trade and investment treaties, which they might enforce against states in investor-state disputes, can result in significant financial restrictions for such states, even to the extent that resources for the effective realisation of Human Rights might be lacking.[664]

Before IHRL as we know it today, states were not only considered the main actors on the international stage vis-à-vis other states, but they were also the only perceived danger and risk to people and their enjoyment of Human Rights. In their own jurisdiction, states did not – not even theoretically – need to fear control and sanctions by external authorities for Human Rights misconduct. After all, the state and its organs have been the sole holders of sovereign power, and PIL did not contain any provisions on how a state ought to treat its own nationals.[665] Thus, states were considered the only actors in possession of the capacities to commit gross Human Rights violations and, additionally, almost certainly get away with it. This unique combination of potential danger and lack of supervision in sovereign states arguably gave rise to regulatory concerns with respect to Human Rights in the post-war era.[666]

For this reason, the community of states created the framework of IHRL, beginning with the International Bill of Rights[667] and later on treaties and covenants relating to particularly specific rights such as the Convention on the Rights of the Child,[668] the Convention on the Elimination of All Forms of Discrimination Against Women,[669] the Convention on the Elimination of Racial Discrimination[670] and therewith established a comprehensive set of rules by which they have obliged and, through the multilateral involvement of a large number of states, subjected themselves to the monitoring and control by third states. In favour of Human Rights, the absolute sovereignty of the state has, thus, been abandoned to a certain extent without the provision of an immediate remuneration.[671]

Nowadays, businesses possess the unique combination of high risk and the likelihood of escaping prosecution as well. The precise number of frequently committed Human Rights abuses by or involving corporate actors is difficult to determine. However, as part of the

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[664] Suárez Franco and Fyfe, *supra* note 48, at 145.

[665] Bates, *supra* note 60, at 12.

[666] See Herdegen, *supra* note 79, at 376; Vitzthum, Proelß and Bothe, *supra* note 77, at 266.

[667] For details see above, Sect. **B.I.**

[668] United Nations Human Rights Office of the High Commissioner, 1577 UNTS 3 (1989).

[669] United Nations Human Rights Office of the High Commissioner, 1349 UNTS 13 (1965).

[670] United Nations Human Rights Office of the High Commissioner, 600 UNTS 195 (1965).

[671] Shaw, *supra* note 79, at 272f,.Wotipka and Tsutsui, 'Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965-2001', 23 *Sociological Forum* (2008) 724, at 725.

process of elaborating the UNGP, official bodies of the UN, such as the High Commissioner for Human Rights, have reported up to three-digit numbers of documented allegations around the globe and from all industries.[672] Out of those, an estimate of sixty per cent accounts for direct forms of corporate involvement, saying that the accused corporations actually committed the alleged violation by their own acts and omissions, and not merely indirectly.[673] Evidently, states are by far not the only ones who can cause great damage.[674] Neither are states the only actor against whom no administrative or legal action can be taken. Due to the reasons already mentioned above, governments are often thwarted in their efforts to investigate and punish shady corporate actions.[675]

In the context of IHRL, it is therefore primarily the ability to decide autonomously on the collective granting or denial of Human Rights, as well as the ability to shape legal, social, and political structures and thus to exert direct influence on the legal and social order that defines the superior position of states in relation to individuals and makes them the most obvious addressees of IHRL. These capabilities apply to businesses and are not necessarily linked to specific types of business, sectors, or cross-border operations. Whether a business is capable of assuming such a state-like position in relation to the individual depends very much on the particular capabilities of the business in each case.[676] Consequently, it cannot be determined in a general manner for certain types of businesses whether a subordination relationship exists and thus whether there is a case for regulation in IHRL. This renders any differentiation in the personal scope of application difficult, since for reasons of practicability and manageability a generalisation will be necessary. However, since in principle all businesses bear the potential to establish a subordination relationship with individuals and to assume a superior position of power within this relationship, the scope of application for all such businesses should be generally open and will generate or at least allow for the greatest possible protection of Human Rights.[677] Whether a subordination relationship actually exists in the case at hand, to what extent it requires imposition of Human Rights obligations and, in particular, whether individual corporations have the ability to implement such obligations at all is a question of concrete capabilities.[678] The hybrid approach of the TRD implements this in

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[672] Cernic, *supra* note 2, at 25; John Ruggie, Special Representative of the Un Secretary-General for Business and Human Rights, 'Corporate Responsibility to Respect Human Rights: Summary Report on Geneva Consultation' (Geneva, 2007), at 2.

[673] Cernic, *supra* note 2, at 25.

[674] An illustration of concrete examples of the severe impacts corporate actions may have on Human Rights has been provided above, under Sect. **B.II.1.**

[675] With regard to individual law enforcement in the BHR context see also below, Sect. **C.IV**.

[676] See Strahovnik, *supra* note 285, at 166 f.

[677] So arguably Ratner, *supra* note 45, at 541 f.

[678] Strahovnik, *supra* note 285, at 166 f; cf. Karp, *Responsibility for human rights*, *supra* note 47, at 3, 5.

in accordance with the telos of IHRL and allows for an application that is in line with the interests of all involved parties.[679] In particular, the open implementation clause envisaged in Art. 3 para. 2 TRD offers room for a flexible and outweighed case-by-case approach.[680]

In attempts to justify responsibilities of businesses for the common good of society, or their inclusion in the regulatory subject matter of PIL, classifications and terminology such as businesses as *'global agents of justice'*,[681] *'political actors'*,[682] *'governors'*[683] and the *'privatisation of Human Rights'*[684] or rather *'politisation of businesses'*[685] have been coined. Underlying these notions is the fact that businesses have emerged from their role as exclusively private actors, and all notions imply what *Clapham* identified as the dissolution of the private-public divide, whereby businesses hold such superiority in relation to the individual that no traditional demarcation of their role from that of the state can take place.[686] The role of businesses in relation to individuals has moved closer to that of a state and, in turn, distant from that of a private actor. Furthermore, if one assumes that a substantial part of the regulatory need in IHRL lies in the regulation of subordination relationships that are susceptible to abuse, then this regulatory need appears particularly urgent in relation to businesses, because the state's power and superior position is usually legitimised in some way by individuals as inferior subjects of protection of IHRL, and it therefore has a democratic *raison d'être*. Businesses, in turn, assume such a position without legitimisation.[687] Their legitimacy should therefore be achieved in another way, e.g. through the social benefit of their operations – in any case, no legitimacy can be assumed where businesses operate in a socially harmful way.

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[679] See with reference to the SRD, where such 'hybrid approach' has been introduced already Deva, *supra* note 576.

[680] Cf. *ibid;* Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 70 f., both referring to the 'hybrid approach', which has been included within the TRD as well, in its regulation of Art. 3 Sec. 2.

[681] Strahovnik, *supra* note 285, at 163 ff.

[682] Cf. Brune, *supra* note 1, at 194.

[683] Börzel and Deitelhoff, *supra* note 1, at 250.

[684] McBeth, 'Privatising Human Rights: What Happens to the State's Human Rights Duties when Services are Privatised?', 5 *Melbourne Journal of International Law* (2004).

[685] As proposed by Wettstein, see Wettstein, 'The history of BHR and its Relationship with CSR', *supra* note 47, at 39.

[686] See Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 3, 11.Cf. Karp, *Responsibility for human rights, supra* note 47, at 156 ff. who takes a similar approach, assigning responsibility to actors on the basis of their role as 'public' actors, e.g. where they provide empirical collective goods or are acting in their capacity as a bearer of an authoritative political role. See also on the separation of authority into private and public Börzel and Deitelhoff, *supra* note 1, at 251 ff.

[687] Cf. Börzel and Deitelhoff, *supra* note 1, at 263.

4. Resume on Transnationality as Exclusion Criterion *Rationae Personae*

Businesses are complex regulatory targets.[688] Accordingly, the determination and delimitation of the personal scope of a future BHR treaty can hardly be regulated in a simplified manner. A hard and strict definition focusing exclusively on tangible or measurable factors and characteristics, such as number of employees, annual turnover or location of subsidiaries and affiliates might therefore lead to inappropriate results. Rather, to ensure that the regulations can also respond to special circumstances in the context of BHR situations, regulatory tools ought to be integrated to supplement any generalised scope of application and enable flexible but at the same time legally secure handling, such as already attempted by Art. 3 Sec. 1, Sec. 2 TRD. Such a hybrid approach neither marginalises the subject matter of the regulation nor does it contradict its regulatory purposes - because neither is determined exclusively by transnationality.

It was argued that IHRL is based on the balancing of power asymmetries and that this should also be reflected in the design of the future BHR treaty. The future BHR treaty should intend to address the balance of powers on the international stage. This is particularly relevant in the context of the personal scope, as it must be suitable to accommodate actors who assume a position of superiority vis-à-vis protected individuals. The justification of the regulation of businesses in the legal domain of IHRL should not be based on transnationality, as IHRL does not provide any necessity for this, but rather on its partly state-like integration in subordination relationships with individuals. For this purpose, the transnationality of business activities is not decisive, but an indicator, admittedly a particularly strong one, that requires prominent consideration. In the previous sections it was noted that businesses have developed into public or political actors competing with states to an extent not foreseen by law and that this has resulted in governance gaps which give rise to the need for regulation. The future BHR treaty is intended to fill these gaps. Businesses should therefore ideally be addressed by the future BHR treaty whenever they can be regarded to act as public or political actors.[689] Factors contributing to a loss of state control over non-state actors such as businesses are, among others, increasing the hard and soft power of such entities, their flexibility, losses or interdependence.[690] Transnationality, however, is no *conditio sine qua non* to classify businesses as political actors, and thus also not the sole reason for the regulatory

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[688] S. Deva, *The Zero Draft of the Proposed Business and Human Rights Treaty, Part I*: *The Beginning of an End?* (2018), available online at https://www.business-humanrights.org/en/blog/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-i-the-beginning-of-an-end/.

[689] Cf. Karp, *Responsibility for human rights, supra* note 47, at 157.arguing that corporations should be considered responsible to protect and provide for Human Rights to the extent that they act as 'primaty political agents'.

[690] Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 231.

need to fill existing governance gaps. [691] Accordingly, the UNGP did rightfully not make a corresponding differentiation based on transnationality.[692]

The focus on different factors at the level of assignment of concrete obligations, as provided for in Art. 3 Sec. 2 TRD, allows for a risk-based application: the greater the potential Human Rights impact and threat emanating from a business, the stricter the regulation under the future BHR treaty in relation to this business.[693] A risk-based approach allows for an effective and appropriate application, e.g. from a certain number of employees or a certain minimum annual turnover, however, allowing for exceptional application for certain high-risk business activities or high-risk sectors, so that even small but structurally relevant businesses for the protection of Human Rights could be covered.[694] Such rather risk-based application of Human Rights standards to businesses is arguably also provided for in the UNGP, which allow for a differentiation of the due diligence measures required of businesses based on circumstances of the individual case and the size of a business.[695] This avoids inappropriate results, which are conceivable with a blanket focus on transnationality, e.g. that a small low-emission corporation with cross-border business relations is fully covered by the regulation, while a nationally operating corporation, which, however, holds a monopoly position in one state and thus a position of power vis-à-vis the individuals, is not.

In theory, the proposed solution to the personal scope of the future BHR treaty allows for teleologically appropriate as well as the most proportionate results, yet it also entails high risks. Whenever the law grants discretionary powers in application, there is an imminent danger that such discretion will be abused and exploited. Additionally, the approach followed by Art. 3 Sec. 1, 2 TRD, which is not based on tangible and measurable factors, is vague and has obvious weaknesses. Soft criteria relating to a superior position of businesses are difficult to determine. Consequently, discretionary decisions made on such a basis might be difficult to reproduce and control. A balance must be struck here, between the risk of limited

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[691] See Börzel and Deitelhoff*, supra* note 1, at 256. Who identify characteristics of businesses that are likely to engage in governance as public or political actors. While the size of a business is considered one out of multiple factors contributing to the likelihood of a business engaging in governance, transnationality of operations is not qualified as such.

[692] The 'preamble' of the UNGP explicitly prescribes the applicability of the principles to both, transnational business corporations and others.United Nations Office of the High Commissioner on Human Rights, 'Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. HR/PUB/11/04' (New York, Geneva, s.l., 2011), at 1.

[693] Macchi and Bright, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', in D. Russo, M. Buscemi, L. Magi and N. Lazzerini (eds), *Legal Sources in Business and Human Rights*: *Evolving Dynamics in International and European Law* (2020) at 17.

[694] Cf. Rüntz, 'Neue Sorgfaltspflichten und Haftungsrisiken in der Lieferkette: Aktuelles zu deutschen und europäischen Gesetzesvorhaben', 9 *Zeitschrift für Vertriebsrecht* (2020) 291, at 292 f.

[695] See Principle 15 UNGP.

revisability and the advantage that flexible and legislative purpose-oriented application clauses such as Art. 3 Sec. 1, Sec. 2 TRD provide. A tool allowing for some clarification is the mandatory performance of a Human Rights impact assessment to determine the potential scope of responsibility on a case-by-case basis. Such Human Rights impact assessment was already contained within the framework of the UNGP and is envisaged within the TRD as well.[696] This kind of assessment appears to be the only reasonable way for businesses to find out which Human Rights are of relevance in the context of their business model and what need for action and responsibilities arise as a result.[697] Hence, it should be mandatory for all businesses to perform such assessments before the start of any business activity in order to become aware of their role in relation to individuals and, thus, also of their obligations.[698] However, in order for such assessments to be effective, an unambiguous definition of the Human Rights to be assessed by businesses is necessary, which both the UNGP as well as the TRD fail to provide, leaving it to domestic regulation.[699]

To sum up, a single external factor, such as transnationality of business operations, cannot respond to the regulatory reasons and purposes of the intended BHR regulation and is inappropriate to generate reasonable and purposeful results. The progress regarding the personal scope of a future BHR treaty, which took place in the Revised Draft of July 2019 and has been maintained in Art. 3 Sec. 1 TRD, to abandon the characteristic of transnationality of business activities as a decisive and indispensable requirement for application, is therefore welcomed and necessary from a normative point of view.[700] From the logic and purpose of IHRL, it makes neither sense to *necessarily exclude* local businesses from the scope of a future treaty,[701] nor, as has been argued, to *mandatorily include* all transnationally operating businesses equally and regardless of further circumstances of the case in question. The broadly interpretable scope of application of Art. 3 Sec. 1 TRD in combination with the corrective of Art. 3 Sec. 2 TRD allow an application of the provisions of the future BHR treaty in both directions, which is in line with the interests of all parties involved and suitable to serve the purpose of IHRL to balance subordination relationships with regard to individuals.

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[696] Art. 6 Sec. 4 lit a) TRD; Principle 18 UNGP.

[697] Ruggie identifies such assessments as the only way to 'know and show' for businesses that they respect Human Rights. See J. G. Ruggie, *Just business* (1st ed., 2013), at 113.

[698] Cf. J. Bourke-Martignoni and E. Umlas, *Gender-responsive due diligence for business actors* (2018), at 12 f.

[699] On the issue of a lacking definition of business-related Human Rights see Sect. **C.III.**

[700] Deva, *supra* note 576.

[701] Cf. I. Daum, *A Future Treaty on Business and Human Rights*: *Its Main Functions* (2018), available online at https://voelkerrechtsblog.org/a-future-treaty-on-business-and-human-rights-its-main-functions/.

II. Direct Corporate Responsibilities of PIL or Maintaining the Intermediary Solution?

The working title of the OEIGWG negotiations *'international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'* implies that the business entities addressed by the future BHR treaty shall be legally bound by the instruments, at least to some extent.[702] In reality, however, there is strong opposition to any attempts to codify direct obligations of any businesses under the IHRL.[703] The approach to include direct obligations of businesses in the future BHR treaty and not to rely solely on necessary intermediary measures of states is frequently denounced as a *'utopian'* theory without the potential to provide any added value in reality.[704] There are even objections with regard to the terminology 'Human Rights *violation*', as this would imply that businesses have the capacity to breach IHRL in the first place, which is not the case in absence of corresponding obligations and which must not be implied.[705] The tendency is therefore to draft a BHR treaty that is directed exclusively at states and, in its application to them, relies on states as intermediaries to create a legal relationship of obligation and responsibility between businesses and individuals.[706]

Under the current legal situation of IHRL, states are already obliged to create a national legal order that prevents and addresses horizontal Human Rights violations.[707] This obligation is founded in various Human Rights treaties as well as customary PIL and is already 'legally binding' for states. A future BHR treaty relying on an intermediary approach will therefore have a mainly declaratory and specifying effect, as the horizontal Human Rights duties of states are mostly determined by interpretation of IHRL but are not actually legally developed or codified, thus uncertainties as regards their concrete content exist.[708] However, its potential for legal reform and innovation will most certainly be limited.

As has been pointed out repeatedly, states eventually fail to translate Human Rights guarantees into national law that is applicable against businesses or to create sufficient

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[702] Cf. Fasciglione, *supra* note 36, at 43 f.

[703] See Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 17; Carrillo-Santarelli, *supra* note 511.

[704] Nowak and Januszewski, *supra* note 38, at 116; Ruggie, 'Incorporating human rights: lessons learned and next steps', in D. Baumann-Pauly and J. Nolan (eds), *Business and human rights*: *From principles to practice* (2016), 64 at 69.

[705] Cf. Clapham, 'Human Rights Obligations for Non-State Actors', *supra* note 159, at 15. who identifies the same formalistic debate on terminology with regard to non-state armed groups.

[706] Bialek, *supra* note 187, at 522.

[707] Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 31; see J. L. Cernic and T. L. van Ho (eds), *Human Rights and Business*: *Direct Accountability for Human Rights* (2015), at 112 ff., 123 ff.

[708] Monnheimer, *supra* note 73, at 47 ff.

enforceable Human Rights guarantees and mechanisms in favour of individuals. Thus, it appears logical and obvious to consider directly enforceable claims of right holders against businesses in IHRL as a possible solution, which would mean that the legal position of an individual would not depend on the will and capabilities of a single responsible state. Such an outcome would be in line with the idea underlying the '*Internationalisation of Human Rights*' and the protection of human dignity as an international concern, which is to detach the protection from the arbitrariness of single holders of power.[709] Accordingly, a number of IHRL scholars and experts argue in favour of direct corporate Human Rights obligations as the most reasonable and effective way to respond to the post-globalised economic and legal order.[710] It is partially even considered a mandatory and unavoidable consequence and response to the post-globalised order.[711] Few state delegations advocated in favour of the resolution of direct corporate obligations during the OEIGWG negotiations as well.[712] Nevertheless, the approach to establish direct corporate obligations and responsibilities by virtue of a treaty was abandoned in the draft published by the OEIGWG, albeit considered in the initial phase of the treaty negotiations.[713] This outcome is not surprising, since the lobby of opponents of the direct approach is large and influential, however, it is questionable whether this resistance is convincing in terms of normative necessities and legal doctrine.

According to *Ruggie,* an overly ambitious treaty as an outcome of the OEIGWG process ought to be avoided, as it is neither timely nor feasible and would most likely frustrate and counteract the progress and successes already achieved in connection with BHR regulation in IHRL, namely the benchmark endorsement of the UNGP.[714] In the context of treaty-scepticism, particularly the introduction of direct corporate obligations into the system of IHRL is challenged and polarising the whole debate.[715] It is argued that the direct approach would have a negative impact on the whole legal formation process of BHR and, moreover, to

[709] Nowak and Januszewski, *supra* note 38, at 120; A term used byD. P. Forsythe, *The internationalization of human rights* (1991).

[710] See with further references Martens and Seitz, *supra* note 40, at 38; Carrillo-Santarelli, *supra* note 511; Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36.

[711] M. Kamminga, 'Coprorate Obligations under International Law' (Berlin, 2004), at 6.

[712] As reported during the sixth session of the OEIGWG negotiations 'Report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRS/46/73' (2021), at para. 14.

[713] Fasciglione, *supra* note 36, at 42 f.

[714] J. Ruggie, *A UN Business and Human Rights Treaty?*: *An issues brief* (2014), available online at https://www.business-humanrights.org/en/latest-news/pdf-a-un-business-and-human-rights-treaty-an-issues-brief-by-john-g-ruggie/; See alsoBernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 2.

[715] Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 17; Carrillo-Santarelli, *supra* note 511.

directly bind private actors such as businesses by IHRL is considered incompatible with PIL, so there would be no basis for such approach.[716] The creation of direct corporate obligations under IHRL is considered a radical and unrealistic approach.[717]

The argument of compatibility of direct corporate obligations with PIL and legal possibilities of implementation will be discussed in more detail below. However, when pointing to a missing legal basis in PIL or barriers in legal dogma, most prominently referred to are the supposedly lacking subjectivity and legal personality of businesses.[718] The general usefulness and appropriateness of these doctrines, and especially in the specific context of businesses, has already been discussed above. At this point it should only be recalled that, based on the ICJ's reasoning in the case of *Reparations for injuries suffered in the service of the United Nations*, subjectivity or legal personality depends on political and social circumstances and can even vary in scope and content from one actor to another, depending on the circumstances of the individual case.[719] It shall be determined based on the current nature and requirements of the international community at large.[720] In other words, a kind of '*sliding*' legal personality is envisaged in PIL.[721] Thus, if the notion of subjectivity is retained at all and classified as a constitutive element, which is debatable in itself,[722] there is a constant need to re-evaluate which actors are granted legal personality and to what extent, and thus also which rights and obligations PIL ascribes to them, because the circumstances and needs of practice that influence this are constantly changing as well. A reference to subjectivity or legal personality is therefore not a convincing argument against the creation of a legal framework for new actors and specifically in the context of direct obligations of businesses, as the fact that the actual circumstances have changed with regard to the role of business in the international legal order and, thus, the normative necessities changed as well, is beyond doubt.[723] Beyond the lack of subjectivity and legal personality, however, no apparent *legal reason* is put forward that could frustrate the codification of direct obligations.

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[716] McBrearty, *supra* note 346, at 12; Fasciglione, *supra* note 36, at 31 f.

[717] N. Bernaz, *The Draft UN Treaty on Business and Human Rights: the Triumph of Realism over Idealism* (2018), available online at https://media.business-humanrights.org/media/documents/files/documents/Zero_Draft_Blog_Compilation_Final.pdf

[718] Cf. Fasciglione, *supra* note 36, at 33; López Latorre, *supra* note 535, at 57 ff; Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 661; Pentikäinen, *supra* note 371.

[719] *Reparation for injuries suffered in the service of the United Nations, supra* note 503, at 178; Shaw, *supra* note 79, at 193.

[720] *Reparation for injuries suffered in the service of the United Nations, supra* note 503, at 178.

[721] Chetail, *supra* note 506, at 110, 112.

[722] See Sect. **C.III.2.**

[723] See Chetail, *supra* note 506, at 112.

The debate on whether direct obligations of businesses are possible under PIL is therefore arguably unnecessarily polarising and detrimental to legal progress, as from the mere perspective of what would be possible under PIL it can be found that direct corporate obligations already exist and are well codifiable.[724] The sources of PIL, including the treaty law, are capable of obliging businesses.[725] Which provisions are permissible within the framework of an international treaty and which are not is governed primarily by the VCLT, and therefore a future BHR treaty drafted in accordance with the limits of the VCLT could provide for direct international Human Rights obligations of businesses, and it ought to do so where these are normatively required. The following section will therefore focus on the normative imperative when comparing the intermediary approach and direct obligations and their consequences for the regulatory objectives of BHR and general IHRL.

As regards the predicted negative effects on current and future legal development and progress in IHRL as such, it is first necessary to acknowledge that, indeed, by virtue of the UNGP, after a lengthy legislative process, a widespread global consensus on BHR issues has been reached for the first time.[726] The unanimous endorsement of the UNGP serves as evidence for general recognition and agreement among states, that a certain degree of corporate responsibility with respect to Human Rights exists and that the defined substantial Human Rights standards for businesses are necessary and ought to be implemented by states. However, this undeniable success of the UNGP also gives rise to scepticism about more far-reaching legislative projects, such as the future BHR treaty. Such a treaty could lead to frustration of the UNGP's achievements to date, especially if its approaches might appear overly ambitious and agreed on prematurely. States that have recognised the approach of the UNGP might not want to do so with an innovative and binding BHR treaty and, thus, no longer feel committed to the supposedly replaced UNGP, withdrawing from any BHR efforts. Accordingly, the necessity to stick to the line of the UNGP is often emphasised, and warnings of a renewed legislative failure in the BHR context are made if there is a failure to transpose UNGP to a BHR treaty. [727] In other words, a negative prognosis hovers over the whole debate on the adoption of a binding BHR treaty, saying that the progress achieved in the field of BHR is more likely to be counteracted than promoted by an ambitious BHR treaty due to a

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[724] Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 17; Fasciglione, *supra* note 36, at 33 f; Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 38 f.

[725] Carrillo-Santarelli, *supra* note 511.

[726] See Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', *supra* note 339, at 63.

[727] See McBrearty, *supra* note 346; Methven O'Brien, 'Transcending the Binary: Linking Hard and Doft Law Through an UNGPS-Based Framework Convention', 114 *American Journal of International Law Unbound* (2020) 186; Ruggie, *supra* note 714.

lack of political will. The decision in favour of or against direct obligations in a future BHR treaty in particular often appears to be considered a decisive point of contention, or somewhat of a threshold, that could steer post-treaty developments in one direction or another.[728]

The predictions and concerns expressed by opponents of direct corporate obligations are conclusive and to a certain extent may even seem probable. However, one must ask what the proposed counter-scenario might look like? The counter-scenario to a deterrent and overly ambitious future BHR treaty is the adoption of a treaty, which, while bringing little legal innovation and progress, would generate far-reaching positive feedback from states and business stakeholders. In terms of context, such a treaty would be largely based on the existing framework of the UNGP and the biggest difference between both instruments would arguably be the binding legal form. The question of evaluation that arises is which short and long-term consequences of both scenarios would have a preferable impact on the development of the regulatory subject of BHR. In other words, what would have a less detrimental effect on the desired legal progress, an innovative treaty that receives little support at the outset or a universally recognised treaty falling short of the possible and normatively required *lege ferenda*? Would it be worth letting the opportunity created by the OEIGWG negotiations to introduce direct obligations for businesses in IHRL pass in order to prevent the goodwill of the international community from fading?

According to the view and conclusion reached and defended here, it would do more harm than good to IHRL if a BHR treaty is adopted based on political interests and pragmatism and in disregard of its normative necessities. Admittedly, only a treaty that is ratified, recognised and implemented by the world's leading export economies and host states for foreign investment will be able to demonstrate actual effects for its right holders.[729] However, if the content of such a treaty is not determined on the basis of the necessities of the regulatory subject matter and the interests of its right holders, but rather rolled up from the side of political conditions and probabilities which, in turn, are exclusively external circumstances and unrelated to the actual object of regulation, this will hardly have a noticeable effect on the individuals concerned either. It is a phenomenon that can be observed in the context of the debate accompanying the OEIGWG negotiations: the debate on the contents of a future BHR treaty is led from the *'wrong side'*, as the obstacles to certain regulatory contents, which often

[728] Fasciglione, *supra* note 36, at 31 ff.

[729] Methven O'Brien, 'Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty', 5 *Business and Human Rights Journal* (2020) 150, at 6.

have political backgrounds, are discussed before the regulatory necessities are identified in a first step.[730]

Excessive reliance on potential state reactions will negatively affect the responsiveness of a future BHR treaty, as the legal content would no longer be based on the necessities of developments that have occurred, but rather on the predicted reactions of some influential actors. This is incompatible with the underlying idea of IHRL, to entitle everybody to a social and international order in which the best possible and full realisation of Human Rights is guaranteed.[731] When considering and determining which elements should be included in a legally binding treaty, the general effect that the adoption of such an instrument will have on a legislative agenda must be taken into account in view of any expected future legal progress. In the following, it is concluded that any codification of hard law, irrespective of the concrete contents decided upon, leads to a stagnation in terms of further legal progress. This is because with the adoption of a binding legislative instrument, the need for regulation of a specific subject matter is satisfied and the dedication to other subjects of regulation is prioritised at least temporarily. Therefore, when it comes to necessary legal developments, one should not rely too much on progress occurring soon, but rather take advantage of the opportunities that are given at the moment. In case of doubt, it is necessary to introduce legal instruments that appear to be *avant la lettre*.

Codification might produce a drag-along effect in which practical and political realities converge with the formally introduced legal situation over time, especially when considering the strong participation of non-governmental organisations and CSOs within the legislation on BHR.[732] It can at least be doubted that a strictly negative attitude towards a future BHR treaty could be maintained by numerous states under these circumstances – after the adoption of such a regulatory framework the pressure for action from the outside is likely to increase significantly. The argument that there is a lack of political feasibility and thereby the risk of a low ratification-rate remains the strongest argument of opponents to a comprehensive and rather progressive future BHR treaty. However, much of the strength and persuasiveness of those proffering this argument comes from their own underlying understanding of political feasibility. If room for a reinterpretation and reassessment of political feasibility as a norm-determining factor in PIL can be identified, this might and will also have an impact on the influence of political feasibility on the content of a future BHR treaty.

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[730] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 204.

[731] As enshrined in the UDHR, in particular Art. 28.

[732] See Methven O'Brien, *Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty, supra* note 729, at 4.

The sections below ought to demonstrate that firstly, the intermediary and state-centric approach to BHR suffers from weaknesses which render it inappropriate given relations and distributions of power in the contemporary world order and, secondly, there is no sound legal or dogmatic reason why the existing IHRL framework with regard to business conduct should not be strengthened by means of codification of direct corporate obligations within a future BHR treaty.[733] Rather, this undertaking is counteracted by objections and considerations relating to political feasibility and the '*compliance corollary*' as identified by *Ratner* and further elaborated below.[734] The approach to directly bind businesses by means of obligations founded and codified in IHRL bears the potential to at least partially compensate for the shortcomings of the intermediary approach of state-centrism, especially inability or unwillingness of states to hold businesses to account for Human Rights misbehaviour. Such obligations could set boundaries for businesses in abusing superior positions. Direct corporate obligations under IHRL are admittedly not a *panacea*, nor the only way to resolve legislative and administrative governance gaps that exist in the context of BHR in IHRL. The willingness and goodwill of states to enforce respective obligations will always remain an essential precondition for their practical effect.[735] However, the mere process of legislative codification might generate a desirable positive effect on all relevant actors, namely states, businesses as well as victims and activists.

1. Intermediary Obligations of States under the Status Quo

According to originalist approaches to IHRL, states enjoy a prerogative to regulate most issues of private conduct and relations between private actors within their jurisdiction, generally including breaches of Human Rights by private actors, as long as no governmental involvement that would raise the issue to an international level of relevance exists.[736] As has been noted already, consistent protection of human dignity and Human Rights generally requires protection against any kind of power intrusion, regardless of the nature of the intruder and particularly regardless of the fact as to whether the intrusion steams from a public or private source.[737] The response that IHRL provides to this necessity so far is an intermediary approach, based on the due diligence obligations of states to prevent, counteract and prosecute intrusions to Human Rights on a horizontal level from any powers other than the state authority itself. The UNGP are founded on such an intermediary approach as well.[738] The due diligence obligations of states arising from IHRL, to protect

[733] Cf. Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 29.

[734] S. R. Ratner, *The thin justice of international law* (1st ed., 2015), at 89.

[735] Cf. Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 72.

[736] Ratner, *supra* note 45, at 466.

[737] Fasciglione, *supra* note 36, at 40; Carrillo-Santarelli, *supra* note 511.

[738] Cf. McBrearty, *supra* note 346, at 12.

individuals from Human Rights violations committed by other private actors, are largely uncontested.[739] If a violation on the horizontal level nevertheless occurs, this will constitute a violation of the state's own due diligence obligation – provided the preconditions for such due diligence violation are fulfilled – but the private perpetrator's law-breaking conduct will not be attributed to the state.[740] The mere recognition of due diligence obligations of states for horizontal Human Rights protection prove that issues that take place on a purely private and horizontal level do not necessarily lack any relevance under PIL.[741]

It has been noted earlier that the notion of state-centrism suffers from a lack of responsiveness and appropriateness nowadays and therefore is disputable. In the concrete context of BHR, the traditional intermediary approach of IHRL to non-state actors simply does not produce the required protective effect. Due to the reorganisation of power relations in the post-globalised political and economic order, businesses have become difficult targets for the states addressed by the intermediary approach in comparison to other private actors. The intermediary approach with due diligence obligation of states can therefore work well in private relationships between individuals at the horizontal level, while this is not the case in relationships between individuals and businesses. This is due to the shift of power between the state and businesses, but also because the relationship between the individual and businesses can often no longer be understood as a typically horizontal relationship for which the intermediary approach has been envisaged.

The normative goal of the intermediary approach, to implement IHRL compliance at the horizontal level through mediation by the state, can only be achieved under *'ideal circumstances'*, which do not exist in the jurisdictions most frequently affected by structural BHR issues.[742] Under ideal circumstances, an obliged state has both the means and the will to fulfil its own obligation to the detriment of businesses operating in its jurisdiction and in favour of Human Rights interests. If this ideal situation does not exist and the primary obliged states fail in the horizontal enforcement of Human Rights protection, alternative solutions and, if necessary, alternative responsible actors ought to be identified.[743] Continued and unchanged reliance on already existing legal instruments, in turn, including those enshrined in the UNGP, would constitute a response to new realities with outdated means and would

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[739] Chetail, *supra* note 506, at 126; UN Human Rights Committee, *supra* note 164, at para. 8. Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 2.

[740] Chetail, *supra* note 506, at 125 ff.

[741] Ratner, *supra* note 45, at 470.

[742] Brune, *supra* note 1, at 113 ff; referring to these situations as 'hard cases', in which the premises underlying the interdemiary approach do not workDeva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 33, 34 f.

[743] Karp, *Responsibility for human rights, supra* note 47, at 156.

therefore be neither practical nor realistic in itself.[744] The legal force and potential for development of the future BHR treaty as envisaged by the TRD is weak with regard to actual corporate accountability, as it strictly follows the intermediary approach, leaving arguably little space for a response beyond this in the short term.[745] Under non-ideal circumstances, to maintain the intermediary solution could leave victims of Human Rights violations empty-handed or, in the best case, with remedies against a somewhat 'secondary' claimant.

a) Non-Ideal Circumstances for Implementation of the Intermediary Approach

The UNGP provide no instrument to resolve situations where the regulatory goals of the intermediary approach to horizontal Human Rights protection fail to materialise. Rather, it is expressly stipulated that the responsibility to respect Human Rights as determined by their second pillar may not be confused with corporate legal liability or enforcement of rights and claims against businesses, which exclusively ought to arise from domestic law.[746] Thus, the UNGP provide for maintenance of the intermediary approach of general IHRL, without any modification in relation to businesses.[747] However, the practical success of the intermediary approach upheld by the UNGP relies on two assumptions: first that states addressed by the UNGP will be willing and able to exercise their duty to protect Human Rights on a horizontal level; second, that businesses will carry out their responsibility to protect Human Rights diligently.[748] In order for businesses to meet the objectives of BHR, institutional regulations and implementation mechanisms must be created by states, otherwise any foundation for the realisation of expectations towards businesses is lacking.[749] If the state fails to fulfil its obligations of implementation at the primary level, the whole rationale of the intermediary approach fails, as in this case there is no regulation concerning businesses to which the

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[744] Cf. Strahovnik, *supra* note 285, at 166, 177; Nowak and Januszewski, *supra* note 38, at 115 f.

[745] Cf. Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 16.

[746] See the commentary on Principle No. 12 United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 13 f.; Clapham, 'Human Rights Obligations for Non-State Actors', *supra* note 159, at 21.; The UNGP are founded on three pillars. The duty to protect addressed towards State parties, the responsibility to respect addressed towards businesses and the necessity to provide remedies, which is addressed to both the States and businesses.

[747] Cf. Clapham, 'Challenges', *supra* note 143, at 568; Massoud, 'Die Guiding Principles on Business and Human Rights: Eine absehbar begrenzte UN-Agenda', 46 *Kritische Justiz* (2013) 7, at 10.

[748] Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 33. Nowak and Januszewski, *supra* note 38, at 124.

[749] This reasoning was brought forward by Ashford and O'Neill in a more general context, seeAshford, 'The Inadequacy of Our Traditional Conception of the Duties Imposed by Human Rights', 19 *Canadian Journal of Law and Jurisprudence* (2006) 217, at 221; It was incorporated into the BHR context with regard to the weaknesses of the UN Framework for Business and Human Rights by Brune, *supra* note 1, at 113 ff.

latter ought to adhere.[750] This is precisely what BHR regulation ought to respond to by virtue of some form of fall-back mechanism and what the UNGP do not address adequately.[751]

In order to generate effect, the UNGP, hence, rely precisely on the existence of *'ideal circumstances'* in the sense stipulated above.[752] Under such ideal circumstances, states will adhere to IHRL, translate the standards determined in IHRL and the UNGP into their national laws, e.g. on the basis of NAPs, and will be willing and powerful enough to enforce such laws.[753] Where states fail to do so, the corporate responsibility to respect, which is enshrined in the UNGP, will theoretically still require businesses to respect Human Rights and refrain from violations, as the first and second pillar of the UNGP exist independently from one another. However, in absence of domestic legislation, any stipulated respect for Human Rights is based on internal corporate goodwill, conscience, or social pressure only, not on any legally binding means.[754] Rather, in such cases, the corporate responsibility to respect will arise from a '*transnational social norm*' only.[755]

A report by a Working Group on the issue of BHR and the implementation of UNGP published in 2018 concluded that the standards set therein, such as the performance of Human Rights impact assessments, introduction of due diligence, or non-judicial internal grievance mechanisms were only implemented by a small number of businesses.[756] As regards the implementation by states, the report revealed redundancy as well, as only a small number had introduced domestic laws implementing the UNGP and, additionally, the willingness to monitor compliance with any such laws, in particular implementation of legally prescribed due diligence measures by business, proved equally low.[757]

As indicated above, NAPs are the main instrument applied by states in order to implement the UNGP on a domestic level. NAPs can be qualified as a general Human Rights impact assessment or gap analysis carried out by states, wherewith the latter determine their own gaps in their dealings with businesses in the context of Human Rights protection, based on

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[750] Brune, *supra* note 1, at 113.

[751] Cf. Massoud, *Die Guiding Principles on Business and Human Rights, supra* note 747, at 10.

[752] See Brune, *supra* note 1, at 113 ff; Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 33.

[753] Cf. Nowak and Januszewski, *supra* note 38, at 124.

[754] Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 33; cf. Clapham, 'Human Rights Obligations for Non-State Actors', *supra* note 159, at 21.

[755] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', *supra* note 339, at 75.

[756] Taylor, *supra* note 609, at 106. United Nations Working Group on Business and Human Rights, *supra* note 219, at para. 25 ff.

[757] Taylor, *supra* note 609, at 106. United Nations Working Group on Business and Human Rights, *supra* note 219, at para. 31 ff.

the standards set out by the UNGPs.[758] On the basis of this analysis, strategies for future policy actions are developed. Most NAPs have lead to domestic legislative attempts to introduce legal obligations for corporations to exercise non-financial reporting.[759] These laws require businesses to report and disclose their Human Rights practices, but often do not impose any obligations on them, such as a duty to conduct Human Rights impact assessments or due diligence, and thus fall short of the requirements of the UNGP.[760] The objective of such reporting obligations is to generate responsible business practices by way of public awareness of Human Rights commitments and reputational damages by risk of exposure.[761] However, a Joint Committee on Human Rights has found that in the UK this objective is poorly realised and that many businesses are disclosing merely blanket and general information about internal policies without this having any real impact on their operations and their actual Human Rights impact.[762]

Additionally, when a state decides to implement the UNGP on the domestic level by means of an NAP, this NAP itself may either be based on a voluntary approach to corporate obligations and recommendations, or it may foresee introduction of hard domestic law – as the state sees fit. The Implementation of NAPs has been criticised as too slow and ineffective in a relatively early stadium after the endorsement of the UNGP already.[763] More than ten years into the implementation of the UNGP by states, there is evidence supporting this criticism. Germany, for instance, reacted rather promptly after the endorsement of the UNGP and issued its NAP in 2016, by which it decided to choose the option based on voluntary

[758] See UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (Geneva, 2016), at 3 ff.

[759] Nolan and Frishling, *supra* note 286, at 112; as laws focusing on reporting see for instance Directive 2014/95 of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 22 October 2014; An Act to make provision about slavery, servitude and forced or compulsory labour and about human trafficking, including provision for the protection of victims; to make provision for an Independent Anti-slavery Commissioner; and for connected purposes, 26 March 2015; Modern Slavery Act; An Act to require some entities to report on the risks of modern slavery in their operations and supply chains and actions to address those risks, and for related purposes, No. 153, 2018, 2018; Modern Slavery Act; cf. also Cassell and Ramasastry, *supra* note 311, at 19 f.

[760] See UNGP Principles No. 18, 19, 20.

[761] Nolan and Frishling, *supra* note 286, at 112.

[762] Which is why ultimately, the Joint committee recommended to legislate mandatory Human Rights Due Diligence obligations in UK law in order to achieve a positive impact in this regard, see House of Lords, House of Commons Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability, Report from 5 April 2017) at para. 59, 37-38; *ibid.*

[763] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 65; cf. Cassell and Ramasastry, *supra* note 311, at 9 ff.

implementation by businesses.[764] The German NAP envisaged a voluntary commitment to which it encouraged businesses and which was to be monitored over a period of two years, stipulating that half of the addresses from which corporations operated had implemented the voluntary guidelines by that time.[765] At the end of this period, the efforts of the businesses were to be evaluated and only then would a decision be made on how Germany should proceed with the BHR agenda, in particular with regard to binding legislation.[766] In 2019, the government initiated a first round of evaluation, whereby a survey of more than 3,000 corporations was intended in order to get a picture of how the German NAP is implemented.[767] Only 14 per cent of the requested corporations had responded to the governmental examination and out of these very few - merely 18 per cent - passed the examination in the sense that they had sufficiently fulfilled the requirements of the NAP to implement the UNGP.[768] Another final round of monitoring with another more than 2,000 surveyed corporations has confirmed this low implementation rate, revealing a compliance rate with the German NAP at about 15 per cent of the surveyed corporations.[769] As a consequence, formal legislative initiatives have been initiated leading to the adoption of the German Supply Chain Act, which, however, due to pressure from the business sector was significantly diluted during the legislative process in terms of its protective effect.[770] As mentioned above, no civil liability of corporations for Human Rights violations has been integrated, which makes the German Supply Chain Act and its provisions on due diligence within supply chains exemplary for an insufficient realisation of the third pillar of the UNGP, which is often a deficiency in the domestic implementation of the UNGP by states. Only administrative measures by supervisory authorities, such as fines, are provided for in the event of a violation of the due diligence obligations stipulated in the law. Special remedies for injured victims are not foreseen. This applies regardless of the type and scale of Human

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[764] See the German NAP 'Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte' (2016).

[765] Macchi and Bright, *supra* note 693, at 17; Die Bundesregierung, *supra* note 764, at 28; Auswärtiges Amt, -*Monitoring zum Nationalen Aktionsplan Wirtschaft und Menschenrechte* (2020), available online at https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2124010.

[766] Auswärtiges Amt, *supra* note 765.

[767] Rüntz, *supra* note 694, at 291.

[768] See 'Zwischenbericht Erhebungsphase 2019: Monitoring des Umsetzungsstandes der im Nationalen Aktionsplan Wirtschaft und Menschenrechte 2016–2020 beschriebenen menschenrechtlichen Sorgfaltspflicht von Unternehmen' (2020), at 6, 18.

[769] Rüntz, *supra* note 694, at 291; 'Abschlussbericht: Monitoring des Umsetzungsstandes der im Nationalen Aktionsplan Wirtschaft und Menschenrechte 2016–2020 beschriebenen menschenrechtlichen Sorgfaltspflicht von Unternehmen' (2020), at 6 f.

[770] See also Sect. **B.II.2.** above.

Rights violations in question. In case of doubt, damages remain uncompensated. The law is therefore not only belated, but also falls short of the UNGP standards (albeit some of these are partly classified as '*minimalist framework*'[771] already) and does not correspond to the general rationale of IHRL. Unlike criminal law, for instance, IHRL is not limited to having a repressive effect on the perpetrator, but rather pursues a victim-oriented focus that aims to empower and legally strengthen them, i.e. requires a level of restoration of justice that exceeds mere sanctioning.[772]

The disillusioning result of voluntary Human Rights compliance by businesses in Germany is probably not insignificantly related to the fact that both the UNGP as well as the German NAP rely exclusively on voluntariness. Neither of these foresees mandatory legal consequences or even sanctions for non-compliance. The above-mentioned example of the Covid-19 responses in the garment industry shows that, at the latest in times of crisis, corporate commitments based largely on voluntariness reach their limits quickly. When it comes to averting economic damage and securing profits at the expense of Human Rights – even if businesses have committed themselves to certain principles and introduced mechanisms for their enforcement – these will be suspended deliberately if a lack of legal force allows for it.[773] This is also the reason for necessary legislative efforts being delayed to such an extent, although implementation would have been possible at an earlier point in time. In the end, Germany's decision to enact a binding law implementing the UNGP was made a decade after its endorsement, and the law will not be applicable until 2023.[774] A major argument in favour of the UNGP and against a binding legal instrument was precisely that the UNGP, as a soft law instrument, could offer a *short-term solution* and, thus, produce as much recognition and positive effects as possible in a short period of time, which, in contrast, was predicted as impossible for a binding BHR treaty.[775] Thus, the UNGP were supposed to be the more efficient solution compared to a binding treaty: better qualified to bring about noticeable effects in the shortest possible time. In the case of Germany, but also

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[771] Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?', 7 *SUR International Journal on Human Rights* (2010) 198, at 200.

[772] Nowak and Januszewski, *supra* note 38, at 154.

[773] Cf. Initiative Lieferkettengesetz, *supra* note 280, at 7 f.

[774] As provided by Art. 4 of the German draft bill of the *Lieferkettengesetz*, the law will enter into force at 1st of January 2023, but only for businesses with more than 3,000 employees. From 2024, the law will apply to businesses with 1,000 employees or more. See also Krebs, *supra* note 296.

[775] Rejecting the solution of a binding treaty for BHR and advocating the soft law approach of the UNGP instead Ruggie qualified a binding treaty as inappropriate because of the 'painfully slow' nature of treaty negotiations and the immediate need for action regarding BHR. See Cassell and Ramasastry, *supra* note 311, at 8.; John Ruggie, Treaty road not travelled, Ethical Corporation, May 2008, at 42f. Ruggie also argued that a treaty-making process *"now"* could undermine "*effective shorter-term measures"* and noted "*serious questions"* about how a treaty would be enforced to be still open. Id. at 42.

many other states, such as the Netherlands, which to date have only been able to pass a corresponding BHR law with regard to the rights of children,[776] i.e. a particularly vulnerable but still only a very limited group, or Switzerland, where a lengthy legislative process has also only recently produced a much weaker BHR law than originally envisaged,[777] the theoretically possible and desired short-term effect of the UNGP has failed to materialise.[778] Yet a large part of states supporting the endorsement of the UNGP have not taken any legislative action at all. Given these limited practical effects, it is unsurprising that very shortly after the endorsement of the UNGP a debate about their effectiveness broke off. In this debate, some states took the position that the new UNGP simply needed a little *more time* for implementation – acknowledging that the desired short-term effects were lacking and, concomitantly, largely conceding that the mere choice of an instrument of weaker legal nature has not resulted in any accelerating force – while others lamented that continued and exclusive adherence to the UNGP would only prolong their ineffectiveness and, in consequence, delay the path to a hard law solution.[779]

The trend questioning the efficiency of the UNGP continued and five years after their unanimous endorsement frustration remained high, as the envisaged shorter-term effect proved to be less effective than expected.[780] Evaluations by Human Rights groups reported that, in reality, not much had changed for affected individuals.[781] A study commissioned by the European Union Parliament revealed that the UNGP have led to a high increase in awareness and sensibility for BHR among states, businesses and society and for the first

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[776] See Business & Human Rights Resource Centre, *Dutch Senate votes to adopt child labour due diligence law* (2017), available online at https://www.business-humanrights.org/en/latest-news/dutch-senate-votes-to-adopt-child-labour-due-diligence-law/.

[777] Business & Human Rights Resource Centre, *Switzerland: Responsible Business Initiative rejected at ballot box despite gaining 50.7% of popular vote* (2020), available online at https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/; cf. also Macchi and Bright, *supra* note 693, at 15.

[778] Admittedly and fortunately there are also successful examples of national legislative implementation of the UNGP, such as the French Loi de Vigilance, which provides for a strict BHR regime with a legally defined due diligence obligation for corporations as well as civil liability for violations and administrative sanctions for violations of up to EUR 10 million. This law was also highlighted by the UN Working Group on Business and Human Rights, see United Nations Working Group on Business and Human Rights, *supra* note 219, at 2. On the French law see as well Cassell and Ramasastry, *supra* note 311, at 22; Macchi and Bright, *supra* note 693, at 231; Taylor, *supra* note 609, at 100. Taylor, p. 100. Although neither this progress nor the overall value of the UNGP is to be diminished, it must nevertheless be noted that such implementations are rare and, above all, have so far not been able to carry the often-painted picture of the UNGP as the only effectively realisable instrument for BHR regulation.

[779] Cassell and Ramasastry, *supra* note 311, at 10.

[780] *Ibid.*, at 9.

[781] *Ibid.*

time provided a globally accepted platform for action.[782] However, the study comes to rather sobering conclusions regarding extremely slow implementation by states, with only 12 NAPs in force after five years – thus, it articulates a call for more political will on the part of governments and fewer declarations, while maintaining a generally optimistic vision for the future.[783] Another five years later, however, the situation has unfortunately still not improved substantially. In the meantime, some further states have implemented NAPs – according to the UN there are now 26 states with adopted NAPs and another 20 reportedly initiated processes to implement a NAP.[784] However, this is still only a very small fraction of the international community that endorsed the UNGP unanimously. Additionally, the mere fact that a state has adopted an NAP does not automatically result in the realisation of the UNGP standards in that state's jurisdiction, as demonstrated by the negative example of Germany.

Against this backdrop, the question arises to what extent the achievements of the UNGP will actually be jeopardised by the adoption of a binding future BHR treaty. For obviously, the endorsement that states have shown with regard to the UNGP does not reflect their actual willingness to act, at least in non-ideal circumstances. Arguably, it is the soft nature of the UNGP that ensured both rapid acceptance on a broad level and at the same time frustrated chances for effective and rapid implementation, as was desired in the first place. It is a basic prerequisite for the functioning of soft law instruments, which are based on the voluntariness of their addressees, that these addressees must be willing to implement the standards even without the threat of sanctions or the stigma of breaking the law. Studies in the BHR context illustrate that there is a correlation between soft law regulatory resolutions and insufficient compliance with such soft laws by their regulatory targets.[785] No legal consequences arise from a violation of soft law, which rather has interpretive value when applied in connection with a formal legal norm.[786] However, a claim or remedy always depends on binding and formal law.[787] Thus, over-reliance on soft law limits effects in practice. Unsurprisingly, concrete forms of legal accountability by virtue of binding law are demanded by Human

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[782] Cf. Faracik, *supra* note 559, at 8.

[783] *Ibid.*, at 8 f.

[784] See above, Sect. **B.II.3.c).**

[785] Bright *et al., supra* note 267, at 670; L. Smit, C. Bright and R. McCorquodale, 'Study on due diligence requirements through the supply chain' (2020), at 16.

[786] Garrido Alves, *supra* note 39, at 9.

[787] This materialised in the Akpan v. Royal Dutch Shell case before the Hague District Court (2013) in the Netherlands - although the court found it had jurisdiction, the case was tried and damage was identified, a claim was ultimately denied because it was not provided for by law under the applicable Nigerian law. However, based on the standards as set out by the UNGP alone there arguably should have been compensation for the victims, see *ibid; Akpan et al v. Royal Dutch Shell et al,* C/09/337050 / HA ZA 09-1580 District Court of the Hague (2013).

Rights activists, scholars and indeed some states as well, that go beyond action plans and mere reporting obligations.[788] In view of the shortcomings of the intermediary approach to respond to BHR issues in the past, whether in relation to the intermediary obligations of states arising from general IHRL or the UNGP after their endorsement, it appears far away from the necessities of reality to deny the need to introduce direct corporate Human Rights obligations in IHRL and some form of liability arising from IHRL, which ought to apply regardless of national transformation laws and state obligations.[789]

The UNGP, as a guideline and soft law instrument, must not necessarily be expected to conclusively define the subject matter of regulation and determine a solution for all scenarios. Rather, a binding instrument such as the future BHR treaty usually follows soft law.[790] The fact that the UNGP itself do not offer an answer to the shortcomings of the intermediary approach is therefore tolerable. The future BHR treaty, however, should address and remedy this issue. Objections against direct obligations often criticise such an approach as being utopian and out of touch with reality. However, it is questionable whether a legislative response that unconditionally retains the intermediary approach, which is not providing the desired effects under non-ideal circumstances, is actually that much closer to reality. Direct recourse to businesses and a relaxation of the intermediary approach would respond to the reality of many cases in which the injustice of BHR scenarios is realised.[791]

Van Ho, in turn, interprets the shortcomings of the intermediary approach differently.[792] The fact that it is primarily a lack of state willingness giving rise to a need for regulation in the field of BHR should lead to the conclusion that solution-oriented BHR regulation needs to start precisely at this point, i.e. with further regulation of the misbehaving state, and not with businesses as new addressees.[793] Accordingly, it is argued that the existing regime of horizontal due diligence obligations of states is in principle suitable to adequately respond to the regulatory needs in this area. The problem is not that the legal obligations already provided are insufficient and therefore further obligations need to be created, but rather that the existing mechanisms, while providing a strong foundation, are insufficiently implemented in reality when states do not prevent or legally address violations of Human Rights by businesses.[794] However, this problem would not be resolved only because the defendant

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[788] Clapham, 'Challenges', *supra* note 143, at 569.

[789] Cf. Carrillo-Santarelli, *supra* note 511.

[790] Bright *et al., supra* note 267, at 670; cf. Shaw, *supra* note 79, at 88; with regard to soft law instruments in the BHR context see International Commission of Jurists, *supra* note 290, at 34, 44.

[791] Nowak and Januszewski, *supra* note 38, at 116.

[792] van Ho, *supra* note 151.

[793] *Ibid.*, at 112 ff.

[794] See *ibid.*, at 123 ff., 136 f.

changes.[795] Therefore, *Van Ho* argues in favour of creating a more elaborated due diligence mechanism in order to get states to fulfil their own obligations, but objects to the introduction of direct obligations.[796]

It is undisputed that states are already obliged by IHRL to create a legal order in which Human Rights violations between private parties in their jurisdiction are prevented and prosecuted and that, consequently, PIL already contains appropriate norms to address BHR issues.[797] Nowadays, Human Rights are not regarded as mere rights of defence against the state. Rather, it has been widely recognised that most international Human Rights enshrined in the main treaties, particularly the International Bill of Rights, establish positive obligations of the state towards the individual.[798] The duty to protect Human Rights encompasses the obligations of states to create a legal order in accordance with the purposes of IHRL, get their own governmental houses in order, and to minimise governance and remedial gaps.[799] Thus, theoretically, it could suffice to modify and improve the norms on state responsibility in more concrete terms with regard to BHR issues. Strictly speaking, the governance gaps in IHRL do not exist due to a lack of legislative regulation, but are rather caused by factual circumstances and, above all, by the fact that there is no remediation mechanism that addresses and attempts to compensate for a simple non-implementation of state obligations with regard to BHR. The strong opposition to direct corporate obligations in international BHR regulation, thus, stems precisely from a rejection of necessity, given the existing mechanisms that IHRL already provides. *Van Ho's* considerations imply such reasoning, while *Monnheimer* follows on from *Van Ho's* approach filling it with detailed content regarding its legal specifications, as will be illustrated further below.[800]

However, law should also respond to failures of international politics that are not necessarily rooted in legislative *lacunae*.[801] This includes alternative solutions for regulatory subjects that may already be sufficiently regulated, but in reality do not have the desired effect due to a

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[795] *Ibid.*, at 135.

[796] *Ibid.*, at 135 f.

[797] see Monnheimer, 45f., 38 ff Bhuta, '6 The Role International Actors Can Play in the New World Order', in A. Cassese (ed.), *Realizing Utopia*: *The Future of International Law* (2012), 61 at 75, in particular at footnote 65; This is precisely the assumption on which the UNGP are based, see only Principle 1, Commentary, United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 3.

[798] Clapham, 'Challenges', *supra* note 143, at 563.

[799] Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All', 38 *Fordham International Law Journal* (2015) 458, at 463. Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights, supra* note 799, at 463.

[800] Monnheimer, *supra* note 73 For Monnheimers elaboration on the due international diligence obligation of States see the subsequent section.

[801] Cf. Bhuta, *supra* note 797, at 75.

lack of political will. Where a host state decides not to intervene against businesses violating Human Rights within its jurisdiction, one can hardly enforce due diligence obligations against such host states effectively, e.g. for omissions regarding massive chemical or extractive industries operating with little regard for the health of those affected by their business.[802] Due diligence obligations of states, even if modified, do not exert preventive effect. Even if victims would be granted the possibility to obtain financial compensation from states due to violations of due diligence obligations, this would not lead to the prevention of the occurrence of harm to the same extent as direct corporate obligations could. However, prevention of damages should be the primary goal. Actual prevention cannot be predicted realistically without threatening immediate consequences for those actors who ultimately decide upon the occurrence of damage, which in either case are businesses, not states. If the due diligence solution is adhered to, a preventive effect will only occur much later. Under non-ideal circumstances it must first affect an unwilling state to such an extent that the states decide to fulfil its own duty after all, which in turn would require direct national regulation of business, which ultimately could be likely to deter businesses from further unlawful actions and only at this point work preventively. It would not only be simpler and faster, but also desirable from a victim's perspective to establish direct corporate obligations in addition to the existing due diligence obligations of states.

Most certainly, state behaviour in relation to BHR issues will not automatically or necessarily change simply due to the inclusion of businesses into the circle of direct addressees of IHRL. However, direct obligations could remedy situations where states do not act on BHR or do not adequately enforce their laws. They would provide victims with substantive claims against tangible respondents and, depending on the enforcement mechanisms that a treaty would provide for, allow redress by way of supranational complaints or mediation bodies, foreign courts or through non-state arbitration processes. Even without corresponding legislation and procedures in their own home states, victims would be granted a claim by which they could appeal to such bodies and would not be limited on referring to a *'transnational social norm'*. As justified and necessary the focus on securing the enforcement of rights by states set out by *Van Ho* is, it is just as important and necessary to secure the legal basis for claims in the relationship between businesses and individuals. For as long as there are no legally anchored obligations on the part of businesses, individuals have *no claim against the actual perpetrators of their damage*, albeit they may well have a strong and justified reparation interest in pursuing precisely these perpetrators.[803]

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[802] Clapham, 'Challenges', *supra* note 143, at 560.

[803] Cf. Lane, *supra* note 633, at 34.

It is quite conceivable that the mere fact that a breach of the law is actually taking place will generate greater willingness, awareness or even pressure among businesses for more Human Rights compliance, even if the state in which they operate does not enforce these norms.[804] Once a binding legal norm has been created, it may produce positive effects beyond the possibility of legal enforcement, which contribute to the implementation of the regulatory objective. Although, initially, this does not terminate unlawful misconduct of states, it can have a positive effect on the legal position of victims, which is decisive to achieve the regulatory goals of BHR.

It is only logical and indeed appropriate to first exhaust and reconsider the possibilities of existing legal means before considering a new concept, as which the codification of direct corporate obligations in a future BHR treaty is understood. However, the creation of direct corporate obligations from IHRL is not a competing approach to the intermediary solution and state due diligence responsibilities, but rather a necessary supplementation to it in view of the weaknesses of the intermediary solution. If one assumes that states are obliged to create a legal order that is friendly to Human Rights and allows their effective protection, it is at least conceivable that this obligation must not be limited to their own domestic legal system in any given case. Rather, it might be extended to the creation of a respectively effective *international* legal order, if domestic means of implementation have proven insufficient in the past, e.g. because businesses abusively evade the domestic regime created by the state in order to comply with its intermediary duty to protect. In the light of the overriding role of Human Rights protection, might it not then be necessary to extend this duty and to require state to seek for ways to prevent impunity beyond domestic measures? The interpretation of written and unwritten norms of IHRL should be measured against the framework created by the UDHR, i.e. it should neither go beyond its scope nor fall significantly short of the claims, expectations and objectives set out by the UDHR.[805] Art. 28 of the UDHR clearly speaks of people's entitlement to an international order that guarantees effective protection and enjoyment of Human Rights. If one interprets the intermediary approach of IHRL and the horizontal state obligations in the light of Art. 28 UDHR, the introduction of direct corporate obligations must not appear a departure from state obligations, but rather an expression of it. The fact that IHRL already provides for ways to deal with horizontal Human Rights violations by the state would, if interpreted accordingly, not conflict with the approach to codify direct corporate obligations in a future BHR treaty. The future BHR treaty would rather constitute an

[804] Carrillo, *supra* note 99, at 71.

[805] Also in favour of a strong position of the UNDHR as a interpretation and application guide for subsequent Human Rights treaties López Latorre, *supra* note 535, at 79.

own means by which states attempt to fulfil their intermediary obligations to prevent and protect from horizontal Human Rights violations.

In sum, the failure of states to fulfil their own Human Rights obligations at the horizontal level is the main problem underlying the entire issue of the BHR. However, stricter involvement of states and direct obligations for businesses are not mutually exclusive regulatory goals. Neither the academic literature in favour of direct obligations, nor the respective positions of stakeholders presented during the negotiations on the BHR treaty indicate that the introduction of direct obligations is regarded a *panacea* for the BHR as a regulatory subject. Rather, it should be considered a necessary next step that ought to be taken now in order to produce noticeable effect on victims and enhance further legal development, but which should in no way lead to a neglect of other regulatory elements of BHR. There is a lot implying that a future BHR treaty affecting businesses directly could most likely generate a short-term change of trend in the way businesses operate or at least in their willingness to act. As long as all regulations on BHR remain limited to the state, on the other hand, businesses will be able to escape their own responsibilities and get away with impunity. It would not bring a noticeable incentive to act in the short term, but rather could paradoxically be understood as legitimising the *status quo*.[806]

If the proposed direct obligations of businesses under IHRL are understood as a kind of fall-back or supplementary mechanism to compensate for the shortcomings of the intermediary approach, a coexistence of both approaches is not only possible but necessary.[807] If states fulfil their obligations and create a legal order that is in conformity with IHRL and works in the newly shaped relationships with businesses, there is basically no reason for obligations and supranational or international processes. In other words, where sufficient substantive domestic laws are in place, there is no need for direct corporate obligations stipulated in a future BHR treaty to apply. This kind of subsidiarity, not of obligations but of sources of law – comparable to the complementarity of ICL[808] – could well be anchored in a treaty without harming the regulatory objective of BHR. Nevertheless, the mere codification of such obligations could ensure cross-border legal clarity and legal certainty and possibly even provide an additional incentive for the states under obligation to manage BHR autonomously in a manner appropriate to the requirements of IHRL. Thereby, reprimands and interference from the outside would thus be counteracted and reduced.

Moreover, the creation of internationally applicable direct obligations for businesses would address one of the main causes giving rise to the inadequacy of the intermediary approach.

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[806] Massoud, *Die Guiding Principles on Business and Human Rights, supra* note 747, at 16 f.

[807] Cf. Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 30.

[808] See above at Sect. **B.III.1.b)i.**

By imposing direct obligations on businesses through a future BHR treaty, businesses would be deprived, at least to a certain extent, of the possibility to exert pressure on the states and their regulatory decisions with regard to BHR. Presently, states must fear a decrease of foreign investments in case they *autonomously* raise legal standards for Human Rights protection in their jurisdiction.[809] This is a strong argument in favour of the general regulatory necessity and harmonisation at the international level, which cannot be satisfied by means of indirect due diligence obligations alone. If direct obligations are created by means of an international treaty, businesses are deprived of the possibility to manipulate the legal situation in weaker states to their own advantage, as direct obligations from IHRL will still affect them in any case.[810] Influence by businesses to the detriment of Human Rights legislation and states being vulnerable to such influence cannot be entirely prevented in this way, but such an additional legislative channel of PIL would at least make the exercise of business leverage more difficult.

b) Activating Due Diligence Liability of States in IHRL

The intermediary approach not only fails when states are deliberately unwilling or unable to fulfil their Human Rights obligations against business at the horizontal level. Most obligations of states to prevent Human Rights infringements on a horizontal level are due diligence obligations of conduct and not obligations of result.[811] Thus, it is well conceivable that states might sufficiently fulfil this obligation of diligence and still, however, a horizontal Human Rights violation occurs.[812] In this case, there is no breach of the duty of due diligence and thus, in principle, no possibility to hold the state liable for any infringement and damage.[813] In consequence, victims are left without legal means of defence, in the worst-case scenario, if national law does not provide for claims directed against the acting corporations.[814]

In order to legally address corporate misconduct and despite the rather obvious gaps arising from the purely state-centric approach to Human Rights accountability, states are increasingly considered to be indirectly liable for corporate Human Rights violations due to their own failure to effectively prevent such violations by businesses in the first place.[815] In this way, victims of violations are provided with the possibility to obtain at least financial reparations by way of remedies against the state. However, even if one follows the approach

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[809] Brune, *supra* note 1, at 38; Ruggie, *supra* note 697, at 86 f.

[810] Cf. Garrido Alves, *supra* note 39, at 29.

[811] Monnheimer, *supra* note 73, at 4; Chetail, *supra* note 506, at 125; Nowak and Januszewski, *supra* note 38, at 142.

[812] Cf. Carrillo, *supra* note 99, at 66.

[813] Chetail, *supra* note 506, at 125.

[814] Lane, *supra* note 633, at 34.

[815] Ratner, *supra* note 45, at 469 f; Nowak and Januszewski, *supra* note 38, at 116.

in favour of exclusive responsibility and liability of states, there will be a need to determine for which specific detrimental business impacts this ought to apply and under which conditions of liability.[816]

In order to establish liability, the state must mandatorily *be accusable* of some form of failure on their part, at least of negligence or omission, in order to be responsible and liable for violations committed by businesses. The approach to call states into account for Human Rights violations of private business entities by means of due diligence obligations is based on the assumption that it constitutes a violation of the state's own Human Rights obligations, if the state 'tolerates' or fails to prevent violations by third parties within its sphere of influence, i.e. its jurisdiction.[817] It presupposes that although a business operation was reprehensible and damaging, it was at the same time not acknowledged as a breach of legal obligation of the business in question. Rather, the legal reprehensibility is allocated to the state and qualified as a breach of that state's own international obligation.[818] Under customary IL, international state responsibility and liability to compensate harm will generally only arise where the unlawful act in question is attributable to the state.[819] For this purpose, the ILC Articles on International State Responsibility in their Chapter II provide for rules of attribution, most of which are recognised as customary IL, but all of which require a certain degree of state control, empowerment, or adoption of the non-state conduct and therefore exclude a substantial part of the BHR problem, i.e. where businesses operate entirely autonomously.[820]

The due diligence obligation of states is applied in the BHR context precisely in order to avoid such shortages in attribution. State due diligence obligations in the context of horizontal protection of Human Rights have been recognised in the first pillar of the UNGP, the Maastricht Principles[821] as well as by various monitoring bodies of IHRL such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women as well as Racial

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[816] Cf.Ratner, *supra* note 45, at 465.

[817] *Ibid.*, at 470; Ryngaert, 'State Responsibility and Non-State Actors', in M. Noortmann, A. Reinisch and C. Ryngaert (eds), *Non-State actors in international law* (2015), 163 at 177.

[818] Ryngaert, *supra* note 817, at 177.

[819] McCorquodale and Simons, *supra* note 190, at 601, 608 f; Nowak and Januszewski, *supra* note 38, at 142; see also*Case concerning military and paramilitary activities in and against Nicaragua* International Court of Justice (1986) I.C.J. Reports 1986, 14, at para. 115. The court found that the acts committed by the 'contras' are not sufficiently attributable to the United States, despite inter alia financial support provided by the state, and therefore cannot give rise to international legal responsibility.

[820] McCorquodale and Simons, *supra* note 190, at 601, 606 ff; Cf. Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 241 f; Ryngaert, *supra* note 817, at 163 f,.

[821] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 28 September 2011.

Discrimination and the Inter-American Court of Human Rights.[822] In terms of content, Human Rights due diligence stipulates the duty to prevent violations of IHRL between private parties under the jurisdiction of a state.[823] The notion of state due diligence practically replaces or rather supplements attribution of wrongful corporate conduct by establishing a state's own duty and responsibility, which does not need to be attributed in order to hold it liable.[824] In other words, where there is a due diligence obligation, no attribution aspects need to be taken into account. However, due diligence liability is still subject to certain limiting conditions, as the state must be accusable of an own violation of IHRL. In order for due diligence to apply, the state must have known or ought to have known of a businesses' risk-prone conduct with regard to Human Rights guarantees.[825] In other words, it is not sufficient to find that an infringement of material content of a Human Right has occurred, rather it ought to be shown that the state in question had known of the risks and yet failed to diligently introduce preventive measures.[826] It is questionable when a state's knowledge exists and how such knowledge can be substantiated, for instance, by victims seeking compensation within a Human Rights litigation. *McCorquodale* and *Simons* identify two cases of constructive knowledge in this context, which ought to give rise to a due diligence violation of a state: first, where a business intends to invest in conflict-affected areas and, second, where a home state negotiates a Trade and Investment agreement in favour of its national businesses, thereby somewhat assisting and legitimising the start of economic activity in the host state in which a Human Rights violation occurs at a later date.[827] In both situations, there are exceptional circumstances that justify a special degree of necessary diligence on the part of the state. Both standards ought to apply in extraterritorial situations and not when a Human Rights violation takes place within a state's own jurisdiction. However, although knowledge is definitely a factor that may give rise to a due diligence violation, it is inappropriate as the sole standard of liability. On the one hand, some effort is required to demonstrate that knowledge is quite high, whlle on the other hand, it is a factor which lies solely within the subjective sphere of influence of the state itself. Outside of such predetermined case groups as suggested by *McCorquodale* and *Simons*, it will often be within the state's exclusive power to acquire knowledge of certain circumstances or to remain

[822] Providing further references see Lane, *supra* note 633, at 32, 34 ff; *Case of Velásquez-Rodriguez v. Honduras,* Serie C No. 4 Inter-American Court of Human Rights (1988), at para. 172; Ryngaert, *supra* note 817, at 178 f.

[823] Ryngaert, *supra* note 817, at 177 f.

[824] McCorquodale and Simons, *supra* note 190, at 618. Monnheimer, *supra* note 73, at 4.

[825] McCorquodale and Simons, *supra* note 190, at 620. Monnheimer, *supra* note 73, at 117.Nowak and Januszewski, *supra* note 38, at 142.

[826] Monnheimer, *supra* note 73, at 71.

[827] McCorquodale and Simons, *supra* note 190, at 620 f.

deliberately or negligently unaware of them. Deliberate or negligent unawareness are equally difficult to ascertain and to prove and, thus, weaken the legal position of victims. This is especially true when there are superficial BHR policy efforts in a state. Therefore, there is a need for more objective criteria determinable and based on external circumstances, in addition to knowledge, such as foreseeability[828] and whether the occurred violation could have been avoided by reasonable means of state intervention as factors justifying the allegation of a breach of due diligence by the state.[829] The more concrete and objective the requirements for due diligence are, the easier it is for victims to operationalise them.

However, in IHRL, the principle of due diligence obligations with regard to horizontal issues and the concept of state responsibility in general are rather abstract, context-dependent and underdeveloped concepts, in need of interpretation and difficult to grasp for victims of Human Rights violations.[830] This is a deficiency of IHRL, which must necessarily be remedied, irrespectively of BHR issues, but does not mean that the latter regulatory object ought and can be solved by a corresponding focus on the regulation of state responsibility exclusively.[831] After finding that the traditional typology of Human Rights obligations does not provide for guidance on what requirements must be met in order to give rise to state responsibility, *Monnheimer* proposes a conduct-based typology of Human Rights in order to concretise the concept.[832] She identifies three types of positive Human Rights obligations relevant to horizontal Human Rights protection, namely positive obligations of result, of diligent conduct and progressive realisation, non-compliance with all of which occurs and can be called into account under different conditions.[833] Accordingly, failure of states to enact adequate Human Rights legislation and an administrative apparatus enforcing such legislation and providing for sanctions, remedy and reparation where an infringement occurs, constitutes a violation of a state's positive Human Rights obligation of result and shall give rise to state responsibility under the respective source of law.[834] Thus, victims of horizontal Human Rights violations could hold states accountable where a Human Rights violation occurs and cannot be redressed or sanctioned due to the state's failure to enact legislative and administrative infrastructure to do so.[835] In practice, in most cases there will be some form of infrastructure for Human Rights protection integrated in a state's legal order, the

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[828] See Lane, *supra* note 633, at 31.

[829] Chetail, *supra* note 506, at 125; For a detailed evaluation on such delimiting criteria, see Monnheimer, *supra* note 73, at 114 ff.

[830] Monnheimer, *supra* note 73, at 47 f; cf. Lane, *supra* note 633, at 31.

[831] As already indicated above with regard to the approach of *Van Ho*, see Sect**. C.II.1.a).**

[832] Monnheimer, *supra* note 73, at 54 ff.

[833] *Ibid.*, at 55.

[834] *Ibid.*, at 58 ff., 63.

[835] Cf. *ibid.*, at 68 f.

question of state liability being whether it has been implemented with the necessary diligence – which, in *Monnheimer's* view, must be decided on a case-by-case basis.[836] Having found this, the author defines several criteria supposed to establish liability for the violation of the state's due diligence obligation to create a properly functioning Human Rights order, by which the regulatory and accountability gaps in relation to the subject matter of BHR ought to be resolved instead of introducing claims directly against businesses.[837] Finally, the study finds that in determining whether a state has breached its due diligence obligations, two circumstances in particular will cause difficulties in practice, namely to demonstrate foreseeability and the balancing of the lack of capacities or will on the part of the state obliged to act diligently. In conclusion, it is proposed to resolve foreseeability with mandatory state Human Rights impact assessments following the model of Environmental Law, whereby *Monnheimer* concedes that this will only be feasible to a limited extent;[838] while the BHR-typical situation, where a host state does not comply with the due diligence obligations required of it consciously or out of inferiority vis-à-vis certain businesses, an orientation towards the '*unwilling or unable'*-standard, which is applied in the international fight against terrorism and allows third states to intervene in order to prevent and mitigate risks for international interests, is proposed.[839] In most cases, however, the latter will probably only be feasible if there is a minimum degree of willingness to cooperate on the part of the states involved, which is ultimately also assumed in the above analysis. Both main issues, the standard of foreseeability and a necessary willingness to implement, are immanent to the intermediate nature of state due diligence obligations in horizontal Human Rights protection.

The detailed comprehensive analysis of *Monnheimer,* intending to determine a workable due diligence concept in IHRL, as well as *Van Ho's* more general considerations on state responsibilities and due diligence liability, are most certainly both justified and necessary and offer feasible approaches in order to improve the legal position of many individuals in IHRL. However, the conclusion drawn from the need to reform the regulatory issue of state due diligence responsibilities, that it is not the time or even superfluous to promote direct corporate obligations in parallel, is not compelling. Exclusive recourse to the state in BHR situations does not respond to significant concerns of victim protection and normative necessities of the subject of BHR regulation, which gave rise to a treaty process in the first place. This is not an objection that can be raised against the aforementioned evaluation, as it did not intend to explicitly and specifically resolve regulatory concerns about BHR but rather

[836] *Ibid.,* at 69.

[837] Cf. *ibid.,* at 76 f.

[838] *Ibid.,* at 218 ff.

[839] *Ibid.,* at 325, see also chapter 7 on the extraterritorial applicabilty of due diligence obligations at 258 ff.

to provide a general concept of due diligence in IHRL. A conceptualisation of state due diligence obligations and liability will not provide an answer for victims as regards to whom and where to turn if their rights have been violated, in cases where the state cannot be accused of negligent behaviour, e.g. because it acted within the limits of its resources and reasonableness.

First, it needs to be noted that even if the threshold of due diligence liability of states was substantially lowered, i.e. by application of a very low standard of foreseeability or modification of the due diligence obligation into an obligation of result in particularly severe cases of Human Rights violations in order to ensure some kind of universal liability for corporate violations,[840] the legal position of victims in such situations would still be worse than if they had a direct claim against businesses. The burden of substantiation is automatically greater when referring to state liability for corporate misconduct: not only do victims have to prove damage in connection with a corporation's unlawful or reprehensible conduct, but they also have to show some kind of link or culpable omission on the side of the state, i.e. why the state's conduct in the situation in question has not been diligent enough.[841] In addition, there are practical problems and inhibitions in enforcing claims for damages against the state, to which victims are naturally inferior and may, thus, feel compelled to restrain themselves. The state will naturally be the more difficult defendant for victims than businesses.

The standard of diligence is limited at least by a state's technical and financial capacities – where it exploits these capacities no violation of due diligence obligations exists.[842] Thus, while the lack of direct horizontal effect potentially precludes victims from getting a remedy vis-á-vis the actual perpetrator of their harm, the duty of due diligence and the standard as

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[840] A somewhat absolute liability for corporate Human Rights abuses, based on risk and not on fault of is envisaged in Art. 8 of the Third Revised Draft wirth regard to the due diligence obligations of businesses which States are required to impose, see D. Cassel, *The New Draft Treaty on Business and Human Rights*: *How Best to Optimize the Incentives?* (2021), available online at https://media.business-humanrights.org/media/documents/Treaty_draft_8.21_dwc_incentives_draft.pdf. In determining which measures would have been necessary to assume diligent action on the part of the state, the degree of danger posed by the entrepreneurial conduct as well as the severity of the human rights violation is also decisive, in the sense that a state is expected to do more and can therefore also be reproached more quickly with regard to the duty of care, the more serious the violation in question is. See

Chetail, *supra* note 506, at 125 f.

[841] Monnheimer, *supra* note 73, at 139; with regard to the flexibility of the standard of diligence see Lane, *supra* note 633, at 31 f.

[842] Bonnitcha and McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', 28 *The European Journal of International Law* (2017) 899, at 905 f.

applied currently will prevent victims from achieving redress through indirect horizontal effect; whereas if the case had been brought against a state which had, itself, committed the same harmful acts as the business, victims would arguably have been able to obtain some form of remedy.[843] Developing states often claim and will be able to successfully invoke insufficient capacities when failing to comply with their positive Human Rights obligations.[844] Such defence claims are particularly relevant to BHR, as developing and economically weak states are precisely the main regulatory target of BHR, as businesses deliberately relocate their business processes here and the states, in turn, seek to attract investments. The question is to what extent the accountability gap can be closed in these cases, especially from the victim's perspective, while avoiding direct accountability of businesses. Within her comprehensive concept of Human Rights due diligence of states, *Monnheimer* proposes to apply due diligence standards extraterritorially in order to remedy deficiencies in particular capacity-lacking states.[845] Even if, in cases where a state lacks the necessary capacities to fulfil its own obligations, one assumes that host states have a duty to request international assistance or even establishes due diligence duties of third states, namely home states, to intervene in BHR issues in order to avert a risk to Human Rights interests or to deal with damage, this might constitute a theoretically existing solution to BHR regulation.[846] However, such a method of resolution will have a limited effect on the level of victim protection and in relation to the regulatory goal of empowering victims only. The accountability gaps that are supposed to be closed by BHR regulation in the relationship between individuals and businesses are only addressed to a limited extent – the accountability of businesses is neither mandatory nor does a state necessarily take their place. Ultimately, calling host states as well as home states to account because of their due diligence obligations presupposes that they have a minimum of resources and capacities to deal with BHR issues. The fact that this is not the case is precisely one of the reasons for BHR's regulations.[847]

The approach to BHR which is limited to extraterritorial state due diligence obligations imposes the right on the home states or the duty to diligently regulate businesses domiciled in their jurisdiction to respect Human Rights when operating abroad, e.g. the laws that have been introduced in various states, such as the French Lois de Vigilance or the German Supply Chain Act.[848] Here, practice shows that this solution is taken by states only half-heartedly. States weigh economic against Human Rights interests – the problem of corporate

[843] Lane, *supra* note 633, at 34.

[844] Monnheimer, *supra* note 73, at 222 ff.

[845] *Ibid.*, at 258 ff.

[846] *Ibid.*, at 236 ff.

[847] Cf. Lane, *supra* note 633, at 33 f.

[848] Monnheimer, *supra* note 73, at 307 ff.

influence on state Human Rights performance underlying BHR is not remedied in this way, but rather manifests itself. According to the view held here, it is indisputable that extraterritorial due diligence obligations of home states should be recognised, and *Monnheimer's* detailed analysis of the due diligence concept in IHRL provides comprehensive support for this. But the question is how victims who are affected by a violation that has occurred are supposed to make this fruitful or enforce it when home state legislation has not sufficiently taken place yet? Against whom will they be able to direct a claim after suffering damage due to a corporate Human Rights violation that has not been prevented and regulated adequately? How are they to enforce it? How must they demonstrate that a claim against both the business and the host state fails precisely because of the facts that could justify intervention by a third party? These are questions of recompensating justice, in situations where businesses violate the Human Rights of their dependent employees or customers and are not held to account and which the future BHR treaty ought to respond to. If no solutions tangible by those affected are found, the accountability gaps that exist in BHR and need to be solved by regulation will remain – if a corporation operates in a state that is not in a position to prevent risks emanating from it and to take repressive action against harmful practices, accountability will in all likelihood remain absent, at least in a large number of cases, despite having acknowledged extraterritorial obligations of host states.

Even if a state is obliged, able, and willing to protect individuals against violations of non-state actors, such as corporations, it is difficult to implement outside its own national borders. Against acts of aliens, a state has only limited capacity to react, both in law and in fact. Even if found that it does not amount to an interference with the domestic affairs of another sovereign state, in reality, it will be difficult even for state entities and agents to access, identify, or even investigate and obtain evidence of perpetrators abroad. Furthermore, the enforcement of a final and issued domestic judgement is not easily possible. The complexity of trans- or international situations will often leave states seeking to regulate corporate Human Rights impacts with tied hands and gives rise to a special regulatory necessity under PIL. States might adjust their national legal order and implement sufficient jurisdictional safeguards and remedies, but where either the perpetrator or the victim of a corporate Human Rights violation is outside the immediate sphere of action and influence of their own jurisdiction, realisation of Human Rights will be difficult, and they will depend on the will of host states to help victims. In accordance with PIL, namely without violation of the sovereignty of third parties or other ultra vires acts, the resolution of such situations is best possible on the basis of an agreed international legal standard. The regulation of how and under what circumstances action can be taken against foreign perpetrators and to what extent legal standards and decisions of a state can have effect abroad should also be the

solution most favourable from a perspective of interest from all parties involved, i.e. states and businesses. A directly applicable treaty without need for transformative national legislation ought to create cross-border legal certainty and uniformity of rules that can only be of advantage to transnational corporations. At least if it is not intended to precisely abuse the lack of uniform regulation.

As *Ruggie* noted in his closing plenary remarks as part of the discussion on the need for a BHR treaty, from a victim's perspective, it does not matter whether a business operates internationally or only within the borders of a single state, what matters is that there is a possibility to redress Human Rights violations against perpetrators.[849] Although this observation was made in the context of the question of limiting the personal scope of application of a treaty to only certain types of businesses, the line of thought has a similar validity when it comes to the question of against whom claims for compensation, sanctions or remedies for Human Rights violations should be directed in a rather general regard. It is often found that from a victim's perspective, it is irrelevant whether a Human Rights violation is conducted by a private entity or a state.[850] However, this is an incomplete observation, because it is not only irrelevant for the interest of victims in the processing and prosecution of Human Rights violations whether these originate from states or businesses, rather, victims will often have a legitimate positive interest in ensuring that such prosecution takes place against those actors who have actually caused the Human Rights violation and contributed to any occurrence of damage. Even a very differentiated and functioning concept of state responsibility and due diligence cannot respond to this interest.

"Crimes against PIL are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of PIL be enforced."[851] This finding was made by the International Military Tribunal during the Nuremburg proceedings in 1948. The court rejected the objections raised against the international criminal liability of individually accused Nazi functionaries and concluded that the principal applicability of PIL to sovereign states could not prevent the prosecution of certain crimes.[852] This can probably be qualified as one of the first attempts to deviate from the state-centric approach of PIL, piercing the veil of state sovereignty to some extent.[853] The above statement can also be applied to the BHR context. If one prioritises an extended and adapted due diligence solution that prefers the liability of states for Human Rights violations to compulsory direct obligations,

[849] Ruggie, *supra* note 602, at 5.

[850] See, for instance, Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 35; Monnheimer, *supra* note 73, at 31.

[851] International Military Tribunal at Nuremburg, *supra* note 460, at 466.

[852] *Ibid.*, at 465 f.

[853] Stahn, *supra* note 473, at 119.

the result is precisely the liability of such abstract entities instead of the actors who actually caused injustice.

From the perspective of victims in particular, the state-centric approach can be a hurdle for recourse to the 'correct perpetrator'. While states in most cases will indeed bear a great part of responsibility where corporate Human Rights violations occur within their jurisdiction,[854] it seems fundamentally unjust that the entity responsible as last actor in the causal chain is not held to account at all on an international level, even if a state is held accountable in their place. Such an outcome seems difficult to reconcile with the right of access to remedies, which occupies a key role in the IHRL regime and is also a particular focus of BHR issues. Access to effective remedies constitutes a prominent issue within the UNGP as its third central pillar and is highlighted within the OEIGWG Drafts as well. However, can the mere opportunity to obtain financial compensation render a remedy appropriate and effective? It is beyond doubt that damages resulting from Human Rights violations must be compensated financially at some point. Admittedly, this will be of outstanding importance to many victims and mitigate the consequences of – often irreversible – damage. Nevertheless, if the perspective of the victims is conscientiously taken into account, additional factors arise. Due to the personal nature of many Human Rights, money often plays an ancillary role in reparation interests of victims and relatives.[855] Particularly when it comes to serious violations of essential Human Rights such as the right to life, physical integrity or self-determination, which are particularly closely related to human dignity, there will be a notional desire for non-financial but rather immaterial reparation in addition to the interest in financial compensation.[856] It is reasonable to assume that in some cases victims of Human Rights violations will only feel a sense of satisfaction, rehabilitation of justice, and the ability to physically and psychologically recover from harmful events and experiences if the actors who are personally and directly responsible are held legally accountable.[857] Non-financial reparation interests are not unfamiliar to PIL. At least with regard to inter-state violations, they are explicitly recognised in Art. 31 of the Draft Articles on State Responsibility for

[854] There are hardly any realistic scenarios conceivable in which serious or even systematic Human Rights violations within the jurisdiction of a state can be committed by businesses without the state at least being accused of negligence. Corporate Social Responsibility and a BHR treaty cannot and are not supposed to change the fact that it is the primary responsibility of the state to prevent such situations, by legislative and administrative measures, in the first place.

[855] Stephens, 'The Rise and Fall of the Alien Tort Statute', in S. Deva and D. Birchall (eds), *Research Handbook on Human Rights and Business* (2020), 45 at 59.

[856] Cf. Carrillo, *supra* note 99, at 67.

[857] This kind of conclusion has already been put forward in connection with the emergence of individual responsibility for Human Rights violations and is equally transferable to them, cf. Ratner, *supra* note 45, at 464.

Internationally Wrongful Acts.[858] Such a desire or interest can, however, only be satisfied if it is asserted against the party that initiated the injustice.[859] There is no moral reparation obtainable from parties not actively involved in an unjust wrongdoing.

The desire to hold accountable the actor who is actually responsible for the materialisation of injustice will also contradict the approach to refer to individual responsibility only, i.e. to persons acting on behalf of a corporation rather than the corporation as a collective. It could be argued that within a corporation, individuals execute Human Rights violations as acting organs of a corporation and, thus, should be held to account instead of the corporation itself, constituting the 'abstract entity' in terms of the aforementioned finding of the Nuremburg Tribunal. However, in the BHR context, it is often a matter of collective culpability rather than individual fault. The wrongful conduct and the risks emanating from businesses stem precisely from organisational decisions, particular business models and operation of corporations, rather than from the decisions of a single individual.[860] In the context of decision-making processes within a corporation, responsibilities are distributed among so many heads that an injury cannot really be traced back to the responsibility of one individual. Individuals in the corporate veil also often lack the necessary control, awareness of action, and influence to take an autonomous action. Rather, it is often autonomous corporate will and autonomous action of the business leading to violations of Human Rights and realisation of injustice.[861] Personal accusations of guilt, thus, are only possible to a limited extent, which in turn is unsatisfactory for the victims processing the violation. Collective entities such as businesses can engage in conduct detrimental to Human Rights in ways that would not be feasible for individuals acting autonomously, without the networks, resources, and tools at the disposal of the corporation.[862] However, it is precisely the dangerousness that emanates from the exploitation of such resources and opportunities that makes business conduct a systematic problem for IHRL and produces a severity of injustice that might be incomparable with individual behaviour. Therefore, the quotation from the Nuremburg Tribunal must be applied in a differentiated manner to BHR situations, depending on whether the focus of culpability regarding the Human Rights violation in question lies in the executive action of an individual or the culpability of the corporation as a whole. A corporation as autonomous entity cannot be reduced to the attitude of its members alone.[863]

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[858] Responsibility of States for Internationally Wrongful Acts, annex to General Assembly resolution 56/83 of 12 December 2001, 2001; Articles on State Responsibility.

[859] See Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 208.

[860] Strahovnik, *supra* note 285, at 169 f.

[861] Cf. *ibid.*, at 171 f.

[862] Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 242.

[863] Strahovnik, *supra* note 285, at 169 f.

Furthermore, if one assumes that IHRL also serves to balance power relations and not only to prevent and regulate substantive violations of rights, it is also necessary to grant individuals a direct claim against the businesses themselves and to oblige them directly.[864] For only in this way is the individual genuinely noticeably approximated to the superior position of the business in their relationship of subordination. If, in contrast, individuals are only granted a claim on account of the state's violation of its own obligation of due diligence, not only does the legal position of businesses remain unchanged, but not even the unlawfulness of the business conduct is identified. Only the unlawfulness of the state's breach of due diligence is expressly recognised. Such a valuation grants businesses an even more privileged position in their legal and societal relationship with individuals than they already have.[865]

Additionally, from a purely normative point of view, it might be necessary to address businesses directly, as only by this way a deterrent effect for corporate perpetrators will occur, which will be necessary to achieve the regulatory goal to prevent Human Rights violations.[866] A deterrent and preventive effect will occur if legal consequences and remedies exist that will affect the actual culprit or perpetrator. But if the incidents are only handled by a proxy liability of the state, it is likely that a desirable learning effect will be quickly reduced to zero or even strengthen the perception to get away with such behaviour anyway. Businesses undertake a cost-benefit calculation with regard to the profitability of their activities. The intermediary approach to BHR renders a negative Human Rights impact a low risk but profitable factor in such calculations.

In order to actually achieve the desired adaptation of IHRL and empowerment of individuals in the contemporary globalised society, which is the core concern of the subject matter of BHR, both the exploitation of the possibilities provided within state responsibility as well as progress with regard to the establishment of business responsibilities will most certainly be necessary in the end. Any decision in favour of direct corporate Human Rights obligations in BHR situations must not lead to a *'take-it-or-leave-it-scenario'* to the detriment of state's due diligence obligations. Rather, it is arguably the most effective way to establish the obligations of host states, to prevent, by legislative and administrative means, Human Rights violations by businesses, *complemented* by the obligation of home states to regulate and monitor the Human Rights impact of businesses domiciled under their jurisdiction acting abroad and ultimately, to oblige businesses to adhere to commonly recognised Human Rights standards,

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[864] Cf. Nowak and Januszewski, *supra* note 38, at 118.

[865] Cf. Gardbaum, 'The "Horizontal Effect" of Constitutional Rights', 102 *Michigan Law Review* (2003) 387, at 395.

[866] Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 234. Ratner, *supra* note 45, at 464.

even if no explicit national laws apply in the case at hand and no punitive mechanisms exist.[867] The now initiated OEIGWG project on the future BHR treaty to which this work is dedicated should, however, be used as the opportunity it is to contrast with a series of fruitless attempts at regulation. These were limited by the perception of exclusive state responsibility and lay a foundation for the progressive path.

c) No Marginalisation of the Role of the State

States will always play an overriding role in PIL and will remain indispensable for its realisation. The shift in the power structure of the international community due to globalisation does not change that.[868] Therefore, any lack of state engagement in BHR issues is a problem necessarily to be addressed through international regulation. There are no methods and mechanisms that would permit dispensing with the capacities of the state when implementing and enforcing international standards and laws to hold actors of any kind accountable for unlawful behaviour.[869] This is beyond doubt and hardly changeable in the near future. In the context of the debate on direct obligations, there is frequently a fear of dilution of the state's responsibilities, as well as regarding a displacement from its position as guarantor of Human Rights and a resulting additional empowerment of the businesses to be regulated.[870] In sum, it is feared that instead of regulating and limiting the power of businesses on the international plane, direct corporate obligations in IHRL will lead to their additional legitimisation and empowerment.[871] The state, in turn, might be considered to have been deprived of one of its most original and common governmental characteristics, namely its regulatory authority over private actors, when this function is internationalised.[872] The state would thus be deprived of sovereign authority and its dominant position in PIL while businesses would experience an increase in it.[873] Furthermore, a broader distribution of legal responsibilities for IHRL across various actors or rather an internationalisation of individual

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[867] Cf. Committee on the Elimination of Discrimination, *supra* note 452, at para. 25; Nowak and Januszewski, *supra* note 38, at 116.

[868] Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 8; Peters, *Beyond Human Rights, supra* note 868, at 6. Ratner, *supra* note 734, at 86.

[869] Cf. Bhuta, *supra* note 797, at 72.

[870] Carrillo-Santarelli, *supra* note 511; Clapham, 'Human Rights Obligations for Non-State Actors', *supra* note 159, at 12; United Nations Human Rights Council, 'Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/40/48', at para. 55.

[871] Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 25; Pentikäinen, *supra* note 371, at 149.

[872] See Peters, *Beyond Human Rights, supra* note 868, at 61. who refers to this objection in relation to direct international obligations of individuals. However, it is transferable and of equal validity with regard to corporate private actors.

[873] Chetail, *supra* note 506, at 111.

duties could lead to negative effects, such as responsibilities being shifted back and forth between addressees, tempting states to strategically shift their responsibilities away from themselves by initiation of debates regarding the identification of the right duty-bearer.[874] By granting businesses a leading role in the fulfilment of Human Rights, states would be given the opportunity to evade their role.[875] To sum up, objections relate to both an opaque accountability regime as well as a solidification of the power imbalance, which originally ought to be counterbalanced by means of BHR regulation. Since states are indispensable for the implementation and validity of PIL, any withdrawal or displacement from a regulatory matter is counterproductive.

The fact that the status of a non-state actor does not automatically change or 'upgrade' simply because legal obligations are established is demonstrated by the example of Art. 3 of the Geneva Conventions.[876] The extent to which the position of an actor in the legal system changes and interacts with other actors is rather primarily determined by the contract design and the codified content of corresponding obligations. Businesses already play an essential role in the international legal and economic order, as noted repeatedly. However, this applies specifically to their legally recognised position in PIL. From the 1990s onwards, there has been a general, clear, and strong stagnation in the conclusion of international agreements.[877] This applies to both bilateral and multilateral agreements.[878] However, as regards material content, not all types of agreements are affected equally. In contrast, the willingness to conclude trade and investment agreements is high, whose direct beneficiaries are not states or their civilian population, but rather foreign investors, which in most cases are large and internationally active commercial enterprises.[879] It is a matter of fact that by virtue of trade and investment treaties the international community of states is granting businesses direct benefits and claims under PIL at the direct cost of own sovereignty and Human Rights guarantees, e.g. by restricting their own means of supervision, monitoring and intervention

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[874] Peters, *Beyond Human Rights, supra* note 868, at 71; Ruggie, *supra* note 697, at 97; See also Cogan, *supra* note 71, at 369 f.

[875] Pentikäinen, *supra* note 371, at 149; Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 25.

[876] Carrillo-Santarelli, *supra* note 511.

[877] Pauwelyn, Wessel and Wouter, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', 25 *The European Journal of International Law* (2014) 733, at 734 ff.

[878] *Ibid.*, at 735.

[879] Cf. United Nations Inter-Agency Task Force on Financing for Development, *Trade and Investment Agreements*: *Number of signed international investment agreements (IIAs), 1980 - 2018* (2018), available online at https://developmentfinance.un.org/trade-and-investment-agreements.

within such agreements.[880] Independently of the movements in power relations due to globalisation, states have thus endangered their own sovereignty and authority, as well as the exclusivity of their status in PIL based on treaties and in favour of desired economic independence.

The mere fact that businesses would be directly targeted in a future BHR treaty can, thus, not lead to an increase in their authority or legitimacy if this is not also seen in the context of trade and investment treaties. On the contrary, by means of direct obligations in IHRL, the exceedingly powerful status that businesses possess is counterbalanced rather than strengthened.[881] Particularly with regard to the position of businesses in the context of International Trade and Investment Law, direct corporate obligations could be considered a counterweight or boundary to such a growth of power.[882] In particular, the codification of direct obligations would prevent businesses from exploiting their superiority over certain states. When these standards are codified and recognised once, they claim validity beyond the will of a single individual state. In view of the recognition that businesses already experience at the level of PIL and politics, additional responsibilities for Human Rights will not automatically legitimise their role and increase their authority. Rather, such effects will depend on the design of the responsibilities and duties. The risk of approximation to the role of the state, however, is low. State sovereignty and authority do not arise from the responsibility and competency for Human Rights only, but first and foremost from the representative function for its own citizens.

Neither is the responsibility of states in the context of BHR regulation to be regarded as diminishing or shifting. Opponents of direct corporate Human Rights obligations have argued that in case the state-centric approach to Human Rights is abandoned, states could use the BHR treaty to shift their own responsibility for Human Rights protection and, thus, undermine their own failure when Human Rights violations occur.[883] However, the introduction of direct corporate Human Rights obligations can also be understood as a modifying instrument in relation to state responsibilities with regard to the horizontal dimension of Human Rights protection. Not only do states owe due diligence obligations on a domestic level, but, more specifically, states owe the creation of proactive and responsive international legislation and enforcement mechanisms protecting individuals from Human Rights violations at the private

[880] Martens and Seitz, *supra* note 40, at 27; See McCorquodale and Simons, *supra* note 190, at 621 f. Providing a concrete reference to the bilateral investment agreement concluded between Canada and the Republic of Ecuador.

[881] Cf. International Commission of Jurists, *supra* note 290, at 44.

[882] See Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 71.

[883] McBrearty, *supra* note 346, at 12; Karp, *Responsibility for human rights, supra* note 47, at 32.

level and the supervision of its implementation.[884] However, it often seems to be interpreted in an opposite way, as *Van Ho's* argumentation, which was discussed earlier, implies as well. For this is generally also based on the idea that stronger regulation of businesses seems to be necessarily associated with a weakening or negligence of regulation and enforcement vis-à-vis states. It has been already argued in this context that the possible introduction of direct corporate obligations should rather be understood as a supplement.

Eventually, the fear of a possible loss of state responsibility for Human Rights is partly borne by the design of the failed Norms of 2003. The Norms are referred to in comparison to the BHR treaty in order to prove the unsuitability of the latter as well as of direct corporate duties.[885] The Norms provided for direct corporate obligations under IHRL as well. However, the sole focus of the Norms was placed on the role of businesses, in fact completely disregarding the role of the state in BHR matters. This immature legal design might have been the predominant reason for their failure, rather than the mere stipulation of direct corporate obligations *per se*. Similar to the UNGP, the future BHR treaty should be based on a two-tier distribution of obligations, with the decisive difference that it is also a legally binding effect with regard to businesses.

In any case, to avoid misleading and even abusive application of the law, it is imperative that the codification of direct corporate obligations from IHRL be accompanied by a reinforcement of state obligations in this regard, as the notion of the horizontal dimension of state Human Rights obligations, albeit undisputed, is far from being clear and, thus, vulnerable to any legislative developments that supposedly appear to endanger its rationale. The relationship would have to be made clear in a future BHR treaty challenging the absolute state-centric approach. State responsibilities shall never be substituted but rather complemented by the creation of corporate responsibilities.[886] The content of the treaty would have to be formulated in a way notwithstanding the authenticity, nor the legitimacy, of the existing IHRL system and its sources. Although introducing innovative approaches such as direct corporate obligations, it should be noted that this more specific treaty does not contradict other Human Rights instruments but is rather intended to complement them. For reasons of effectivity, the future BHR treaty should therefore not stand in mutually exclusive competition with other existing laws.

Any regulations introduced by a future BHR treaty ought to be interpreted in line with its object and purpose, which is to raise, tighten, and complement the standard of protection of

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[884] Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 8.

[885] See Ruggie, *supra* note 714, at 4.

[886] Cf. McBrearty, *supra* note 346, at 12.

IHRL. States remain obliged to fulfil their own duties as well as to enforce obligations imposed upon businesses, generally regardless of what their source is.

As regards ICL, the introduction of individual responsibility in PIL for certain forms of offences did not limit or even replace state responsibility. Rather, it was determined that state responsibility alone cannot do justice to the subject matter of the regulation, which is why a supplementary legal instrument was needed, which would also provide for the direct involvement of businesses in BHR regulation.[887] A fear underlying the adherence to the intermediary approach, that states could use the codification of business obligations to evade their own responsibility, presupposes that there can only be a single party directly and primarily obliged under IHRL. However, there is no basis for this. Insofar as different actors can simultaneously contribute to the protection of Human Rights as well as be involved in their violation, the possibility of co-existing responsibility should be a regulatory goal. The assessments of sceptics of a future BHR treaty, which tend towards an alternative and exclusive application of responsibilities, show that if direct obligations are to be created in the future, this co-existence must be clearly emphasised. The aim is to achieve co-existence of the obligations of businesses and states through the introduction of direct obligations in order to close gaps in the intermediary approach that exist due to a lack of temporal adequacy, without provocation of new gaps in the application of existing regulatory approaches.[888]

The risk of excessive displacement of responsibility should be countered first and foremost by a forward-looking treaty design, in particular with an appropriate degree of precision. Any business responsibility for Human Rights violations that is to be codified, whether derived directly from a future BHR treaty or through an intermediate step, must be clearly and unambiguously demarcated from state responsibility that shall be explicitly defined as more far-reaching. In particular, it must be limited to certain facts and violations of rights that are affected by the regulatory gap in the area of BHR. For this reason, among others, a reference to Human Rights instruments that were originally tailored to states as addressees regarding the material scope of a future BHR treaty is questionable, as will be further illustrated in sections below.

The debate on the content or scope of the obligations to be imposed on businesses relates to evaluations of the role of the state in case of an expansion of the scope of Human Rights obligations of businesses. The question arises to what extent the obligations imposed on business are to be considered negative or positive. In general, the obligations derived from individual Human Rights are divided into three categories: the duty to respect, the duty to

[887] Kamminga, *supra* note 711, at 6.

[888] Fasciglione, *supra* note 36, at 41.

protect, and the duty to fulfil.[889] The *duty to respect* arguably may be regarded the weakest of these. Therefrom only an obligation not to harm is derived and it is precisely this duty which – if at all – is recognised with regard to businesses, forming the basis of the framework created by the UNGP.[890] According to the second pillar of the UNGP, businesses bear a responsibility to respect Human Rights. The component *'to respect'* is often ascribed a purely negative dimension. [891] However, the regulatory goal sought by this responsibility can also demand a positive action from the addressees under certain circumstances. The due diligence approach of the UNGP appears to necessarily segregate the responsibility to respect of the second pillar into, first, avoid causing or contributing to Human Rights violations, second, address adverse Human Rights impacts when they occur, and third, prevent and mitigate impacts directly linked to their operations, products, services, or business relationships.[892] This does not fit into the traditional tripartite division of IHRL obligations in which the duty to respect is limited to no-harm. The codification of direct international Human Rights obligations of businesses will deem a case-by-case evaluation necessary to determine what is required by a specific business, as this is a particularly heterogeneous group of addressees. It will become necessary to take into account the reasonableness and possibility of implementation of certain obligations in light of available resources in individual corporations, as has also been envisaged above in the context of the personal scope of a BHR treaty.[893]

However, from a normative point of view, the question of what is owed, i.e. whether an obligation of a positive or negative nature exists, should not depend so much on the type of actor addressed, but rather on the content of the Human Right concerned as well as on the general understanding underlying the treatment of IHRL.[894] Therefore, apart from a necessary differentiation based on concrete capacities in individual cases as to what is to be demanded of certain non-state actors in order to fulfil their obligations under IHRL, it is unreasonable to determine in generalising terms which actors have to undertake what kind of

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[889] Lane, *supra* note 633, at 29.

[890] Karp, *Responsibility for human rights, supra* note 47, at 34; Ruggie, *supra* note 8, at 9, 14 ff.

[891] Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 6.

[892]Cf. J. Hughes Jennett, L. Hamzi & R. Mashru, *Corporate Human Rights Due Diligence in Times of COVID-19* (2020), available online at https://www.ejiltalk.org/corporate-human-rights-due-diligence-in-times-of-covid-19/.; cf. also UNGP, Principle no. 13.

[893] Cf. Strahovnik, *supra* note 285, at 176.

[894] See Karp, 'What is the responsibility to respect human rights?: Reconsidering the 'respect, protect and fulfil' framework', 12 *International Theory* (2020) 83 The author suggests a re-interpretation of the whole 'respect, protect and fulfil' framework of IHRL, thereby putting a special focus on the dimension of 'respect' for Human Rights which according to him ought to be understoof as an obligation not to dehumanize other right-holders - generally regardless of the nature of this obligation's addressee.

actions, either positive, negative, or proactive. This cannot be determined independently of the material content of a concretely affected Human Right. The question of what is to be achieved in the sense of the three-step *'respect, protect, fulfil'* approach to Human Rights protection is therefore also not considered a question reserved for the regulatory area of BHR and to be clarified solely in relation to businesses, but rather as a question of the general application of IHRL, exceeding the scope of this work.[895] It is obvious that businesses, in their classification as addressees of Human Rights, cannot be expected to do the same as states, as is also repeatedly stated in this work. When regulating IHRL in the context of businesses, it must be reflected that state obligations under IHRL exist by nature and, thus, are also universal and absolute in nature, whereas those of businesses are not. A differentiation in the scope of obligations must therefore take place, but not necessarily based on an overarching and general categorisation into negative or positive obligations.

d) Frustration of the UNGP Achievements Due to Competing Initiative

It has been briefly illustrated above already that, with the adoption of the UNGP, the lengthy and bumpy legislative process around BHR and CSR has led to a major success for the first time after its initial start in the 1970s.[896] For the first time, the UNGP codify, albeit being soft law, in an authoritative and universally acknowledged way the general consensus of the international community of states: (1) that Human Rights must be protected from business activities, (2) that businesses at least to some extent shall be obliged to consider Human Rights within their activities and (3) that victims shall be entitled to law enforcement in case of misconduct with respect to BHR. [897] In light of these contributions to the regulatory subject of BHR, there are different ways in which one can classify the legislative initiative on the future BHR treaty in relation to these. The negotiations on the BHR treaty can be seen as some kind of a threat to previous achievements and one can insist on increased implementation of the UNGP rather than promoting further and new regulation.[898] In fact, treaty opponents, especially states of the Global North and businesses, often consider the initiative to draft a binding instrument as somewhat sabotaging to the UNGP and their

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[895] See also *ibid.*

[896] See Sect. **B.II.3.**

[897] K. Winarsky Green & T. McKenzie, *"Culturally Appropriate and Rights-Compatible"*: *The Esprit De Corps Of the United Nations Guiding Principles on Business and Human Rights & the Hague Rules on Business and Human Rights Arbitration* (2020), available online at https://www.ejiltalk.org/culturally-appropriate-and-rights-compatible-the-esprit-de-corps-of-the-united-nations-guiding-principles-on-business-and-human-rights-the-hague-rules-on-business-and-human-rights/.

[898] See for instance Human Rights and transnational corporations and other business enterprises, UN Doc. A/HRC/26/L.1, 23 November 2014, at para. 8; Also, see Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 65. International Commission of Jurists, *supra* note 290, at 44 f.

achievements or even a *'competing initiative'*.[899] Such a competitive relationship is particularly apparent when an initially new regulatory approach is pursued that partly contradicts the standards of the UNGP, such as the proposed direct corporate obligations. It is precisely in these cases that frustration of the previous efforts is at stake. Advocates of a rather ambitious treaty, in turn, tend to regard the UNGP as a brake on more ambitious legislative progress regarding BHR.[900] Both sides of such absolute '*either-or-views'* are misguided and, fortunately, are becoming less common as the negotiation process for the BHR treaty progresses.[901] The adoption of the UNGP should rather be considered a welcome springboard for success of further regulation on the subject matter, and its content should be exploited as fertile ground for future legal progress.[902]

The adoption of the UNGP led to substantial political mobilisation, particularly within CSOs, but as well with regard to state actors and their perception of BHR. [903] The *High Tide* for the adoption of a binding BHR treaty, which, according to *Deva*, we are in now, would not exist without the prior widespread endorsement of the UNGP.[904] Moreover, it makes strategic sense to integrate as much of the content of the UNGP as possible into a future BHR treaty and to explicitly codify the connection between both instruments in order to ensure the best possible response to the feature treaty and to minimise opposition against it, as states having formally endorsed the UNGP could then hardly reject a future BHR treaty.[905]

A major weakness of the UNGP, however, is that it refrains from legally ascribing any international responsibility and basis for accountability of businesses.[906] Although the corporate responsibility to respect within the UNGP is designed as generally independent from state obligations, i.e. it still exists even if states fail to fulfil their own obligations, states are still considered the only internationally responsible parties for the fulfilment of Human Rights, while the legal basis for the responsibility to respect identified in relation to business

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[899] This is how the BHR treaty negotiation were termed by the USA in the aftermath of the resolution establishing the OEIGWG, see Cassell and Ramasastry, *supra* note 311, at 11.; International Commission of Jurists, *supra* note 290, at 44 f; McBrearty, *supra* note 346, at 11 f; C. Methven O'Brien, *BHR Symposium*: *The 2020 Draft UN Business and Human Rights Treaty–Steady Progress Towards Historic Failure* (2020), available online at http://opiniojuris.org/2020/09/11/bhr-symposium-the-2020-draft-un-business-and-human-rights-treaty-steady-progress-towards-historic-failure/; see Garrido Alves, *supra* note 39, at 48.arguing that this objection regarding the OEIGWG process leading to a future treaty has been 'framed' by business.

[900] Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights, supra* note 799, at 467.

[901] Cf. Suárez Franco and Fyfe, *supra* note 48, at 153.

[902] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 63; Deva, 'Alternative Paths to a Business and Human Rights Treaty', *supra* note 7, at 22; Pentikäinen, *supra* note 371, at 153; cf. Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights, supra* note 799, at 542.

[903] See Methven O'Brien, *supra* note 899.

[904] Deva, 'Alternative Paths to a Business and Human Rights Treaty', *supra* note 7, at 22.

[905] *Ibid.*, at 23.

[906] International Commission of Jurists, *supra* note 290, at 17.

is to be found elsewhere; in other legal sources.[907] Though appearing contradictory, such an outcome is not a conflict, because the UNGP do not derive the responsibility of businesses from law, but rather from a social expectation, referred to as *'transnational social norm'* or also a *'social licence to operate'*.[908] The fact that such an expectation of society exists is growing and manifesting itself in practice and is undisputable. This is demonstrated by the examples of boycotts etc. already mentioned above, as well as from the public interest in and commitment to the BHR treaty. In principle, thus, it should be considered a logical consequence to cast such strong social expectation into a legal framework. Codification of norms and values of the societal system into a source of law can be regarded one of the main functions of law. IHRL, albeit being part of PIL, which originally serves inter-state relations, is somewhat a-typical in this regard and mainly serves the individuals behind its directly addressed states. However, although this social norm is becoming more and more entrenched in perception, businesses cannot be legally blamed for disregarding it. Victims cannot derive an enforceable claim from this socially perceived responsibility and hold businesses accountable on this basis. Thus, the status quo of law falls short of societal values and demands. The aforementioned corporate responsibility to respect Human Rights is only of use to the individual where it is cast into legal form and, thus, rarely in non-ideal circumstances.[909] The relationship between the UNGP and the BHR treaty is more appropriately described as complementary rather than alternative or competing.

Generally, it is inherent to non-binding soft law instruments that these are to be considered an interim solution to a regulatory issue, which then ought to be followed by a binding legal instrument as soon as the right preconditions for the latter, particularly political feasibility, are met.[910] In principle, soft law instruments can also be described as *'stages of transition'*, which are still legally vague and immature and which, due to their transitional nature, do not in themselves represent the final regulatory solution but are regularly followed by binding law.[911] In accordance with this perception of soft law, much of the UNGP language as well as of the corresponding commentaries to the principles is kept vague and flexible.[912] While this serves to achieve the broadest possible consensus, it limits the potential for protective and normative effects of the UNGP. Arguably, the most important added value of soft law for the regime of PIL is that it serves to create some common sense on a certain regulatory subject

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[907] See commentary on Principle 12 United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 14.

[908] Ruggie, *supra* note 8, at 17, at para. 54; Brune, *supra* note 1, at 41 ff., 44; cf. Ruggie, *supra* note 697, at 91 ff.

[909] Wetzel, *supra* note 427, at 4.

[910] See International Commission of Jurists, *supra* note 290, at 34, 44.

[911] Cf. Bright *et al., supra* note 267, at 670; Olivier, 'The Relevance of 'Soft Law' as a Source of International Human Rights Law', 35 *Comparative and International Law Journal of Southern Africa* (2002) 289, at 294.

[912] Cassell and Ramasastry, *supra* note 311, at 22. Chetail, *supra* note 506, at 128.

matter and, thus, in the medium or long term, enables the emergence of hard law as well as influences and updates the perception and application of existing sources of PIL, such as treaties and CIL.[913] *Ruggie* himself argues for an understanding of the UNGP as a common global platform with regard to the regulatory issue of BHR on which step-by-step cumulative progress ought to be built.[914] However, while not ruling out a further legal development of the UNGP, he seems unconvinced of the timing.[915] In assessing whether the time is right for further legislative development, the extent to which such a solution proves effective to date in relation to the subject matter should also play a role. For the less effective the latter is, the more urgent binding regulation becomes and the less weight must arguably be given to circumstances that justified the decision to opt for an interim solution only. As already outlined above, the effectiveness of the UNGP has proven to be limited, especially regarding the time factor and the expected short-term effects. Much of the scepticism regarding the effectiveness and practical impact of the UNGP due to their non-binding legal nature and lack of enforcement mechanisms and accountability for its addressees materialised.[916] Additionally, much frustration among states in the Global South seems to exist due to the disproportion in legal treatment of businesses when comparing UNGP to International Trade and Investment Law.[917] While the latter is designed entirely in the form of binding law with enforceable claims, IHRL issues are regulated by soft law, which actually disqualifies them as an appropriate response to the strong position of companies in Trade and Investment Law.

In sum, it remains to be pointed out that although the UNGPs are neither suitable nor were they intended to completely close the regulatory gaps with regard to BHR issues, they should be considered a first step to be followed by subsequent ones.[918] Rather, the UNGPs are the smallest possible standard understood as immediately implementable, sometimes critically referred to as a minimalist approach which, despite the weak legal form chosen and the approach based on voluntarism and self-commitment, has not had the desired prompt, immediate large-scale effect, as briefly noted above.[919] Therefore, there is generally no

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[913] Chetail, *supra* note 506, at 118.

[914] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', *supra* note 339, at 64; Ruggie, *supra* note 340; see also Ruggie, *supra* note 602, at 2.

[915] Cf. Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', *supra* note 339, at 64.

[916] See van Ho, *supra* note 151, at 116.

[917] *Ibid.*, at 118 f.; International Commission of Jurists, *supra* note 290, at 44.

[918] Ford and Methven O'Brien, *supra* note 558, at 1224. 17/4 Human rights and transnational corporations and other businesses, UN Doc. A/HRC/RES/17/4, *supra* note 338, at para. 4.; see also International Commission of Jurists, *supra* note 290, at 17.

[919] See Bilchitz, *The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?, supra* note 771, at 200; cf. van Ho, *supra* note 151, at 116.

reason to classify further legislative initiatives, such as the future BHR treaty in particular, as a development that would jeopardise their achievements – even if it adopts regulatory approaches that differ greatly from these, such as direct international corporate obligations. In principle, since the impact of the UNGP in terms of legislative developments and improvement of the legal position of victims has been and remains very limited, objections predicting a frustration of these limited achievements should be treated with restraint.[920]

Finally, there is no reason for such concerns about the implementation of the UNGP during and after the adoption of a treaty from the 'official side'. Immediately after the mandate on the treaty negotiations, the HRC explicitly stated that the UNGPs continue to enjoy authority and legitimacy, and their implementation is required and expected from both states and businesses.[921] This constitutes a clear positioning on the relationship between the UNGP and the future BHR treaty. In addition, from the point of view of both the states and businesses concerned, there is a strong case for implementing the substantive requirements of the UNGP: when legislative progress by means of a BHR treaty is sought, there is probably no more suitable and efficient preparation for a legally binding future BHR treaty than compliance with the UNGP. [922]

2. Necessity for a Progressive and Binding Solution for IHRL

Regarding the effectiveness of the future BHR treaty and, above all, the legal position of victims, there is a strong case for codifying direct obligations of businesses in addition to due diligence obligations of states. In addition to these aspects, which are rather related to the practical effect of the treaty, considerations of legal doctrine and progress of IHRL support such a development in a future BHR treaty.

The academic debate on all substantive decisions in the process of shaping the content of the future BHR treaty, starting with its personal scope of application but especially in connection with direct corporate obligations, is determined by political considerations. Evaluations and decisions are made considering which regulatory instrument will meet with the greatest possible approval from the states on whose ratification it depends, rather than on the basis of normativity, but often disguised under the cover of legal doctrine. There is even talk of a treaty to 'please the masses'. The question, however, arises whether this focus on the political feasibility of a treaty is justified. After all, particularly in light of expected future legislative and practical developments, what is actually more detrimental to the regulatory

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[920] See International Commission of Jurists, *supra* note 290, at 17.

[921] Cassell and Ramasastry, *supra* note 311, at 13; see 26/22 Human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/26/L.1, 23 June 2014.

[922] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 77 f; P. J. Selvanathan, *The Business and Human Rights Treaty Debate*: *Is Now the Time* (2015), available online at https://media.business-humanrights.org/media/documents/files/documents/IsNowtheTime_TreatyDebate.pdf.

purposes of the future BHR treaty; maintaining the intermediary approach or accepting a low ratification rate?

a) Doctrinal Coherence

It was briefly determined above that ICL emerged as a response to the shortcomings of state responsibility with regard to the prosecution of international crimes.[923] ICL is proof of a general recognition in PIL that the enjoyment of Human Rights under certain circumstances will not depend on the state exclusively. In light of this, it appears hard to provide a convincing conceptual or technical reason why PIL as such, besides ICL, could not be extended to cover private actors where the regulatory subject matter requires so.[924] Even more so, in the BHR context, there are some doctrinal and normative reasons paralleling the emergence of ICL and applying in favour of the codification of direct corporate obligations in IHRL.[925] Nevertheless, a lack of doctrinal or conceptual coherence is brought forward within the debate against the codification of respective obligations in a BHR treaty.[926]

The narrative still implicit in the debate about the advantages and objections of imposing direct obligations on businesses in a future BHR treaty, namely that PIL does not provide any means for such regulation, is unfounded.[927] Rather, the opposition to such a regulatory approach lies mainly outside the dimensions of law-making, but is a question of political will on the part of the states setting the tone.[928] In any case, the dogma invoked by opponents cannot be '*what does not exist yet can no longer become'*.[929] Because this cannot be the aspiration of a regulatory instrument that was initiated precisely for the purpose of closing regulatory gaps. From a perspective of legal policy, it should be considered a basic function of law to be responsive, as regards the needs and demands of the addressees it intends to serve and to translate such responses into legally binding formal provisions.[930] If new treaties are enacted in PIL and do not serve this function, although the legislative needs and the weaknesses of the *lex lata* are known, this could undermine the credibility of PIL as a whole

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[923] See above at Sect. B.III.1.b)i; Stahn, *supra* note 473, at 199.

[924] Clapham, 'Challenges', *supra* note 143, at 562f; Bernaz, *supra* note 717.

[925] Cf. Ratner, *supra* note 45, at 464.

[926] Ford and Methven O'Brien, *supra* note 558, at 1235; McBrearty, *supra* note 346, at 12; Appea Busia, *supra* note 91, at 35 f; Special Representative of the Secretary-General, *supra* note 477, at para. 60; Nowak and Januszewski, *supra* note 38, at 116; cf. Karp, *Responsibility for human rights, supra* note 47, at 152.

[927] Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 17. See Nowak and Januszewski, *supra* note 38, at 116 f.

[928] Garrido Alves, *supra* note 39, at 27. Nowak and Januszewski, *supra* note 38, at 123.

[929] Cf. Nowak and Januszewski, *supra* note 38, at 117.

[930] Cf. Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 230; Wetzel, *supra* note 427, at 4; cf. Nowak and Januszewski, *supra* note 38, at 117; Decken and Koch, *supra* note 14, at 17.

and as a regulatory tool to tackle modern day problems.[931] Regulation that fulfils this function should always be considered conceptually and doctrinally justifiable despite conflicting traditionalist approaches.

i. IHRL as a Gateway for Transformation and Natural Challenge in the Regime of PIL

IHRL is one of the main pillars of modern PIL under the influence of the UN.[932] Its object is to protect Human Rights of individuals and to implement an international minimum standard of Human Rights protection that cannot be compromised.[933] Within the regime of PIL, the field of IHRL constitutes a legal discipline in its own right, which provides for many dissimilarities to general PIL.[934] As has been noted, PIL has been traditionally considered the law of coordination between sovereign states.[935] Thus, a field of law intended to determine the rules for the interaction of states with each other, necessary to maintain the protection of their sovereignty and equality. The state was not only the addressee and legislator, but also the main object of protection under PIL.[936] Accordingly, the first conceptual break or dissimilarity of IHRL as part of PIL lies in the very nature of this field of law. It does not serve the regulation of interaction of states among each other but rather primarily the relationship of states to subordinated individuals who are somewhat at their mercy.[937] The emergence of IHRL constituted an immense '*paradigm shift'*, transforming PIL quite radically and affecting many of its most basic structures and dogmas.[938] Human Rights are legal goods that are very dynamic and therefore bear a tendency to a supposedly incoherent way of application and interpretation inherent in them. [939] Logically, IHRL left much of the traditional doctrines of PIL, which were neither prepared for such a paradigm shift nor for the future developments of this inherently dynamic and volatile field of law. Most notable among the natural points of friction and collision between IHRL and its optimisation and traditional principles of IL is its state-centrism and subjectivity, which, as indicated above, have been or still are being applied to IHRL, although they do not harmonise with each other.

Moreover, the concept of absolute state sovereignty, as IL is supposed to safeguard it, and which at the same time means that a state is not subject to any obligations to which it has not expressly and willingly submitted itself, and the universality of Human Rights are hardly compatible. The protection of Human Rights as envisaged by the regime of IHRL and its

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[931] Decken and Koch, *supra* note 14, at 17.

[932] Tomuschat, *Human Rights, supra* note 68, at 2.

[933] See Art. 1 para. 3 of the UNCh; Wheatley, *supra* note 29, at 68 f.

[934] *Ibid.*, at 189.

[935] Appea Busia, *supra* note 91, at 43.

[936] See Tomuschat, *Human Rights, supra* note 68, at 1 f.

[937] Johansson, *supra* note 186, at 20.

[938] Appea Busia, *supra* note 91, at 44; Monnheimer, *supra* note 73, at 47.

[939] Wheatley, *supra* note 29, at 16.

codifications requires states be held accountable for purely internal activities and, thus, may be regarded as a challenge to the classical view of non-intervention, a basic foundation of PIL.[940] Under the rationale of IHRL, states may no longer claim their sovereignty and the corresponding rule of non-intervention as an obstacle to the engagement, categorisation and legal assessment of their internal Human Rights situation by the international community.[941] The paradigm shift triggered by IHRL is arguably the origin of the trend that has been observed in PIL for some time now, changing towards a transnational legal order that extends beyond the coordination of inter-state relations and, above all, is decreasingly tolerant of the notion of state sovereignty being misappropriated as an excuse for violations of humanity.[942]

The conflict of IHRL and state sovereignty is natural, since the object of IHRL is precisely to diminish the power of a state vis-à-vis individuals by establishing rules and restrictions on the permissible exercise of power. At least in modern PIL, post-emergence of IHRL and shaped by its influence, the *raison d'etre* of state sovereignty is to be found among Human Rights-related objectives. State sovereignty as a legal concept and its practically absolute protection may be derived from the protection of the self-determination of the people behind a sovereign state.[943] State sovereignty as recognised by PIL should be regarded as a means of securing the well-being of individuals.[944] The protection of state sovereignty reaches its limit when it is misappropriated and no longer used to protect people and their self-determination, but rather to their detriment. State sovereignty is then simply no longer worth protecting and loses its claim to non-intervention. According to an understanding influenced by IHRL, state authority is not legitimised by the fact that it is exercised by the 'right' sovereign entity, but rather by the manner and the purposes for which exercise of authority occurs. It is thus not a question of whom but a question of how.[945] IHRL curtails state sovereignty without compensation in a way that cannot be found in any other area of law. The point at which the protection of humanity replaces sovereignty as the supreme maxim of PIL has not yet been

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[940] Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', 54 *International Organization* (2000) 217, at 217.

[941] Shaw, *supra* note 79, at 215.

[942] Arnauld, *supra* note 465, at 625.

[943] Wettstein, *Multinational corporations and global justice, supra* note 1, at 53; with reference to Lauterpacht Tomuschat, *Human Rights, supra* note 68, at 1.

[944] Peters, *Beyond Human Rights, supra* note 868, at 6. cf. Ratner, *supra* note 734, at 86. who makes similar considerations about the connection between the raison d'etre of the whole State system and the protection of the individual, but proceeds less far than Peters' conclusion, which has been adapted in this paper, and does not establish the connection between the sovereignty of States and the individual interests behind it; cf. also Tomuschat, *Human Rights, supra* note 68, at 1 f.

[945] Karp, *Responsibility for human rights, supra* note 47, at 58.

reached.[946] However, the perception of sovereignty itself is subject to change if it is understood as a principle derived from considerations of Human Rights protection. This, in turn, makes it unnecessary to replace one maxim with another.

Before the emergence of IHRL, it was unimaginable that there could ever be a recognised concept that would allow any interference in the sovereign domestic affairs of another state because of the way it treats its own citizens.[947] Less than 60 years later, however, legal figures such as the Humanitarian Intervention and the Responsibility to Protect emerged from PIL and gained recognition.[948] IHRL has thus already served as a gateway for conceptual change in the past. If one wanted to measure the pace of the future according to the rhythm of the past, the step towards direct Human Rights obligations of (qualified) private actors appears long overdue. To some extent, IHRL might be considered an accumulation of deviations, breaches, and necessary modifications, which have only become apparent over time after its emergence. To assume that an expansion of the direct circle of addressees of Human Rights obligations would be doctrinally incoherent or would otherwise fail due to conceptual obstacles is misguided given this context of IHRL. Such reasoning is simply not convincing in relation to the future BHR treaty. The latter is an instrument intended to resolve an unanticipated regulatory matter in a legal field, which, by nature and as a whole, does not correspond to the dogmas and concepts of the overarching discipline of PIL. On the contrary, it seems inconsistent to selectively insist on concepts and dogmas that have not been comprehensively applied with regard to other regulatory subjects from the very beginning.

ii. Undefined Regulatory Targets within the Rationale of IHRL

Based on the purposes and optimisation of Human Rights protection, it makes sense and is conclusive to apply a doctrine of IHRL that does not exclude direct obligations of non-state actors such as businesses from its scope. Every state bears an inherent potential to severely violate Human Rights, which, concomitantly, creates its ability to protect these Human Rights effectively on the other hand and constitutes part of the *raison d'etre* of the state-centrism of Human Rights responsibilities.[949] While this finding appears to be paradoxical, it is not contradictory at all. Only when an actor holding the power in his hands to deprive individuals from their rights decides not to do so, will this decision reach the right holders in a noticeable way. To assign the protection of rights to actors granting them is the most direct and effective regulatory measure, which is why the sources of IHRL primarily engage states with this task. The determination of the correct addressees of duties therefore depends less on the

[946] Bhuta, *supra* note 797, at 72.

[947] Bates, *supra* note 60, at 11; see Cogan, *supra* note 71, at 331 ff.

[948] Shaw, *supra* note 79, at 880 ff. As it is beyond the scope of this paper, these concepts should not be discussed in detail.

[949] Clapham, 'Challenges', *supra* note 143, at 558; Nowak and Januszewski, *supra* note 38, at 131.

personal characteristics of the actors in question, but rather on their relationship to Human Rights guarantees.[950] Nowadays, the supposed aforementioned paradox can be easily transferred to business actors as well.[951] Their inherent potential to put Human Rights at risk is a decisive factor justifying the regulatory need of BHR, just as it has been perceived with regard to states.[952] The regulatory need follows the same pattern. How will doctrine justify not obliging actors to meet all the criteria regarding regulatory necessity, especially where prior intermediary regulation has proven fruitless? The aforementioned dynamicity of Human Rights applies to the identification of duty-bearers as well.[953] IHRL does not provide for a natural limitation of duty-bearers. To a certain extent, a limitation follows from the objective to empower individuals in asymmetrical relationships, but Human Rights have never been *designed* in a way that would explicitly address certain agents as the sole possible duty-bearers, and thereby exclude others in terms of a personal span of application. It has not been exhaustively determined to whom it falls to realise the corresponding entitlements and how this is to be achieved.[954] Human Rights, as envisaged in the UDHR, do not contain a strict exclusion for its addressees' *rationae personae*.[955] A Human Right may address a non-exhaustively defined mass of multiple duty-bearers, which only undergo a specification in the course of a change of circumstances requiring such specification, in particular if the contents of these obligations are modified or extended.[956] If the content of a law is changed or adapted, it is only logical that this may also require changes in the addressees. As has been pointed out above, human dignity is the most intrinsic Human Right of which the need for protection has been established in regulatory terms. It is the reason for the emergence of IHRL as we know it today, as well as the fundament of Natural Law approaches to Human Rights.[957] IHRL articulates the imperative to protect certain rights and freedoms from the perspective of their beneficiaries and therefore, tailored to the needs of the rights holders and

[950] Which is why the general exclusion of certain forms of businesses is not appropriate neither, see above Sect. **C.I.**

[951] Clapham, 'Challenges', *supra* note 143, at 558. Cf. Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 234 f.

[952] Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 234 f.

[953] Cf. Ratner, *supra* note 45, at 468.

[954] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 206, 208; ; cf. Ratner, *supra* note 45, at 469.

[955] Nowak and Januszewski, *supra* note 38, at 139.

[956] Fasciglione, *supra* note 36, at 40, particularly at footnote 34.

[957] Cf. Cogan, *supra* note 71, at 334.

not the possibilities of their counterparts.[958] Thus, the focus is on the right, which comes first and precedes the duties.[959]

As every human being is unconditionally entitled to human dignity, a law preventing deprivations unconditionally is required. Human dignity does not stop at certain actors, but applies absolutely, i.e. with regard to all conceivable dangers. Human dignity can be endangered by any actor in an asymmetrical position of power in relation to the holder of human dignity.[960] This applies in immediate relationships of dependence, such as employment relationships or businesses operating in the utilities sector. Why should a person enjoy less protection through a deprivation of his Human Rights when it is committed by a private actor in a similarly unjust way? Indispensability and Natural Law require a flexible handling of the concrete obligations arising from the existence of a right and their addressees. As mentioned before, human dignity is a property inhabited by every single human being and entitles them to Human Rights. This ought to apply universally, regardless of any characteristics of the claimant as well as unconditionally.[961] Human dignity is supposed to have an absolute effect on all actors concerned and effectiveness does not depend on who or what a person is confronted with.[962] As has also been pointed out before, in some cases, deprivations of human dignity might occur, which cannot be blamed on the state. Thus, it cannot be decisive for the validity and enforceability of the indispensability of human dignity and its related Human Rights, whether or not the opponent is a state.[963] Making the identity of the opponent an exclusion criterion will significantly marginalise the unconditional nature of Human Rights. From a purely dogmatic perspective, human dignity and, thus, the Human Rights that intend to serve to guarantee human dignity ought to be invocable against anyone.

The treatment of employees in the German meat industry shall serve as an example for systematic interference by businesses with human dignity. It proves well that the issue of BHR is neither a regional problem nor necessarily depending on the political or economic situation of a state.[964] One must not search for giant corporations operating through subsidiaries in destabilised jurisdictions to identify regulatory need. In the context of a large internal outbreak of Covid-19 infections in a German meat factory at the time of the raging

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[958] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 206; Nowak and Januszewski, *supra* note 38, at 139.

[959] See Ratner, *supra* note 45, at 468.

[960] Nowak and Januszewski, *supra* note 38, at 114.

[961] See above Sect. **B.I.3**.; See Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 206; Tomuschat, *Human Rights, supra* note 68, at 47.

[962] Cf. López Latorre, *supra* note 535, at 78 f.

[963] Cf. Ratner, *supra* note 45, at 472.

[964] Rüntz, *supra* note 694, at 291.

pandemic in 2020, abuses of power in the industry caused a great deal of attention in society and a huge media echo.[965] Yet the working and living conditions of employees in the German meat industry have been rather an open secret for a long time than a new phenomenon. Respective corporations take advantage of workers from economically weak neighbouring states, lure them with low wages, make them work under precarious employment conditions and accommodate their foreign workers in conditions just as unworthy as the circumstances at the workplace. The whole system and model of employment is often designed to deprive people, in a way legitimised by law,[966] of most labour rights granted by the legal order and to exploit them, ultimately depriving them of the right to dignified living and working conditions. In so doing, the industry speculates on workers from abroad, who often do not have a better alternative at their disposal and engage *in a trade with their human dignity* for a small, but for them, indispensable, salary. Rarely do those responsible assume that they can recruit workers from within the country who regularly have quite different and much higher demands and would most certainly never get involved in such model of employment. In an exaggerated sense, this is a hunt for '*second-class*' people willing to work under conditions that would be unacceptable to the majority of locals. The concept is, thus, similar to that of European Union-based fashion businesses having their goods produced in factories in Central Asia, because they assume that the people there, who are undemanding due to necessity, are prepared to accept payment and working hours that would not attract any workers in their home countries or would be even prohibited by law.

As indicated above, a Human Right is not invalidated solely due to the fact that the primary duty bearer, the state, is not in a position to fulfil it.[967] Rather, the universality and non-derogable nature of Human Rights as well as the independence from state disposition implies a necessity, in line with the legal doctrine, to engage alternative responsible parties, if

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[965] See J. Reimer, *COVID-19-Ausbrüche - Warum die Arbeitsbedingungen in Schlachtbetrieben so prekär sind* (2020), available online at https://www.deutschlandfunk.de/covid-19-ausbrueche-warum-die-arbeitsbedingungen-in-100.html; N. Klawitter, *Ausbeutung als Geschäftmodell* (2020), available online at https://www.spiegel.de/wirtschaft/unternehmen/ausbeutung-als-geschaeftsmodell-a-84fd2e3e-b117-49a7-86f3-103358bd30aa.

[966] Instead of employment contracts - which offer workers comprehensive legal protection and claims against their employer - German law allowed employers to agree on temporary service contracts that leave employees in a much worse position. This has been exploited in the meat industry in particular with regard to workers from foreign countries within the EU, who are naturally in inferior positions. The German legislator only attempted to revise this situation it in the wake of the media uproar surrounding working conditions in the meat industry.

See Deutscher Bundestag, *Bundestag verbietet Werkverträge im Kernbereich der Fleischwirtschaft*: *Textarchiv* (2020), available online at https://www.bundestag.de/dokumente/textarchiv/2020/kw37-de-arbeitsschutzkontrolle-790534.

[967] Brune, *supra* note 1, at 128.

such are available. This necessity is also the reason why courts, other tribunals, and science, both at the national and international level, attempt to construct such an obligation of alternative responsible parties in the absence of sufficient explicit regulations by other means, for example through legal figures such as the German '*Drittwirkung',* as will be described further below. In this way, they react to a reorganisation of external circumstances. If an 'old right' is supposed to remain in full force even under changed external influences, this may necessitate the creation of new obligations on the basis of this 'old right'.[968] The need for regulation with regard to such alternative responsible actors may be less obvious and questionable if a failure of the explicitly and primary responsible actors occurs only sporadically and on the fringes of an otherwise functioning legal regime. However, if actors represent a structural threat to Human Rights, it should not be the exception, justifiable only with increased effort, to oblige them to respect Human Rights and to hold them accountable in case of violations. It is required by the telos of IHRL as well as legal clarity and uniformity of the law and hardly lacks doctrinal coherence. Moreover, it cannot be left to the individual disposition of states whether or not actors who are capable to decide comprehensively and systematically on the realisation of Human Rights are obliged to comply with IHRL or not. This would impede the rationale of IHRL and the internationalisation of Human Rights as regulatory concern.[969] In principle, states have no discretionary power with regard to the provision of Human Rights guarantees, but are subject to them *ipso facto* and, at least in part, independently of their consent.[970] In IHRL, it is precisely the limitation of state power, but in principle of any form of arbitrary exercise of power, that is intended.[971] Where the state fails to act as a link in the chain of guarantees and this leads to large-scale and systematic Human Rights violations, which in turn are not remedied, it would be tantamount to an indirect disposition power of the state not to do so due to overriding interests. However, Human Rights are fundamentally independent of a state's will or capabilities.[972] If it is established that material Human Rights violations are caused by businesses, for example by damaging the health of individuals, interfering with their privacy or otherwise exploiting their

[968] See Ratner, *supra* note 45, at 468. Referring to a quote of Joseph Raz, finding that 'a change of circumstances may lead to the creation of new duties based on the old right'.

[969] Cf. Nowak and Januszewski, *supra* note 38, at 120.

[970] *Ibid.,* at 120 f., particularly at footnote 18. Pointing out that several Human Rights treaties do not contain a withdrawal clause at all and that IHRL partially achieved ius cogens and customary international law status. Thus, states are subject to such norms regardless of their consent and sovereign decisions.

[971] See above the section with regard to the necessary balancing of power asymmetries in IHRL. See also *ibid.,* at 114 f. stressing that sources of violence and Human Rights injustice 'keep growing and thriving where power structures remain without restraint.'.

[972] Except of states of emergencies. In such circumstances, states might derogate their Human Rights obligations to a reasonable and appropriate extent, see Art. 4 ICCPR, Art. 2 ICESCR.

dependence, it cannot be up to the state to decide whether and to what extent this qualifies as a violation of IHRL and whether it ought to trigger legal consequences. IHRL determines the wrongfulness of such an injury and whether it requires remediation.

At this point, again, it can be argued that this problem should be remedied by a more pronounced accountability of the state, such as a more precise and legally secure design of the due diligence obligations. In theory, this could be a remedy, because the urgent need for regulation in IHRL would not exist if domestic law were to take care of it. However, for the reasons mentioned above, reliance solely on the state would not be expedient. The best way to balance the governance and accountability gap is a complementary coexistence of State due diligence and direct corporate obligations.[973] As has been found above, the introduction of direct obligations must not lead to a blurring of responsibilities and, above all, must not in any way diminish State competencies and responsibilities with regard to IHRL. This is not only a question of political considerations and state authority, but rather a normative necessity. The envisaged direct corporate Human Rights obligations and the obligations that IHRL ascribes to states are based on completely different grounds and must therefore be manifested differently in terms of content and scope. Both the state and businesses owe…. the protection of Human Rights to individuals, as they are in a superior position of power compared to the individual, from which the latter is supposed to emerge by empowerment.[974] However, both actors derive this power from different sources. The state from its inherent sovereign power, which ought to serve the benefit of its citizens,[975] and businesses from their *de facto* economic and political power potential. Since the factual position of power that businesses can assume is decisive for the regulatory necessity, this must also be of importance for the design of the obligations to be attributed to them. While States are likely to be subject to a blanket procurement obligation with regard to Human Rights, this is not the case for businesses. The limits of what a business can be expected to do in individual cases under IHRL are found in the feasibility and reasonableness of effort, as well as the nature of the legal interest affected and the severity of the threat to Human Rights.[976] Where to draw the line must be determined depending on the actor concerned and in particular also in distinction to the requirements to be imposed on states. For while states owe the fulfilment of their Human Rights obligations in principle unconditionally and only subject to narrow exceptions, this is not the case with private actors such as businesses – on the contrary, they can claim certain rights for their part and, if necessary, also invoke them against the rights of

[973] Cf. Nowak and Januszewski, *supra* note 38, at 116; Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 565.

[974] Cf, Nowak and Januszewski, *supra* note 38, at 118.

[975] Cf. Tomuschat, *Human Rights, supra* note 68, at 1 f.

[976] Cf. Strahovnik, *supra* note 285, at 166 f; cf. Hughes Jennett, Hamzi and Mashru, *supra* note 892.

others.[977] A major flaw of the UN Norms, for example, was that there was no such specification of interdependence and that the instrument did not provide for clear limits to corporate responsibility and corresponding obligations.[978] Such an approach is not in the interest of any of the parties and stakeholders involved, as it is imprecise and creates legal uncertainty with regard to the distribution of duties and responsibilities. The *de facto* power of disposal that businesses have in part with regard to Human Rights protection justifies their responsibility for Human Rights provision and protection.[979] However, it must at the same time logically limit it. Their responsibility is only justified because they stand in a relationship to individuals that requires a balance of power, and only as far as they exercise actual influence on the protection of the Human Rights of these individuals. For precisely this reason, the scope of duties to be attributed to businesses must be clearly materially differentiable and somewhat lower than that of the state, which owes the protection of Human Rights irrespectively of external circumstances. The failed UN Norms, by contrast, were not able to make this differentiation; instead, they provided for a kind of blanket application of IHRL standards, which are tailored to the state as their addressee and were correspondingly misguided in their application to businesses. The fact that any kind of normative justification of direct corporate obligations must share the fate of the Norms is therefore a comparison that does not convince, since the direct nature of the foreseen obligations alone cannot be invoked as a reason for the failure of the legal instrument.

Finally, the dogmatic justification of direct obligations of businesses from IHRL results from the conception and doctrine of due diligence obligations of states in horizontal relationships in the first place: strictly speaking, it is a precondition for the existence of the undisputed state due diligence obligations in relation to horizontal violations of IHRL that the actor who should have been prevented from violating IHRL by the state must necessarily be subject to some standard which the state should have induced the actor to comply with.[980] Only if an individual is entitled to have his Human Rights respected *vis-à-vis* another private actor on a horizontal level, can there be room for an obligation of states to actively prevent violations by

[977] Nowak and Januszewski, *supra* note 38, at 128.

[978] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', *supra* note 339, at 71; Nowak and Januszewski, *supra* note 38, at 159.

[979] Cf. with regard to responsibilities of non-state actor in general Jacob, Ladwig and Schmelzle, 'Normative Political Theory', in T. A. Börzel, A. Draude and T. Risse (eds), *The Oxford Handbook of Governance and Limited Statehood* (2018), 564 at 567.

[980] Chetail, *supra* note 506, at 127; Fasciglione, *supra* note 36, at 45 f; Nowak and Januszewski, *supra* note 38, at 142.

non-state actors.[981] Therefore, the recognition of state due diligence duties goes hand in hand with the implication that there is already some kind of responsibility or duty at a horizontal level between private actors.[982] But as implementation by states constitutes the weakness of the intermediary approach where non-ideal circumstances exist, direct corporate obligations offer a response, as it would elevate the enforcement of the implied corporate obligations from dependence on the state. The codification of corresponding duties in a future BHR treaty should thus not be understood as undermining the state due diligence obligation or as an obstacle to its development, but rather as a reassurance of its justification and a means of its specification. This relationship between state and businesses obligations in IHRL is to be secured through appropriate treaty arrangements, which should further refine and deepen the state's obligation.

To sum up, if there is a duty of the state arising from a Human Rights treaty to ensure that non-state actors comply with certain legal obligations of that treaty, it necessarily follows that this said treaty, be it implicitly or explicitly, recognises and establishes a legal obligation of the non-state actor itself to refrain from certain actions and comply with certain obligations.[983] A state cannot be declared a guardian and enforcer of horizontal legal relations and obligations, the existence of which is in turn doubted. It is difficult to reconcile both at the same time. The content of the intermediary approach to horizontal Human Rights protection, thus, is practically limited to the enforcement of already existing duties, but not to their initial creation and foundation. According to this view, corporations in fact are already legally obliged by IHRL but, however, due to lack of explicit recognition of such obligations by virtue of positivist norms such as a specific treaty, corporations can claim impunity under PIL, leaving victims and opponents unable to offer any tangible and irrefutable counterarguments provided by law. Recognition and codification of direct corporate obligations in relation to IHRL, thus, help to eliminate confusion and align existing law with the correct normative position, leading to coherence and legal certainty.[984]

This line of thought can theoretically be applied to individuals as well, who are also in a position to restrict the Human Rights of others. State obligations to prevent and address horizontal Human Rights violations within the intermediary approach are not limited to businesses only. However, as already mentioned above, the necessity to codify immediate legal effects of PIL on non-state or private actors arises only if the facts of the case cannot be

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[981] The State duty to prevent Human Rights violations by third parties was already addressed under Sect. **C.II.1.** as this duty is the necessary precondition or rather original cause for State responsibility and liability for third party violations.

[982] López Latorre, *supra* note 535, at 69 ff.

[983] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 208.

[984] *Ibid.*

regulated legislatively in purely domestic dimensions with regard to Human Rights protection. The matter of regulation is based on a structural subordination relationship, which applies to businesses. The addressees to be obliged by IHRL must hold a superior position of power over its subjects of protection in order to meet its legal objective.[985] This is the case with businesses, and indeed with individuals in certain cases, if they are organised in terrorist or other militant groups or are part of a non-governmental organisation.[986] In this case, there is a necessity to directly subject such actors to the regulatory content of PIL. However, with individuals, the case for international regulation is less obvious compared to businesses as regulatory targets. Their conduct would have to represent a structural problem for the regulatory objectives of IHRL and, thus, trigger 'international concern', which has so far only been recognised by ICL in connection with the perpetration of the core crimes codified in the Rome Statute. All remarks referring to the necessity of regulation of BHR matters and to direct corporate obligations are to be considered only in light of these valuations. Due to the large and normatively significant differences between both regulatory targets, findings with regard to businesses cannot be transferred to individuals without further ado.[987]

iii. Legislative Trends

A BHR treaty imposing direct obligations on businesses would join a legislative trend in PIL that goes beyond ICL and tends to incorporate non-state actors constituting a structural problem to IHRL guarantees into its scope.[988] It would, thus, fit into the overall concept. There is no legal, doctrinal or logical barrier to oblige businesses from IHRL – states must only consent to do so.[989] As legislators of PIL, states have been able to consent to direct application of international legal instruments to non-state actors in order to counteract terrorism, e.g. by means of the Convention for the Suppression of Unlawful Seizure of Aircraft,[990] or the Convention for the Suppression of the Financing of Terrorism[991].[992]

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[985] See already above at Sect. **C.I.**

[986] This enumeration is not intended to be exhaustive, but lists the three types of non-state actors that are usually recognised as such and referred to in connection with the regulatory content of International Law, cf. Clapham, 'Challenges', *supra* note 143, at 558.

[987] As regard international obligations and responsibilities of individuals in PIL see Peters, *Beyond Human Rights, supra* note 868 See in particular chapter 4 at p. 60 ff.

[988] See López Latorre, *supra* note 535, at 64 ff; Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 37 ff. Providing examples with reference to Labour Law and Environmental Law which both are closely related to IHRL Fasciglione, *supra* note 36, at 34.

[989] Chetail, *supra* note 506, at 115; van Ho, *supra* note 151, at 114; Nowak and Januszewski, *supra* note 38, at 119 ff; See also Macchi, 'A Treaty on Business and Human Rights', *supra* note 477 Who agrees with this thesis, however, then presents various reasons from the spectrum of 'political feasibility', which finally move her to a plea against direct obligations, contrary to the normative necessities.

[990] Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, United Nations Treaty Series 105.

Moreover, Art. 3 of the International Convention on Civil Liability for Oil Pollution Damage[993] as well as Art. 137 of the UN Convention on the Law of the Sea[994] recognise the ability of non-state actors to violate international legal obligations and assign a liability.[995] In the field of International Environmental Law, the *'polluter pays'* principle has become established and codified in the relevant treaties, according to which non-state actors are equally capable of violating PIL as states and can be held directly liable for this.[996]

In addition to these codified sources of PIL, it can be observed how international courts and other bodies entrusted with the application and interpretation of PIL repeatedly find themselves in need of developing the law regarding direct obligations of non-state actors. The UN Committee on the Rights of the Child in its General Comment No. 16 recognised a direct and immediate effect of the Convention on business enterprises and found that the duties and responsibilities to respect children's rights in practice are not limited to the state and its institutions, but extend to private actors and business enterprises.[997] The Committee on Economic, Social and Cultural Rights reached similar findings in connection with the right to adequate food and the right to water.[998] Additionally, the Inter-American Court for Human Rights has repeatedly recognised the direct effect of international Human Rights obligations to business entities.[999] Most recently, at the national level, the Canadian Supreme Court addressed the applicability of IHRL to businesses in the *Nevsun Ltd*. case.[1000] The court expressly concluded that although there had not yet been a case in Canadian common law where PIL had been invoked directly and successfully in civil proceedings, it was not excluded that businesses could be directly addressed by IHRL and consequently commit

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[991] International Convention for the Suppression of Financing of Terrorism, New York vol. 2178, 9 December 1999, United Nations Treaty Series 197.

[992] Nowak and Januszewski, *supra* note 38, at 121.

[993] International Convention on Civil Liability for Oil Pollution Damage, 19 June 1975; CLC.

[994] Convention on the Law of the Sea, Montego Bay vol. 1833, 10 December 1982, United Nations Treaty Series; UNCLOS 3.

[995] Garrido Alves, *supra* note 39, at 26 f; Nowak and Januszewski, *supra* note 38, at 122; Alland *et al., supra* note 511, at 114.

[996] Ratner, *supra* note 45, at 480; Shaw, *supra* note 79, at 659 f.

[997] United Nations Committee on the Rights of the Child, 'General Comment No. 16 on State obligations regarding the impact of business on children's rights: UN Doc. CRC/C/GC/16' (2013).

[998] Nowak and Januszewski, *supra* note 38, at 147; United Nations Economic and Social Council, 'General Comment No. 15, the right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11', available online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement; United Nations Economic and Social Council, 'General Comment No. 12: The right to adequate food, UN Doc. E/C.12/1999/5'.

[999] López Latorre, *supra* note 535, at 81.

[1000] *Nevsun Resources Ltd. v. Araya,* Case No. 37919 Supreme Court of Canada (2020).

legally actionable breaches thereof.[1001] It follows from the findings of the court, that national tort law, even if covering corporate abuses, cannot always reflect the wrongfulness and severity of damages caused at least in case of *jus cogens* violations and therefore lacks critical expressive value.[1002] This reasoning provides fertile ground for a doctrinal classification of direct application. It implies that in order to do justice to the significance and validity of IHRL, it is necessary to identify Human Rights violations as such, even in relation to businesses. Simple tort law cannot always produce a satisfactory response.

Direct obligations of non-state actors under PIL are therefore no exceptional anomaly, found only sporadically in the 'formal sources' of PIL, given the decisions by adjudicative bodies, which reflect the application and contribute to the creation of PIL, and according to Art. 38 Sec. 1 lit. d) of ICJ-Statute, constitute part of its legal sources.[1003] Thus, a codification of direct obligations in a future BHR treaty cannot be described as a breach of any doctrinal coherence or drastic conceptual change.[1004] Rather, such a development would be a new milestone in an existing trend and contribute to its consolidation. In reality, there are already direct obligations under PIL for non-state actors in general and business entities in particular, the very existence of which will not be decided by a future BHR treaty.[1005] However, an explicit recognition and codification of such obligations would have an important added value for the further development of IHRL and the fulfilment of the purposes of the treaty. It would strengthen the legal position of victims, as will be illustrated in the subsequent sections.

At the domestic constitutional level, it has long been recognised in various jurisdictions that the state alone cannot guarantee fundamental rights and freedoms. Constitutional law is often regarded as following a state-centric doctrine similar to IHRL, whereby fundamental rights and freedoms as well as the claims arising thereof are considered to exist on the vertical level only and any horizontal effect is a subject of debate.[1006] However, in many jurisdictions, the judiciary has proceeded to modify strictly state-centric application.[1007] Such modifications are for instance the notion of '*Drittwirkung'* in Germany, or the horizontal application of constitutional values in Canada.[1008] The modifications are based on the assumption that certain values founded in the constitution could influence the legal order in a

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[1001] Walton, 'Nevsun Resources Ltd. v. Araya, Case No. 37919: International Decisions', 115 *The Americal Journal of International Law* (2021) 107, at 108 ff.

[1002] *Ibid.*, at 112.

[1003] See Shaw, *supra* note 79, at 81 ff., 84 ff.

[1004] Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 17.

[1005] Garrido Alves, *supra* note 39, at 27; Ratner, *supra* note 45, at 475.

[1006] See Gardbaum, *The "Horizontal Effect" of Constitutional Rights, supra* note 865, at 388 ff.

[1007] Mishra, *supra* note 381, at 54.

[1008] Gardbaum, *The "Horizontal Effect" of Constitutional Rights, supra* note 865, at 398 ff.

state as a whole and, thus, also in the relationship between private actors. Other states, such as Ireland, South Africa, Spain, India, or Sweden have explicitly acknowledged the horizontal effect in their constitutions and apply such rights directly to private actors.[1009] Even if national constitutions and IHRL are only comparable with each other to a limited extent, what they have in common is that they primarily serve to limit the arbitrary exercise of power by the state towards citizens and provide for rights of similar substantive content.[1010] As regards considerations of doctrinal coherence, such a 'break' with state-centrism at the constitutional level can at least serve as an indication or point of reference for corresponding movements and justifications in PIL. Similar evaluations arise with regard to the founding treaties of the European Union and its supranational legal regime. The TFEU is an intergovernmental treaty between the Member States of the European Union, addressed exclusively to the latter and in its operation works similar to multilateral treaties of PIL. Nevertheless, individual norms of the TFEU are attributed direct effect on private actors, namely the so-called fundamental freedoms. These are comparable to international Human Rights in substance and design, like constitutional rights on the domestic level. The only conditions for the direct effect of these European fundamental freedoms are (i) a sufficient definition of rights as well as their (ii) unconditionality.[1011] If these two conditions are met, the norms of the TFEU will generate direct effect on non-state actors and allow the the latter to invoke rights from the TFEU. Although the legal regime of the European Union is very special and not *per se* comparable with PIL, the application of individual rights as claims against private third parties shows that, when normatively necessary, a dogmatic justification for the departure from the intermediary approach must also be possible in IHRL.[1012]

b) Influence of the Feature BHR Treaty on the Perception and Evolution of IHRL

When drafting the future BHR treaty and deciding whether to maintain the intermediary approach to horizontal Human Rights protection as enhanced by the UNGP or to supplement it with direct corporate obligations, the impact of such a BHR treaty on the further creation and development of PIL and IHRL ought to be considered; which direction is IHRL supposed to take and in which way should a BHR treaty be designed in order to meet this objective. Beyond short-term solutions, a future BHR treaty can offer opportunity to reduce regulatory gaps and shortcomings. The added value of any international regulatory instrument is that it

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[1009] Nowak and Januszewski, *supra* note 38, at 148.

[1010] See Gardbaum, 'Human Rights as International Constitutional Rights', 19 *European Journal of International Law* (2008) 749.

[1011] On the issue of direct horizontal effect of European fundamental rights and freedoms on private actors see Karayigit, 'The horizontal effect of the free movement provisions', 18 *Journal of European and Comparative Law* (2011) 303; Müller-Graff, 'Die horizontale Direktwirkung der Grundfreiheiten', 49 *Europarecht* (2014) 3.

[1012] Ratner, *supra* note 45, at 485.

can have a kind of leverage effect on future legislative and judicial dynamics. Developments in certain legal branches may inspire others, i.e. while certain regulations can fuel legal progress, other legislative decisions can also lead to stagnation.[1013] As has been found by *Clapham*, the way we resolve the question of Human Rights protection in relation to non-state actors will be decisive for how we perceive IHRL as a whole in the future and how this legal field will evolve.[1014] This finding implies that the outcome of the OEIGWG negotiations will have - or in any case is suitable to have - a lasting impact on further legislative developments in IHRL or, more precisely, will either promote, initiate or counteract and restrain them.

Generally speaking, every codification of protective standards regarding business conduct in IHRL is progress and should be considered a positive step in the right direction.[1015] The drafts for a future BHR treaty that have been published by the OEIGWG so far all provide for a substantial improvement of the legal position of affected individuals, or rather potential victims and, thus, are to be considered valuable and welcome developments.[1016] Nevertheless, any evaluation of legislative projects must take into account the different impacts and consequences it is likely to trigger in the respective legal field – short-term, mid-term, and long-term. Such consequences may be either positive or negative, depending upon the regulatory content of the legislative acts in question. Thus, how would a future BHR treaty influence IHRL? There are generally two major scenarios to be differentiated: either the OEIGWG negotiations result in a substantially ambitious treaty, fully complying with the notion of *normative individualism*,[1017] which in turn might attract a few state parties for ratification only after its adoption; or the outcome might be a rather restrictive and conservative treaty which might not bring legislative innovation yet, but on the other hand would be particularly successful in terms of political feasibility among state parties. In essence, this question of longer-term consequences of the future BHR treaty is at the centre of the whole debate accompanying its creation.

In the field of BHR, as has been pointed out already, efforts have been made by various parties to satisfy the need for legislative resolution of this subject matter. The UNGP constitute a turning point for progress in the BHR ~~progress~~, triggering a real motivational wave for various stakeholders to contribute to Human Rights protection in the business

[1013] Cf. Carrillo, *supra* note 99, at 58.

[1014] As Clapham noted at the outset of his remarkable conceptual work on the treatment of non-state actors in the IHRL Clapham, *Human Rights Obligations of Non-State Actors, supra* note 26, at 1.

[1015] Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 8.

[1016] Cf. Garrido Alves, *supra* note 39, at 32; Bloomer and Zorob, *supra* note 270, at 2.

[1017] Strahovnik, *supra* note 285, at 177, 173.

sector.[1018] The future BHR treaty, in turn, will be a pioneer regarding corporate responsibilities in IHRL. The mere successful adoption of the treaty will have a revolutionary character or at least will be perceived as such. The contents of the BHR treaty will in any case be the first *binding* standards and will set the tone for any future application and interpretation of law in this emerging legal field. This tone can either have a truly revolutionary character or a rather decelerating effect on IHRL. Other non-state actors, such as militant groups and even individuals, have long been directly subject to international legal obligations in certain circumstances.[1019] As set out above, with the emergence of ICL the differentiation between international and internal matters of concern has already broken down a little and the same development is to be observed in International Humanitarian Law, which is increasingly considered to apply to internal conflicts and non-state parties as well – giving up the differentiation between international and intra-state matters.[1020] An anomaly of PIL would be to not introduce direct corporate obligations despite having normative reasons to do so. [1021] Businesses are influential actors, politically and economically in equal measures. In terms of political influence and influence on legislative and Human Rights policy decisions at national and international level, their leverage is often even greater in comparison to other non-state actors. It should therefore be possible to regulate businesses specifically.

It has already been addressed that above all in national and transnational jurisprudence - but also in the work of the Human Rights Committees - a fundamental tendency can be observed to include non-state actors, particularly businesses, in the circle of addressees of IHRL. This is possible above all because no general, explicit, and mandatory restriction of the personal scope of application to states can be derived from the law and also does not seem necessary in view of the substantive content, as already pointed out above. Conversely, however, since there is also no explicit and codified regulation that permits the inclusion of these actors, this is an open subject of regulation and particularly susceptible to legislative developments and influence. The decision to maintain the intermediary approach, even though it has proven ineffective in the past and often seems outdated, would be a clear signal from PIL-makers against the inclusion of businesses as addressees of IHRL. This could have a negative impact on the legislative agenda (see below) and deprive judiciary and other legal practitioners of a basis for progressive application and interpretation of the law. For instance, the Canadian Supreme Court arguably would not have been able to justify and defend the aforementioned *Nevsun Ltd.* ruling if there was a recent treaty from which a different

[1018] Cantú Rivera, 'National Action Plans on Business and Human Rights: Progress or Mirage?', 4 *Business and Human Rights Journal* (2019) 213, at 214.

[1019] Cf. Nowak and Januszewski, *supra* note 38, at 119 f.

[1020] Shaw, *supra* note 79, at 912.

[1021] Fasciglione, *supra* note 36, at 37.

interpretation of the law derives. This would apply regardless of whether Canada had ratified such a future BHR treaty or not. In any case, the norms and standards contained in a formal regulatory instrument such as the envisaged future BHR treaty serve as a reference point for the identification of international rules and, in particular, *opinio iuris*, which influence the sources of PIL.

The sources of PIL,[1022] according to Art. 38 Sect. 1 of the ICJ-Statute, can be defined as the totality of international treaties, which constitute the positively written provisions of PIL (lit. a), the rules of customary PIL (lit. b), general principles of law recognised by the democratic nations around the globe (lit. c), and, subordinately, judicial decisions and teachings of the most highly qualified publicist of the various nations (lit. d).[1023] All of these sources form PIL. However, these sources can rarely be considered and applied completely separately from one another. Rather, they have their own dynamics, influence each other and interact with each other when applied. Certain treaties can and must be interpreted in the light of other, possibly newly concluded treaties, since these may represent more actual state practice or *opinio iuris*. It may aswell be necessary to interpret certain treaties in the light of customary PIL, or to refer to judgments and decisions of other authoritative bodies for interpretation, especially where these draw a more recent picture of the application of PIL. When determining and applying the contents of a treaty, evolutionary considerations must be taken into account, which can guide legal developments.[1024] The significant relevance of other rules of PIL for the interpretation of treaties and an invitation to do so is expressly enshrined in Art. 31 para. 3 lit. c of the Vienna Convention on the Law of Treaties ('***VCLT***').[1025] Therefore, the mere entry into force of a future BHR treaty would have a significant impact on the application of IHRL as a whole and thus directly affect the legal situation of many victims of Human Rights violations worldwide. The legal framework of IHRL should be understood as an interdependent and connected legal system rather than a collection of independent and individually autonomous treaties that fragmentarily aim to strengthen the legal position of particular target groups.[1026] Decisions on the content of the future BHR treaty made in the

[1022] There is not one definite definition of PIL. However, in order to define the term, one should seek the sum of definitions of its legal sources, its legal subjects and its subject matters. Their interplay allows to define the concept of PIL more precisely. However, there are several highly disputed questions related to those elements, which are beyond the scope of this work. For the purposes of this section, it is sufficient to confine to the determination of the sources of law and their effects. For further details cf. Vitzthum, Proelß and Bothe, *supra* note 77, at 5. para. 2 ff

[1023] Chinkin, *supra* note 75, at 64.

[1024] Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 239.

[1025] Vienna Convention on the Law of Treaties 1155, No. 18232, 23 May 1969, United Nations Treaty Series; VCLT 332.

[1026] López Latorre, *supra* note 535, at 79.

context of the OEIGWG negotiations therefore have the potential to generate impact and, given the pioneering role of the treaty, are very likely to do so. The kind of leverage that the BHR treaty ought to have in the future should therefore be taken into account in its drafting.

The defence of the defendants in the *Kiobel* case before the US courts also provides an example for the radiation effect an international legal instrument can have, even outside international jurisdiction and application.[1027] The UNGPs were invoked by the defendants to justify that there are explicitly no direct Human Rights obligations of corporations in PIL.[1028] *Ruggie* expressly contradicted such a referencing of the UNGP.[1029] Nevertheless, this shows the impact that supposed legislative decisions, in this case the decision to not include direct obligations in the UNGP, can have on the application of the law in general and in future,

However, not only the way existing law is applied, but also how future law is shaped and evolves is largely determined by current practices. The evolution of IHRL should contribute to the fulfilment of its vocation and be truly and fully consistent with its goals and foundations.[1030] As the latter are not genuinely limited to protection from state conduct only, evolution of IHRL in the mid- or long-term must resign from such limitation as well and shall not exclude further possible progress. The sources of law tell us how new rules are made and how the existing ones are being repealed, confirmed, or abrogated.[1031] However, when new regulatory content is created, this is not done in disassociation from existing norms. Rather, efforts are made to ensure that the content corresponds to proven standards and can also be legitimised by legal doctrine, as the debate on whether PIL can provide a basis for the codification of direct obligations at all shows.[1032] In this context, the trend in international case law for Human Rights protection cannot be neglected. The explicit reference in Art. 38 para. 1 lit. d ICJ Statute declares decisions of international courts to be a subsidiary source of PIL and, thus, also of IHRL. The actual significance of international rulings in the system of PIL, which partly also consists of unwritten rules and in which legal development takes place by *opinio iuris* and state practice, is far greater.[1033] International jurisprudence shapes the scope and content of PIL, mainly with regard to existing laws which are clarified and

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[1027] *Kiobel, individually and on behalf of her late husband, Kiobel et al. v. Royal Dutch Petroleum Co. et al.,* No. 10-1491 United States Supreme Court (2013).

[1028] van Ho, *supra* note 151, at 121; Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 29; cf. also International Commission of Jurists, *supra* note 290, at 26.

[1029] J. Ruggie, *Kiobel and Corporate Social Responsibility* (2021), available online at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20(3).pdf.

[1030] Carrillo, *supra* note 99, at 95.

[1031] Chinkin, *supra* note 75, at 63.

[1032] Cf. Nowak and Januszewski, *supra* note 38, at 117.

[1033] Chinkin, *supra* note 75, at 75.

concretised in this way, but also with regard to the evolution of new legal principles and standards.[1034] The latter applies at least to the extent that case law might be referred to in order to identify rules of PIL, e.g. in legislative processes and might serve as a point of reference in order to determine how laws can and should be designed and formulated.[1035] However, as has just been stated, the reference point for more progressive case law can also be withdrawn by way of a treaty and thus ultimately detract from further development of law in this way. A decision against direct corporate obligations *now* is likely to make it difficult, at least in the medium term, to justify a corresponding approach in future regulatory instruments. However, opponents of direct obligations do not exclude direct obligations entirely, but rather seem to suggest that 'now' is not the right time for such a legislative development, as the international community might not be ready.[1036] The problem with this approach is that the 'moment of readiness or timeliness' could be significantly delayed if an appropriate opportunity is not seized now.

PIL, particularly custom, comes into existence by virtue of state reactions and actions in response to new information or changed circumstances.[1037] The outcome of the BHR treaty would definitely be such a reaction, which can also influence the interpretation and application of Human Rights and the pace of their future development beyond the scope of the BHR treaty and its parties. Hard law often grows out of general and non-binding instruments or declarations, as was the case, for example, with the Bill of Rights, which started with the UDHR and ended with the more concrete and binding ICCPR and ICESCR.[1038] On the other hand, if the step towards hard law is taken, it is unlikely that further changes and progress will occur or be actively pursued in the short and medium term with regard to the same and already regulated subject matter. Rather, the issue is likely to be considered closed for the time being, and it is to be expected that no further significant changes will occur, especially not to the instrument itself, but also not through additional legislation – this makes the future BHR treaty somewhat a one-shot opportunity.[1039]

All international treaties and in particular those treaties that have never come into force or failed during the negotiation process, are evidence of state practice and *opinio iuris*. A treaty

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[1034] Pauwelyn, Wessel and Wouter, *supra* note 877, at 737; Cf.Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates', 21 *European Journal of International Law* (2010) 173, at 178 ff., 184 ff. Evaluating how the jursiprudence of the ICJ and other international judicial bodies might influence the creation of new legal rules and even the way law is identified.

[1035] Cf. Chinkin, *supra* note 75, at 75; see also Shaw, *supra* note 79, at 81 ff.

[1036] Nowak and Januszewski, *supra* note 38, at 156; Ruggie, *supra* note 8, at para. 1.

[1037] Wheatley, *supra* note 29, at 134; cf. Skubiszewski, 'Elements of Custom and the Hague Court', 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1971) 810, at 812.

[1038] See Deva, 'Alternative Paths to a Business and Human Rights Treaty', *supra* note 7, at 24 f.

[1039] See van Ho, *supra* note 151, at 113.

that has not come into force is evidence of what the states have explicitly not accepted as law or legally binding norm.[1040] Thus, a negative rule of customary PIL is created, on what is not recognised by law. This negative rule applies for the next foreseeable time after its identification, just as any specific positive rule of customary PIL. Consequently, for the near future, these regulatory subjects are blocked for any development or creation of PIL and rules in this context. In the case of BHR and direct corporate obligations, the lack of recognition of such obligations within the treaty process would mean that there would definitely be no chance of any kind of direct corporate liability under IHRL. It means that law enforcement at the national level and of national laws remains the only possibility to enforce BHR. And if it is not successful, there is no evident alternative for victims, as the treaty would leave no room for interpretation and judicial development. The adoption of a narrow treaty, thus, counteracts both the development of international rules and the flexibility of jurisprudence. Sooner or later it will counteract individual justice in particular cases at hand.

Additionally, any adoption of a regulatory instrument will initially lead to a stagnation on the international legislative agenda on the particular subject of regulation. After the adoption of a treaty, the content that has been decided upon applies. For the time being, it reflects the most recent perception of the law the states as its legislators. Thus, if such content of regulation lags behind the regulatory needs, this gap nevertheless becomes applicable law. Even if regulations are not satisfactory or appear outdated afterwards, the issue nevertheless loses political relevance, at least temporarily. What is decisive here is arguably less the normativity or substantive content actually achieved, but rather the fact that a legal solution has been decided upon and stakeholders are supposedly satisfied. It has been observed that in areas of regulation where a multilateral agreement has already been concluded, the conclusion of further agreements on the same issue, such as supplementary regulations or a renegotiation, is unlikely or difficult to achieve.[1041] The standards as set out in the future BHR treaty will be considered highest possible denominator that could be agreed upon within the international community of states. Thus, if the law does not promote increased Human Rights protection or corporate accountability, then a legal practitioner who is perhaps fundamentally inclined towards a more progressive application will be prevented from any such attempt, which is a compelling effect of legal harmonisation. A treaty that was originally intended to solve the problem in the interest of the victims, can, in certain individual cases, have the exact opposite effect. Therefore, the possible leverage effects of a treaty adoption as well as any legislative movements should not be underestimated.[1042] An ambitious treaty would be

[1040] Pauwelyn, Wessel and Wouter, *supra* note 877, at 736; Chinkin, *supra* note 75, at 68, 71.

[1041] Pauwelyn, Wessel and Wouter, *supra* note 877, at 739.

[1042] Cf. Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 213f.

positive for normative development, as it would shift the original and inappropriate standards of what is feasible in favour of Human Rights promotion. While a rather narrow treaty is likely to set negative and restrictive signs and effects in this regard.

As an opponent of an overly ambitious treaty, *Ruggie* also takes up the concern about the stagnation of legislative development in order to make his point.[1043] He refers to the Paris Agreement for Environmental Protection and the Kyoto Protocol as examples which, in his view, prove that overly ambitious regulations do not achieve their goals and can even lead to a neglect of the regulatory objectives. Admittedly, the more ambitious a new regulation appears the more likely it is that states do not consent to it or do not comply with it as standards are too high. However, the yardstick of what should be achieved legislatively cannot be exclusively measured by what is possible at the time of a particular momentary snapshot, especially if the aim is to close gaps and change unsatisfactory circumstances permanently. There are examples of treaties, laws and legal concepts that were far beyond their time at the moment of their creation or adoption, and accordingly received little short-term attention. However, once established, they were allowed to develop their effectiveness and recognition over the years. The Draft Articles on State Responsibility for Internationally Wrongful Acts may serve as an example here. Originally, the Articles were only an appendix to a General Assembly resolution and did not promise much success due to their relatively strict regime. Today they are considered to be predominantly customary rules of PIL.[1044] Additionally, there are examples of state practice which were initially regarded as beyond PIL, but subsequently expanded in recognition and now constitute customary PIL, such as the development of fishing zones beyond the territorial sea.[1045]

Non-compliance alone is not sufficient proof that a rule has no legal force or legitimacy. Sometimes the formal expression of an *opinio iuris* is sufficient to prove a customary rule, even if the action of a state appears to contradict it.[1046] When a certain behaviour in particular is violative to the basic concept of human dignity and, thus, the core substance of Human Rights, states ought to hold just to their word, regardless of their subsequent actions and practice.[1047] This is especially possible and legitimate where formal rules and legal opinions are supported by further expressions of legal perception, such as statements and findings of

[1043] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', *supra* note 339.

[1044] Campbell, 'The Dynamic Evolution of International Law - The Case for the More Purposeful Development of Customary International Law', 49 *Victoria University of Wellington Law Review* (2018) 561, at 564.

[1045] *Ibid.*, at 562.

[1046] Chinkin, *supra* note 75, at 72; see Shaw, *supra* note 79, at 5.

[1047] Chinkin, *supra* note 75, at 72.

the General Assembly.[1048] A treaty process initiated by the General Assembly leading to the adoption of such a treaty would be such an authoritative expression. However, if a rule is not at least formally recognised and recorded but rather immediately and explicitly rejected in the first place, said rule and all progress in a similar direction can be considered a dead loss for the near future.

While the decision against a treaty or against individual progressive provisions within a treaty closes many doors, a rather open and progressive treaty is more likely to offer potential for fertile ground for further innovation and development. Admittedly, the actual effects of a treaty on the law depend on many other circumstances and most certainly upon politically motivated decisions of states to enhance a treaty or not. The fact that political feasibility is a malleable and, if necessary, also relatively quickly changeable factor is emphasised below. The advantage of an ambitious treaty over a weak treaty is that here options for future change are not only left open, but even practically and expressly inviting change by codification of the desired normative goals. It offers flexibility, because even if particular states refrained from the adoption of certain standards now and the circumstances subsequently change, the state's will and political feasibility also change. Thus, if the necessity for progress increases in the future, an entirely new lengthy and legislative process will not become necessary again.

Lastly, legislative developments in the field of BHR and the decision on the inclusion of businesses into the circle of obliged parties must also be considered in the light of developments in International Trade and Investment Law. As has already been noted, this is a booming area of regulation in PIL. While states willingly submit to the investment law regime and the decision-making power of arbitration bodies in favour of the rights of their investors, they fail to generate comparable ambitions in Human Rights protection.[1049] One must ask, what signal does this send for present PIL, particularly IHRL and its future development? It implies an imbalance, a substantive legal gap that needs to be bridged and a focus in PIL that is not placed on Human Rights protection, despite the central position accorded to IHRL.[1050] Presently, double standards seem to be applied with regard to the inclusion of businesses in the IHRL regime, for which the future BHR treaty ought to compensate. It happens without delay and or great reluctance whenever it is economically advantageous for the (state) parties involved.[1051] It can be certainly assumed that a field of law which lives from *opinio iuris* and consent of its subjects is not unaffected by legislative

[1048] *Ibid.*

[1049] Cf. Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 661, at 25 ff.

[1050] See already at Sect. **B.I.** above, as well as Tomuschat, *Human Rights, supra* note 68, at 2 ff.

[1051] Nowak and Januszewski, *supra* note 38, at 119.

priorities and valuations expressed in this way, even if there is no material rule at the outcome.[1052] Despite the potentially negative consequences for IHRL, its normative necessities and societal demands, a future BHR treaty with a weak material scope and effect would mean to yield a general and fundamental weakness of international legislation: its dependence on political conditions and interests, which – contrary to what should ideally apply to law – can change significantly in a very short time. Changes in national interests and, thus, frequently international political relations, are often triggered by external circumstances and independent of any considerations of justice, legitimacy, normativity, or the rule of law. The state-centric and heterogenous system of PIL-making, particularly with regard to treaties, is subject to impediments that are based within its very nature. States as the only stakeholders in the process tend to a dogged adherence to the *status quo*, national self-interest, and ideological differences and disregard perceived or recognised common interest or problems.[1053] And so the decision against direct obligations of businesses from IHRL is more a decision against *'political controversy'* rather than a decision for the normatively clean solution.[1054]

In view of all this, it can be assumed that a non-progressive BHR treaty in the form as propagated by some, precluding direct corporate obligations and leaving little room for their emergence, is at least as likely to jeopardise the regulatory purpose of BHR and the future evolution of IHRL as an allegedly '*overly ambitious'* or '*utopian'* approach.[1055] However, the latter scenario would at least create a fertile and referrable ground to achieve and promote the desirable legal evolution in the medium or long-term. The counter-scenario - a treaty which is adapted to the national interests of the states in the best possible way - on the other hand, does not promise relevant legal progress in the foreseeable future.

c) Political Feasibility and Timelines as Defining Factors of Legislation – How Much is the Treaty Allowed Now?

The strongest argument in favour of an intermediary approach remains the assurance of strong support on the part of states and thus the lack of political feasibility for direct corporate obligations.[1056] Not only specifically in relation to direct corporate obligations, but also rather generally in relation to most contents of the future BHR treaty, e.g. whether it should exclude regional businesses from its scope, whether it should be limited to certain core crimes of PIL, or which enforcement mechanisms it should provide, most of the controversies raised do not concern matters of legal technique and legislative capabilities, but rather relate to the

[1052] Cf. Pauwelyn, Wessel and Wouter, *supra* note 877, at 736.

[1053] Campbell, *supra* note 1044, at 562.

[1054] Garrido Alves, *supra* note 39, at 27.

[1055] Nowak and Januszewski, *supra* note 38, at 116.

[1056] Cf. International Commission of Jurists, *supra* note 290, at 35.

overarching question of whether it is the right time for a comprehensive and ambitious treaty yet. [1057] A treaty with politically too controversial contents could lead to the stagnation or even definite failure of the OEIGWG negotiations.[1058]

According to *Deva,* the OEIGWG negotiations are taking place in a pending *'High Tide'* for the conclusion of a rather comprehensive and promising treaty, which should be exploited reasonably.[1059] And indeed: the preconditions for a comprehensive BHR regulation are good and arguably have never been better. We live in a largely enlightened, mature, and critical society that considers itself independent. Consumers have access to information on corporate governance; they are educated and have high expectations regarding the globalised economic world and its order. A common perception has emerged that economic might has led to the erosion of state authority and might require legal counteraction.[1060] Businesses are increasingly expected not only to operate in the most economically profitable way serving their stakeholders, but also be able to serve the individual, and thus should be designed to benefit individuals.[1061] Therefore, businesses cannot legitimise their conduct with economic reasonableness and maximisation of profits only, but in the eyes of a growing number of consumers must rather evaluate how to produce social advantages and in any case not harm society, as otherwise the *raison d'être* of their actions might be questioned.[1062] Hence, while the influence and power of businesses is constantly growing (being the first reason for regulatory necessity), general understanding and expectation is that this power must be balanced and limited in order to safeguard said prosocial corporate governance and economic action (being the second reason for regulatory necessity).[1063] Events that are harmful to Human Rights, such as those described in the previous chapter, are increasingly taken note of by society, publicly processed and punished by consumers.[1064] Thus, the preconditions for a High Tide are set, at least in terms of societal will and perception.[1065]

Given the strong discrepancy between state-determined political feasibility and the societal perception of the regulatory subject matter, the overarching question arises as to whether

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[1057] *Ibid.*, at 39.

[1058] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 75.

[1059] Deva, 'Conclusion - Connecting the Dots', *supra* note 363, at 477 ff.

[1060] Ratner, *supra* note 45, at 447.

[1061] Wetzel, *supra* note 427, at 6.

[1062] Börzel and Deitelhoff, *supra* note 1, at 250.; cf. Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 4.

[1063] Cf. Strahovnik, *supra* note 285, at 172 f.

[1064] Makarem and Jae, *supra* note 360. See also above at B.II.3.d).

[1065] See Deva, 'Conclusion - Connecting the Dots', *supra* note 363, at 477 ff; Frynas and Yamahaki, 'Corporate Social Responsibility: An Outline of Key Concepts, Trends and Theories', in B. Rettab and K. Mellahi (eds), *Practising CSR in the Middle East* (2019), 11 at 11 ff.

and to what extent political feasibility should actually be taken into account when drafting international treaties. In other words, how to deal with political feasibility as a defining factor of PIL-making. Is it an irrevocable factor to which legislation ought to be adapted, or can political feasibility itself be determined by way of legislation?

i. Re-evaluating the notion of Political Feasibility as a Defining Factor for Legal Content

Within the OEIGWG negotiations, participant and observers tend to conclude that a conservative regulatory approach must mandatorily generate the greatest potential for protective and actual favourable effect for victims, as an ambitious but unratified treaty would not produce any protective effect at all.[1066] Given the reluctance that industrialised states in particular have shown towards previous attempts to regulate BHR issues in IHRL, a rather conservative treaty is certainly more likely to attract a greater number of contracting states. This, in turn, will result in a broader geographic and, thus, more universal international application of the future BHR treaty. Every legislative act of PIL constitutes a political decision and requires political will from multiple state governments. Such decisions are naturally not always based on normative actual necessities and legal potentials, but rather frequently driven by completely different interests and largely related to foreign policy.[1067] Consequently, due and possible legal developments, as desirable and necessary as they may be from the point of view of legal ethics and the telos of the law, tend to fail to materialise under the guise of political feasibility. A balancing act between what is normatively desirable and what is politically feasible must be performed. The object should be to retain and implement as much normativity as possible in the legal definition of state positions, rather than to *'sacrifice normative objectives on the altar of political considerations'* in a one-sided manner.[1068] Such normativity requires that laws refer to what conduct ought to be obeyed by its addressees to respond to practical and societal necessities and not what conduct is already in place. To a certain extent, the predicted willingness to obey laws that are still in progress must be taken into account in order to determine the content of laws and treaties reasonably. Indeed, it would be unrealistic to determine a law completely detached from the probability of its compliance. However, this predicted willingness should not be determined based on current circumstances only, but take into account any possible future change. Within the OEIGWG process, it appears that an over-emphasis of the degree of observance as a content-determining factor can lead to a disregard of normativity.

[1066] See, for instance Methven O'Brien, *supra* note 727, at 188. Pleading for a regulatory approach strongly aligned to the UNGP.

[1067] Shaw, *supra* note 79, at 8 ff.

[1068] Fasciglione, *supra* note 36, at 33.; Bilchitz and Deva, *supra* note 41, at 157.

The consideration of political feasibility in the drafting decisions of the future BHR treaty as such is appropriate and necessary, since all legislative projects aimed at a binding instrument for BHR issues as described above have, to date, failed. However, in worst cases, a disproportionate account of political feasibility at the expense of overdue normative goals may have the same effect on the creation of law as a complete disregard of political feasibility and ratification rates, i.e. it may hinder the practical effect of the future BHR treaty.[1069]

Therefore, it is necessary to find a way to deal with political feasibility in treaty-making that does not manifest it as a definite source of legal design. In this context, *Garrido Alves* considers abandoning the factor of political feasibility as an irrevocable and predeterminate circumstance around which the law is drafted, but rather adopt an understanding of political feasibility as a flexible and itself malleable factor that can be eventually challenged in the course of treaty-making processes.[1070] Within the BHR debate, sceptics of a particularly comprehensive and normatively progressive treaty seem to perceive the factor of normative necessity as subordinate and easier to adapt compared to political feasibility. Accordingly, treaty content that is not in accordance with the political majority sentiment, such as direct corporate obligations from IHRL, should be rejected as unrealistic in any case.[1071] However, political circumstances and the distribution of political interests are at least no fixed and unchangeable external circumstances, such as compelling environmental influences, whose consideration in legislation is indispensable. In principle, the starting point for determining the content of legislation should first be a legally dogmatic and normative analysis of the object of regulation. On the basis of this, the concrete legislative measures necessary in order to achieve the best possible realisation of the object and purpose of the law can be identified.[1072] If the measures determined on this basis are not compatible with political feasibility, the next step should be to try to bring the factors of normative necessity and political feasibility as close as possible to each other. This process of aligning both factors should not, however, be understood as a one-way street. Rather, optimally the focus should be on moving political feasibility closer to normative necessity in order to bring the resulting formal law as close as possible to its identified normative ideal.

[1069] Cf. Fasciglione, *supra* note 36, at 33; Deva, 'Scope of the Proposed Business and Human Rights Treaty: Navigating Through Normativity, Law and Politics', in D. Bilchitz and S. Deva (eds), *Building a treaty on business and human rights*: *Context and contours* (2017), 151 at 157.

[1070] Garrido Alves, *supra* note 39, at 41.

[1071] Methven O'Brien, *Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty, supra* note 729; see also in conclusion Macchi, 'A Treaty on Business and Human Rights', *supra* note 477; McBrearty, *supra* note 346.

[1072] Cf. Deva, *supra* note 688; Which corresponds to the idea of normative individualism, see Strahovnik, *supra* note 285, at 173.

Political feasibility in the context of international legislation basically describes no other than the will of states to bear a certain legal change. The political will of states, in turn, is determined by a number of external influences and, by its very nature, is itself in a constant state of evolution, as external circumstances change, new information becomes available and, on the basis of this, new behaviour is responded to.[1073] Moreover, the will of the state is shaped by the will of society, which in turn is subject to constant change. If a changeable and unreliable factor in the long term such as political feasibility is given a decisive role in the creation of norms, not only the status quo but possible future fluctuations and changes and the extent to which these can be stimulated by legislation ought to be considered.

Political feasibility and international legislative decisions are mutually dependent. For example, states adhere to PIL even though they have not explicitly committed themselves to it and there is no threat of compulsory enforcement.[1074] Rather, the authority of the law itself plays a role here, as do foreign policy considerations based on PIL, e.g. reciprocity, when a state is interested in other states complying with certain standards and this requires its own compliance.[1075] The political feasibility can therefore also change in a direction specified by the law, which was not foreseen when this law was created. Even more so, the mere fact that certain regulations are under consideration and attracting awareness might trigger national debates, which ultimately may lead states to revise their initial positions.[1076] Examples are the Rome Statute, the ICCPR and the ICESCR, which ultimately only came into existence under the pressure of such debates.[1077] To generalise, it can be said that if one were to accept the argument of lengthy political debates and low initial ratification rates as a decisive factor for the design of international treaties, we would lack many of the crucial Human Rights instruments defining IHRL today.[1078]

In the context of the changeability of political feasibility, *Garrido Alves* as well as *Deva* recognise the potential of CSOs, NGOs, but also academia.[1079] A coordinated engagement and influence of these non-governmental entities in legislative processes could offer a possible alternative solution to deal with (missing) political feasibility and state willingness to enforce an adopted comprehensive treaty, which should be exhausted in any case before an adaptation of normatively required treaty contents is initiated at the expense of normativity

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[1073] See Wheatley, *supra* note 29, at 8 ff.

[1074] Bassiouni, 'The Discipline of International Criminal Law', *supra* note 140, at 33; Shaw, *supra* note 79, at 3 ff.

[1075] Shaw, *supra* note 79, at 6.

[1076] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 80 f.

[1077] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 25 f; Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 81.

[1078] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 76.

[1079] Garrido Alves, *supra* note 39, at 51; Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 47.

and legislative effectiveness.[1080] Influence on legislative decision-making by non-governmental agencies is by no means a new or unimaginable phenomenon. On the contrary, it has long been known from the side of the business community. The ability of CSOs to influence legislation at the international level in a 'bottom up' way has been recognised and addressed rather recently.[1081] The OEIGWG negotiations in particular bring this phenomenon to the fore, where especially the Treaty Alliance participates actively and CSOs constitute a driving force.[1082] The OEIGWG negotiations have been preceded by years of campaigning by several CSOs and it has never been more likely as it is now that a state's will to oppose a BHR treaty can be decisively weakened from the bottom up.[1083] CSOs were instrumental in getting the resolution to create the BHR treaty passed just three years after the formal adoption of the UNGP, which they considered inadequate. The presence at the negotiating table of many state delegations that are not well-disposed towards the treaty project, above all the EU, which threatened resignation at the beginning, is certainly not least due to the ongoing pressure from civil society and the risk of losing face.[1084]

Moreover, businesses also play a crucial role in shaping political feasibility – their role and influence is precisely what drives both proponents and opponents of an ambitious BHR treaty.[1085] It is therefore essential to bring some representatives of the business sector on board to the side of CSOs. To do this, the profitability of BHR compliance must be more prominently advertised. Although the primary focus should not be on profit but on the protection of indispensable Human Rights, at the end of the day it is the implementation in daily business operations and thus corporate commitment to actually prevent Human Rights violations that counts. Here, a Human Rights-friendly outcome is most likely to be achieved when businesses' perceptions of BHR compliance change from being a cost factor that does not contribute to revenue to being a competitive factor and a market advantage. The realisation that BHR commitment can also be deliberately exploited for one's own benefit is increasingly gaining ground and can also be demonstrated by concrete examples such as in the area of data protection – a part of privacy protection and thus basically a special Human Rights aspect – for which there is already a higher density of regulation at national and supranational level than with regard to general BHR issues. When the General Data

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[1080] Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 47.

[1081] Deva, 'Alternative Paths to a Business and Human Rights Treaty', *supra* note 7, at 20.

[1082] See the brief illustration of the first two sessions of the OEIGWG at Suárez Franco and Fyfe, *supra* note 48, at 152 ff.

[1083] See Deva, 'Alternative Paths to a Business and Human Rights Treaty', *supra* note 7, at 23; Garrido Alves, *supra* note 39, at 41 f.

[1084] Cf. Garrido Alves, *supra* note 39, at 44.

[1085] *Ibid.*, at 46 ff.

Protection Regulation (***'GDPR'***) came into force in the European Union in 2018, businesses arguably perceived it primarily as a great organisational and financial burden.[1086] Understandably at least, as compliance with the GDPR demands an effort from businesses, provides high fines and non-financial penalising measures for cases of failure and does not envisage any apparent and immediate remuneration for these efforts.[1087] It is thus a unilaterally burdensome law with regulatory effect limited to individual interests. However, contemporary, up-to-date regulation of data privacy issues was found to be necessary in order to respond to the progressing digitisation of society and industry as the ante-GDPR regulatory *status quo* in the European Union was not adapted to these circumstances. By now, it has been recognised by economic science that privacy compliance may also constitute a competitive advantage.[1088] Businesses can use their own data privacy compliance strategies to advertise, acquire customers and build consumer confidence, as the latter have developed an awareness of data protection, not least as a result of the codification of law, and now tend to pay more attention to this factor when selecting their service providers or vendors.[1089] With regard to general BHR issues, societal perceptions and developments parallel each other and are likely to have similar effects on competition.[1090] The opportunities can be summarised by the fact that reputation can work in both ways: just as a single report of devastating labour conditions in a factory can undo years of consumer relations work,[1091] so too can a single outstanding report of exceptionally good conditions serve for years ahead. The potential for advantages for businesses should, thus, be communicated more prominently in order to encourage businesses to take a leading role in campaigns in favour of a BHR treaty.

If businesses integrate certain BHR standards into their business model and business processes once, they will also be interested in having these standards legally recognised in the legal system of a state in order to exert pressure on competitors. This can lead to businesses lobbying positively towards enactment of stricter regulations, as the example of

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[1086] Voss and Houser, 'Personal Data and the GDPR: Providing a Competitive Advantage for U.S. Companies', 56 *American Business Law Journal* (2019) 287, at 329. J. Kahn, S. Bodoni & S. Nicola, *It'll Cost Billions for Companies to Comply with Europe's New Data Law* (2018), available online at https://www.bloomberg.com/news/articles/2018-03-22/it-ll-cost-billions-for-companies-to-comply-with-europe-s-new-data-law.

[1087] Cf. Art. 15 ff., Art. 32, Art. 83 GDPR.

[1088] See Cavoukian and Jolly, 'Embedding privacy and security to gain a competitive advantage', 1 *Journal of Data Protection & Privacy* (2018) 400; Einhorn *et al.,* 'Data Privacy: A Driver for Competitive Advantage' *The Machine Age of Customer Insight* (2021) 147.

[1089] Voss and Houser, *supra* note 1086, at 337 f. Voss and Houser, *supra* note 1086, at 337 f.

[1090] Frynas and Yamahaki, *supra* note 1065, at 12.

[1091] Cf. Bright *et al., supra* note 267, at 669.

the South African Association of Automobile Manufacturers shows.[1092] In this case, pressure was exerted on the South African government to enact strict environmental regulations on automobile manufacturers in order to prevent cheaper products from entering the market.[1093]
In addition, it is important to note that most certainly not all businesses are to be demonised, and there are Human Rights oriented and ambitious businesses that have committed their business models to establishing and maintaining fair supply chains and combating exploitative business practices. From these two points of view - competitive factors as well as autonomous ambitions - it appears possible to persuade businesses to use the influence they regularly exert on legislative decision-making and, thus, on political feasibility, in favour of a more ambitious legal regime on BHR. However, in order to bring such businesses on board with BHR compliance and to enhance their general willingness and ambitions, a level playing field ought to be created in which compliant businesses do not have to expect a loss of competitiveness in competition with less ambitious corporations.[1094] To optimise the promotion of BHR compliance from the inside of the business industry, due account ought to also be given not only to the elimination of economic and competitive disadvantages associated with BHR policies, but also to positive incentives for compliant business behaviour.[1095]
Somewhat comparably, it must not be assumed that all states opposing direct corporate obligations do so precisely because they want to thwart the protection of Human Rights. Rather, some states are firmly convinced that Human Rights can only be protected in the most effective way if the main responsibility for this remains with the state and only with the state.[1096] Hence, these states are not *per se* opposed to the more ambitious approach, but are simply not yet convinced that it is the most effective option. It is precisely these states that should be targeted first if a change in political feasibility is to be achieved.
The decision to initiate the OEIGWG process was passed with a majority vote in the General Assembly, despite the endorsed UNGP. It has, thus, been proven that there is political will in favour of a BHR regime exceeding the standards of the UNGP. In other words, there is precisely no homogeneous international will *against* an ambitious BHR treaty. However, it appears that the debate on political feasibility in the context of the OEIGWG focuses on the Global North as a yardstick of political feasibility and on the political will that has been formed

[1092] Börzel and Deitelhoff, *supra* note 1, at 257.
[1093] *Ibid.*
[1094] See C. Cronstedt & R. Thompson, *A Proposal for an International Arbitration Tribunal on Business and Human Rights* (2016), available online at https://harvardilj.org/wp-content/uploads/sites/15/Cronstedt-and-Thompson_0615.pdf.
[1095] Cassel, *supra* note 840.
[1096] Karp, *Responsibility for human rights, supra* note 47, at 32.

there. As has been noted, the vote showed a clear split between Global North and Global South and thus practically between industrialised nations and developing nations, as already mentioned above.[1097] It confirmed a dichotomy of interests between states of the Global North and the Global South with regard to BHR regulation, which is similar to that which existed during previous failed legislative attempts. Nonetheless, a majority of states expressed their support for further legislative progress and it must be acknowledged and reflected within any assessment of political feasibility that the external circumstances accompanying the OEIGWG negotiations are by no means the same as they have been during previous legislative attempts. The division of votes between Global South and Global North nowadays cannot be accounted the same weight as it did at the time of the Draft Code of Conduct and the Group of 77. Not only has the balance of power between states and businesses changed in the meantime, but also within the community of states itself.[1098] It can no longer be assumed that change depends solely on the will of a few western nations.[1099] Rather, the BRICS[1100] states, for example, have been in a state of consistent economic progress in recent years and have thereby strengthened their network of political influence, which has also improved their position in international legislation and within international institutions.[1101] Concomitantly, western might and influence led by the United States and Europe has declined.[1102] This, too, is a development of globalisation and the movement of investments. As a result, these states are certainly in a position to exert pressure on the Global North and to persuade it to adjust behaviour, as they hold annual summits and debate on issues regarding international legislation and institutions.[1103] Similarly, a growth and aggregation of economic power and political influence can be observed with respect to the so-called ASEAN States,[1104] which have been party to many of the recent regional trade agreements. In November 2020, after years of efforts to this end by ASEAN States, the Regional Comprehensive Economic Partnership Agreement (RCEP) was signed by 15 East Asian states, creating the largest free trade area in the world, covering 30% of both, the

[1097] See already at Sect. **B.II.3.d)**

[1098] Pauwelyn, Wessel and Wouter, *supra* note 877, at 742; Peters, *Beyond Human Rights, supra* note 868, at 3.

[1099] See Pauwelyn, Wessel and Wouter, *supra* note 877, at 742.

[1100] A title for the group consisting of Brazil, Russia, India, China, and South Africa, constructed from the first letters of their names.

[1101] See on the whole phenomenon on the rise of power of the BRICS States with regard to their role in International Law Rajput, 'The BRICS as 'Rising Powers' and the Development of International Law', in H. Krieger, G. Nolte and A. Zimmermann (eds), *The International Rule of Law: Rise or Decline?*: *Foundational challenges* (2019), 105.

[1102] Peters, *Beyond Human Rights, supra* note 868, at 3.

[1103] Rajput, *supra* note 1101, at 106.

[1104] Association of Southeast Asian Nations.

world's population and the global GDP.[1105] Therefore, when evaluating legislative projects under PIL, it should not refer too excessively to the perception of political feasibility in the Global North and past legislative initiatives it doomed to failure, as such a comparison is misleading and not appropriate to the present time. As has already been stated, there is no uniform legislator in PIL and, thus, there is no heterogeneous legislative will to which political feasibility could be attached as a compelling force in the way that is occasionally suggested.

If one takes this sufficiently into account, the claim that a future BHR treaty imposing direct corporate obligations is completely unrealistic due to a lack of political feasibility is not as incontrovertible as claimed by the opponents of this approach. From the beginning of the negotiations, there have been some advocates among the state delegations in support of an ambitious treaty and particularly for such a regulatory approach.[1106] Furthermore, given parallel developments at national and international level, the over-reliance on the lack of political feasibility seems questionable. Article 46 of the Charter of the African Court of Justice and Human Rights (***ChACJHR***) was amended in 2014 by the member states of the African Union in a way that the ACJHR is now also designated jurisdiction over legal persons and businesses.[1107] The ChACJHR implies international Human Rights obligations of businesses and even criminalises their violation.[1108] Businesses from any home state that carry out activities in the signatory states of the ChACJHR will have to expect to be held accountable by a supranational court in case of doubt when disregarding international Human Rights standards.[1109] The supposedly utopian regulatory approach has thus already been realised in part, albeit being geographically limited in scope. Direct Human Rights obligations of businesses are, thus, established in a multilateral treaty concluded by states.

At the domestic level, as already mentioned, the Canadian Supreme Court in *Nevsun Resources Ltd. v. Araya* has recently taken a stand in favour of a direct application of IHRL to businesses, stating that it is not *'plain and obvious' that corporations today enjoy a blanket exclusion under customary PIL from direct liability for violation of 'obligatory, definable, and universal norms of PIL,' or indirect liability for their involvement in … 'complicity offenses.*[1110] In the Netherlands, the District Court of The Hague held *Royal Dutch Shell* responsible for its

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[1105] Shimizu, 'The ASEAN Economic Community and the RCEP in the World Economy' *Journal of Contemporary East Asia Studies* (2021), at 17 ff.

[1106] See United Nations Human Rights Council, 'Report on the second session of the open-ended intergovernmental working group on transnational corporations: UN Doc. A/HRC/34/47' (2017), at Panel III Subtheme 1 at p. 12 ff.

[1107] Clapham, 'Challenges', *supra* note 143, at 570.

[1108] Cf. *ibid.*

[1109] Clapham, 'Human Rights Obligations for Non-State Actors', *supra* note 159, at 24.

[1110] *Nevsun Resources Ltd. v. Araya, supra* note 1000, at para. 7; Walton, *supra* note 1001, at 108.

contribution to climate change on the basis of PIL.[1111] The contributions to climate change were classified as violations of the Human Rights to life, physical integrity and private family life.[1112] Although the court did not apply the Human Rights enshrined in the ICCPR and ECHR directly against *Shell*, as these treaties only apply between states and individuals, it identified a relevance of Human Rights in the horizontal relationship between *Shell* and individuals and derived an unwritten standard of care from PIL, into which the values of IHRL can be incorporated and which can be the basis for a claim under Dutch Tort Law.[1113] In the absence of codified standards, the court has thus, similar to what often happens nationally with constitutional rights, constructed an application of IHRL to businesses indirectly. Even if the application was indirect, the normative necessity was recognised and an attempt was made to solve what direct obligations could have made possible in a simpler, more uniform, and legally secure way. Basically, however, both judgments are to be seen as a tendency towards the application of IHRL to businesses. Such an emerging positioning of the judiciary in a state can certainly influence the positioning of the other state organs and trigger a political rethinking. Consequently, it might influence the political feasibility of certain legislative projects on the international level as well.

Finally, even if the conclusion is reached that political feasibility is not yet in a state that would produce desirable support for a treaty by time of its adoption, this need not be a compelling factor to shelve necessary legislative developments. While creating new codifications of PIL, the maxim cannot always be *immediate* recognition and high ratification rates. Rather, a treaty may well be successful, and indeed more successful than a mass-suitable but normatively weak and conservative treaty, if a change in political feasibility and formal commitment to the standards codified by the treaty occurs only in the course of time.

ii. Long-Term Consequences of Conservative BHR Legislation

Irrespective of the classification of political feasibility, it is often implied that a future BHR treaty must acquire widespread approval in the short term in order to be considered a conducive resolution.[1114] Such an argument neglects the potential that comes with the mere codification of certain standards and the creation of law.

[1111] A. Nollkaemper, *Shell's Responsibility for Climate Change*: *An International Law Perspective on a Groundbreaking Judgement* (2021), available online at https://verfassungsblog.de/shells-responsibility-for-climate-change/; *Milieudefensie et al. v. Royal Dutch Shell,* C/09/571932 District Court of the Hague (2021).

[1112] Nollkaemper, *supra* note 1111.

[1113] *Ibid; Milieudefensie et al. v. Royal Dutch Shell, supra* note 1111, at para. 4.4.9.

[1114] Cf. Methven O'Brien, *supra* note 727, at 188.

(a) Positive Effects of Codification on the Perception and Handling of BHR Issues in Practice

It is an essential characteristic or rather a function of the law to be responsive to new developments and events in society.[1115] Progressive legislative developments are crucial to achieve responsiveness of law and responsiveness, in turn, is decisive in order to safeguard the relevance and legitimacy of law.[1116] In this context, the mere legislative decision for or against a response to a social or economic development is in itself of considerable importance. Even laws that initially appear to be introduced only formally and are somewhat 'symbolical' - as there are no mechanisms to impose them by force - might emanate significant practical impact in the long term, and thereby safeguard responsiveness to new information. Whereas, in turn, the decision against such a supposedly symbolic codification can negatively influence the handling of the subject matter in practice, as well as further development of the law itself. These considerations regarding the implications of legislative decisions in practice are strongly related to the theory of an *'expressive function'* of law.[1117] According to the expressive function of law, law may convey an authoritative effect, which may result in reinforcement or progress of the norms of a community, even if the law itself is not enforceable by means of coercion.[1118] Specifically in the context of BHR, certain practical developments can be reasonably anticipated which could be triggered due to the codification of binding standards in a future BHR treaty. These effects can also be described as a kind of *leverage potential*, which in principle is inherent to every legislative act in PIL.[1119]

First, there is the perception of society and consumers, which is highly influenced by legislative decisions. If it becomes common sense that the behaviour of businesses can and must be measured against certain codified Human Rights standards, which are generally consultable and accessible, this will have an immense impact. Basically, public perception and a societal will may be built and exist independently of legislation and in the BHR context. It has been noted several times already that an expectation towards business Human Rights performance emerged which, in case of doubt, will be punished. Such a perception by civil society, where it sees itself in a position to make claims and demands against businesses, has prevailed despite the legislative setbacks that have accumulated over the years. However, although legislation is not a necessary prerequisite for trends in societal

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[1115] Cf. Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 45.

[1116] Nowak and Januszewski, *supra* note 38, at 117.

[1117] Carrillo, *supra* note 99, at 70 f., 94.

[1118] The theory of the expressive function of law has been widely spread for a long time and is broadly accepted among scholars. However, it would exceed the scope of this paper to discuss this theory in detail and is therefore only referred to here for the sake of completeness. For more detailed explanations of the expressive function of law itself, see McGinn, 'The Expressive Function of Law and the Lex Imperfecta', 11 *Roman Legal Tradition* (2015) 1.

[1119] With regard to leverage, see already above at Sect. **C.II.2.b)**; cf. also at footnote **219.**

perception, it is undoubtedly an amplifier, and an absence of a legal response to and recognition of such trends may counteract them. In this regard, codification is fuel.

Trends in societal perception are strengthened by means of legislation, allowing them to continue, intensify and even become a common or legal standard in longer term. This may even apply and begin with legislative developments and performative commitments, which initially were not taken seriously by the respective states – there might be some power inherent in the performative act itself.[1120] Victims of corporate Human Rights violations would certainly be empowered by the mere codification of certain BHR standards on the international plane. After suffering from a Human Rights violation, they are likely to feel confirmed and strengthened in their position and even encouraged to defend themselves, criticise, and make claims if it is not merely moral principles they need to refer to but rather recognised legal standards.[1121] Additionally, the Internet allows civil society nowadays to communicate and circulate information in real time, making it difficult for any actor to ensure opacity for their unlawful or otherwise reprehensible actions.[1122] Not only is the simplicity and speed of information flow increasing, it is also spreading in a way that is difficult to control by third parties, such as public state institutions. This is primarily due to the steady rise of online social networks, which have long since ceased to be used for self-presentation or entertainment only, but instead represent an important medium for the distribution and procurement of information, which is largely beyond the control of third parties. This can lead to negative effects and dangers arising from misinformation, so-called *fake news*,[1123] but it is also increasingly being used by CSOs and NGOs to draw attention to identified abuses in certain businesses or the industry in general.[1124] Thus, there is only low probability that businesses engaging in Human Rights violations can get away with it unseen in our digitised information society.[1125] Where there is a codified standard for businesses, abusive businesses can be exposed and called out more easily, since victims and observers are

[1120] Cf. Ford and Methven O'Brien, *supra* note 558, at 1243.

[1121] Carrillo-Santarelli, *supra* note 511.

[1122] Cf. Palma, '7 The Possible Contribution of International Civil Society to the Protection of Human Rights', in A. Cassese (ed.), *Realizing Utopia*: *The Future of International Law* (2012), 76 at 83.The conclusion the authors makes with regard to the opacity of government actions is equally applicable to actions of any public actor and most certaiinly to coporations as well.

[1123] The phenomenon of fake news distributed through the internet and particularly on social networks and its consequences has become especially evident and relevant during the outbreak of the Covid-19 pandemic, see in this regard J. Roozenbeek *et al.*, *Susceptibility to misinformation about COVID-19 around the world* (2020); M. S. Al-Zaman, *COVID-19-related Fake News in Social Media* (2020).

[1124] Such as for instance the 'Fashion Revolution Week' which was initiated in the wake of the Rana Plaza disaster in 2013, see https://www.fashionrevolution.org/about/ (last access 2 May 2021).

[1125] Cf. Ratner, *supra* note 45, at 447; cf. Palma, *supra* note 1122, at 83. Cf. Ratner, *supra* note 45, at 447; cf. Palma, *supra* note 1122, at 83.

provided an authoritative yardstick or rather reference point by which business conduct can be evaluated and called out.[1126] This is often referred to as *'naming and shaming'*, which naturally becomes more manageable on the foundation of legal principles.[1127]

Ultimately, codification of international standards and therewith associated progress and change in societal perception is also likely to lead to a turnaround on the part of businesses, whose awareness and recognition of Human Rights standards will be decisive in the end – perhaps more decisive than of the regulating states themselves – to prevent corporate Human Rights violations and protect individuals from becoming victims. A representative survey from 2014 showed that a large proportion of leaders and managing directors of business entities already feel obliged to include Human Rights in the planning and execution of their business activities and thereby feel responsible for Human Rights impacts.[1128] This is arguably due to existing international societal and legislative trends. In the end, consumer perception may pressure many businesses or whole industry sectors more sustainably than law will, due to the reputational and competitive risks which affect business operations in a more immediate manner than regulation.[1129] However, this execrable pressure takes on much stronger dimensions when it is underlined by laws.

Thus, by means of mere codification of certain standards in a BHR treaty, there is a possibility that businesses will align their practices to compliance, even if the provisions are not implemented or do not come into force in their jurisdiction.[1130] In absence of compulsory enforcement mechanisms against businesses or loopholes in applicability, there is still the risk to be stigmatised as a lawbreaker, which is difficult to get rid of.[1131] The external pressure and the threat of reputational damage are just more serious and compelling when there is a legal standard as a point of reference for observers.[1132] Arguably, law is often obeyed not because of the threat of external sanctions, but rather because of its moral and social content and authoritative power as well as a general sentiment of willing obedience to the law.[1133] Additionally, the effort required by affected businesses to justify why certain measures

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[1126] See Luban, *supra* note 21, at 264.

[1127] Cf. Carrillo-Santarelli, *supra* note 511; Börzel and Deitelhoff, *supra* note 1, at 258.

[1128] Cassell and Ramasastry, *supra* note 311, at 3; see also at International Chamber of Commerce, *Report of the Economist Intelligence Unit*: *The road from principles to practice: Today*s challenges for businesses in respecting human rights* (2015), available online at https://iccwbo.org/media-wall/news-speeches/icc-co-sponsors-economist-report-on-business-and-human-rights/

[1129] Cf. Bright *et al., supra* note 267, at 669.

[1130] Parella, 'Hard and Soft Law Preferences in Business and Human Rights', 114 *American Journal of International Law Unbound* (2020) 168, at 172.

[1131] Carrillo, *supra* note 99, at 71.

[1132] Cf. Parella, *supra* note 1130, at 172 f.

[1133] Lauterpacht, *supra* note 306, at 46.

are not taken or risks entered into will be greater when there is a set of regulations that classifies such business practices as illegal, even if it is not immediately applicable to these businesses due to limited scope. In other words, even if such a law is not legally binding in the case at hand, it will serve as a benchmark for the classification of certain companies and their business practices. Codification of law makes it both easier to identify harmful business practices and harder to justify such identified misbehaviour or negligence. Conversely, the omission of certain regulations is a signal that these are generally not supported by legislative will and do not represent a legally accepted standard or even prohibition. This signal is particularly meaningful if certain regulations, such as corporate criminal liability, direct civil liability, or liability for all parts of a supply chain, were explicitly debated during the legislative process but rejected in the later course. This implies a clear legislative will, providing businesses with a solid defence and justification.

(b) Ritualistic Commitment of States and Long-Term Legislative Progress

In addition to practical implications that the signalling effect emanating from a legislative decision can have, the decision to adopt or not to adopt certain regulations has a great impact on the further development of the law itself. What all objections to a particularly ambitious BHR treaty have in common is that they predict an ineffective regulatory instrument. There is a fear that in case of a future BHR treaty that has been adopted by the OEIGWG but not ratified by major economic nations, there will be a legal regime, which might never enter into force, but nevertheless occupy the legislative space that would be available for a more effective regulation.[1134]

Generally, when an international treaty is concluded on a particular subject of regulation, it marks an end to the prioritisation of that regulatory subject on the legislative agenda. In this context, *Ford* and *O'Brien* argue that a broad-spectrum single comprehensive treaty bears a particularly high risk of merely symbolic and ritualistic commitment, as states apparently lack legislative will to implement any such regulations, but at the same time a particularly comprehensive treaty will signal that this regulatory subject has been sufficiently dealt with.[1135] However, this applies to any kind of instrument that is to emerge from the OEIGWG negotiations. An undemanding and rather legally conservative treaty bears the same risk. The particular high risk that supposedly emanates from a rather comprehensive treaty is obviously based on the assumption that the more concrete and innovative a treaty appears, the greater the impression of regulatory success generated by it. However, when it comes to states seeking to hide under the cover of formal commitments without being prepared or

[1134] Methven O'Brien, *supra* note 727, at 188. Methven O'Brien, *supra* note 727, at 188.

[1135] Ford and Methven O'Brien, *supra* note 558, at 1236 f.

willing to actually implement the laws agreed upon, the concrete content of a treaty should not necessarily determine the outcome.

Every adoption and ratification of a treaty initially creates the impression that the respective states will commit to its subject matter. But it is much more likely that a treaty containing progressive and far-reaching obligations and concrete material regulations will precisely not induce states to ratify it in a purely ritualistic manner, because it is much easier to expose such ritualistic commitment on the basis of comprehensively defined obligations. If the sole aim is to create an appearance of commitment, the ratification of any treaty, irrespective of its substantive content, is likely to have a similar illusory effect. A treaty that is actually demanding, on the other hand, is likely to be more difficult to maintain and therefore have a deterrent effect on purely ritualistic intentions. It will at least appear less attractive in this regard. The risk of ritualism is significantly reduced by regulatory content such as direct application of PIL to businesses, concrete definitions that allow the identification of rights and obligations independent of national implementation and eventually deviating interpretation, or the possibility of using state-independent legal protection mechanisms. Such regulations are not dependent on the performance of a single state, but rather back-ups for failures based on symbolic commitment.

It must be noted that the risk of ritualism can never be entirely eliminated for any treaty. However, ritualism can be outweighed by high potential for further development, long-term consensus-building, positive effects for victims as well as practical trends and changes that even a ritualistic and initially non-implementable treaty may produce.[1136] In this context, NGOs and CSOs in particular play a major role. The codification of legal standards has a considerable influence on the work of these entities and their influence is increasingly recognised.[1137] *Ford* and *O'Brien* also explicitly suggest that the risk of ritualism should be weighed against the potential for further development in legislative decision-making.[1138] Finally, in their academic discussion of ritualism, the authors seem to conclude that an undemanding treaty carries a greater ritualism risk than a value adding treaty, but that the latter should be rejected for lack of feasibility. [1139]

Moreover, it is not only businesses which are under pressure and easily exposable when codification of BHR standards takes place, but states will find themselves in need of explanation as well, as soon as there is a BHR treaty on the international legislative plane which they refuse to ratify. This is especially true if the states concerned normally take up the

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[1136] *Ibid.*, at 1244 ff.; cf. Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, supra* note 36, at 8.

[1137] See Garrido Alves, *supra* note 39, at 42, 50 f; Parella, *supra* note 1130, at 172 f.

[1138] Ford and Methven O'Brien, *supra* note 558, at 1247.

[1139] *Ibid.*

issue of Human Rights protection as one of their core democratic values, as in the European Union. This pressure on states can, of course, primarily originate bottom up from civil society, but there might also be situations of coercion and justification within the community of states.

Under certain circumstances, PIL can develop its own self-organising and self-evolving dynamic.[1140] States adhere to norms, even without coercive enforcement and to an unpredicted extent, simply on the basis that these norms have been commonly recognised and prescribe a certain behaviour which a state itself expects from the other respective state actors.[1141] Thereby, the moral authoritative power of IHRL appears particularly relevant.[1142] States may feel obliged to respect certain codified standards even without ratifying a treaty, e.g. due to evaluations of reputation, reciprocity, prior consent or perceived legitimacy of a legal standard.[1143] This has already been mentioned above in connection with the changeability of political feasibility, but it also shows that – although ratification of a treaty is still the goal and in principle the only way to bind a state to a legal obligation and to call upon it for this purpose – certain standards recognised as norms can take on a force of their own. This kind of self-dynamics of PIL, in which states as legal subjects and legislators influence each other in the way they interact with laws, is precisely one reason why a long-term consensus-building potential is observed even in regulations that cannot be implemented immediately and are not explicitly recognised.[1144] Therefore, in PIL the expressive function of law is of particular relevance. The prerequisite for such dynamic developments, however, is the initial codification of standards and the authoritative power associated with it. Moreover, in a similar way to businesses, a state is put in a position of defence and justification if it acts contrary to the provisions of a BHR treaty, regardless of its own formal commitment.

Against this background, the assumption that the clear rejection of a proposed regulation can be less damaging to a regulatory project than a ritualistic commitment not followed by practical implementation cannot be upheld any longer in the context of the BHR.[1145] This may be true in certain cases, but in view of the self-dynamics of PIL and especially with regard to regulatory domains that are still in process, such as BHR, it is more likely that an explicit

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[1140] See Wheatley, *supra* note 29, at 10 f. in particular. Elaborating on this feature of IL from the scientific methodology of complexity.

[1141] Cf. Bassiouni, 'The Discipline of International Criminal Law', *supra* note 140, at 33 f; Shaw, *supra* note 79, at 3 ff.

[1142] Cf. Bassiouni, 'The Discipline of International Criminal Law', *supra* note 140, at 33.

[1143] Pauwelyn, Wessel and Wouter, *supra* note 877, at 746; Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* (2010) 127, at 128f.

[1144] Ford and Methven O'Brien, *supra* note 558, at 1246.

[1145] *Ibid.*, at 1245.

rejection of progressive regulations will deprive non-governmental entities involved in the promotion of the regulatory subject matter of their basis. If an undemanding treaty whose added value is limited largely to the repetition of existing horizontal state obligations from IHRL is adopted, there is no potential for further development of the subject matter of regulation and long-term consensus-building, since it hardly entails any reform to which this consensus could refer. This is why the risk of ritualism weighs even more heavily in case of less progressive legislation: it creates a perception of new regulation, which in fact only casts existing principles in a new form and thus risks precisely the feared temporary stagnation of the legislative agenda and occupation of legislative capacities. On the other hand, it does not provide reference for a change in practice.

To sum up, if the OEIGWG negotiations result in a BHR treaty being finalised and adopted, the conclusion of the negotiations will eliminate BHR from the legislative agenda. This is likely to occur regardless of the concrete content of the adopted treaty. As indicated above, the future BHR treaty constitutes a one-shot opportunity after which no substantial changes are to be expected in the short and medium term.[1146] Therefore, any such regulation should not deliberately rely on loopholes being filled in future, but rather include any provisions considered normatively necessary *now.*

If a future treaty is designed restrictively and in a way that does not respond to future developments, it will be difficult and very time-consuming to justify the need for formal adaptation and have a detrimental effect on any possible self-progressing dynamics. One could now point to the UNGP and the fact that despite endorsement, a new legislative project has been initiated with the OEIGWG process in a very short time and, thus, no stagnation of legislative development occurred. However, the UNGP are *soft laws* and therefore by their nature destined to be replaced by a binding law.[1147] In contrast, the need for repeated regulatory activity after the adoption of a *binding hard law instrument,* which has been elaborated for years, will be difficult to communicate. It is unlikely that further legislative activity will be initiated without a specific reason in the short term. The fact that existing regulation can have an inhibiting effect on further progress in the short term is also demonstrated by the example of the future BHR treaty itself. Although the initiative on a future BHR treaty succeeded, sceptics repeatedly point to the only recent adoption of the UNGP and the redundancy of the OEIGWG initiative – despite the UNGP being soft law.[1148]

[1146] Cf. van Ho, *supra* note 151, at 113.

[1147] See already at Sect. **C.II.1.d)** above as well as Olivier, *supra* note 911, at 294; Bright *et al., supra* note 267, at 670.

[1148] McBrearty, *supra* note 346.

When drafting the treaty, it should not, of course, end up being a decision between an overly ambitious treaty that risks being neglected by broad sections of the community of states, or a treaty that is suitable for the masses but disregards normative necessities. Any such generalised dichotomies cannot do justice to the complexity of the regulatory matter.[1149] A differentiated balancing act will be required here. In carrying out this balancing act, however, it must be borne in mind that under certain circumstances a widely ratified treaty can be just as detrimental to the regulatory objective as a treaty lacking state support. Otherwise, it risks perpetuating a course that proved unsuccessful in terms of normative necessities for a further undefined period, such as a strictly intermediate approach to corporate Human Rights obligations. The fact that political factors and external circumstances have been unilaterally given priority at the expense of normativity is precisely the reason for regulation. Unlike the approach propagated here, which, in short, is to first codify the goals to be achieved in relation to the subject matter of the regulation and to work towards their implementation in a later course, the effect produced by a generally restrictive treaty will be to determine regulatory goals by way of short-term achievability. This can hardly do justice to the object of IHRL, as the law of unconditional and universal protection of human dignity.

It has been outlined that the future BHR treaty may either contribute to legal progress or stagnation in relation to BHR issues. It is therefore up to the legislators to create a guiding basis. The stagnation of legislative progress in IHRL that is risked by the adoption of a rather conservative BHR treaty would not only be materially detrimental to the purpose, functions, and dissemination of IHRL. It would also not reflect the societal will, which, as pointed out above, tends to raise awareness and accountability of private businesses for Human Rights impacts and generally provides for a more prominent perception of Human Rights protection. State authority, however, derives its legitimacy precisely from the representation of society and individuals.[1150] The legal order created by states must reflect this relationship and provide for the best possible realisation of individual rights.[1151] Legislative decisions cannot legitimately override societal tendencies without justification stemming from opposing and superior societal interests as well.[1152]

[1149] See generally on the exaggerated dichotomy and also division of the BHR debate Methven O'Brien, *supra* note 727. See generally on the exaggerated dichotomy and also division of the BHR debate Methven O'Brien, *supra* note 727

[1150] Sellers, 'International Legal Personality', 11 *Ius Gentium* (2005) 67, at 68 f; Wettstein, *Multinational corporations and global justice, supra* note 1, at 53; Regarding the evolving perception of state sovereignty in PIL due to the continuous rise of IHRL as one of its core pillars see with reference to Lauterpacht Tomuschat, *Human Rights, supra* note 68, at 1 ff.

[1151] Cf. Sellers, *supra* note 1150, at 77.

[1152] As both, the State and the law exist only in order to serve the people under its jurisdiction. *ibid.*, at 69. This has also been found by Kant in his perpetual peace theory, see Tesón, *supra* note 66, at 82.

According to the view expressed here, it must thus be conceded that the success of a fundamentally more ambitious treaty, e.g. containing provisions on direct corporate accountability, will be limited in the short term. However, in the long term it will provide the right and necessary impetus and create a basis for real change beyond mere formal law. Such change, by contrast, would be thwarted for a yet indefinite period in the counter-scenario of a conservative BHR treaty.[1153]

3. Direct Corporate Obligations and the *Pacta Tertiis* Rule of Treaty Law

Subsequently to determining why direct corporate obligations in a future BHR treaty should be regarded as desirable, the next step is to examine whether and how this could be legally implemented under PIL. As has been noted, most objections against direct corporate obligations of businesses do not refer to legal but rather factual and political barriers to such regulation.[1154] This focus within the debate on the contents of a future treaty appears to provoke negligence of *legal* feasibility. It is often asserted in a relatively superficial manner that there are no legal obstacles to directly obliging businesses by means of a treaty concluded by states – rather, the legal sources of IL would allow for such treatment and this cannot be curtailed by '*self-imposed dogmas from legal textbooks'*.[1155] While this is also advocated here, it must be noted that provisions to be included in a treaty must be in accordance with the VCLT, which also applies to Human Rights treaties. The situation that would be created by inclusion of direct corporate Human Rights obligations in a future BHR treaty, i.e. states agreeing on a legally binding treaty that burdens non-participating, non-state third parties, constitutes a distinctive constellation that merits attention and an assessment under international treaty law.

Although, as described above, Human Rights have their origin and their *raison d'etre* in Natural Law and a great part of IHRL is considered customary PIL, IHRL is mostly legitimised and developed by positivist law and state consent in the form of written treaties, such as

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[1153] Ford and O'Brien argue that treaty ratifications without a serious intention to implement the contents in the best possible way generally have a negative rather than a positive effect on the development of law, but base this conclusion solely on the fact that such ratifications generate only a limited measurable positive effect, see Ford and Methven O'Brien, *supra* note 558, at 1231. The fact that positive effects of a codification might be limited without support by the necessary actual will to implement such codifications, however, is not to be equated with an actually unfolding negative effect on the future development of law. At most, it suggests that one should be generally cautious with the expectations of the effects of HR treaties, but not that such treaties should be rather avoided in order to prevent a regression of legal progress.

[1154] See, for instance, Monnheimer, *supra* note 73, at 12 f.

[1155] Carrillo-Santarelli, *supra* note 511; seeCarrillo, *supra* note 99, at 83.

most other fields of PIL.[1156] The validity and effect of these treaties is subject to the VCLT, which is itself a treaty concluded by states, the provisions of which are widely recognised as customary PIL.[1157]

If businesses are to be bound by an intergovernmental treaty, it is apparent that this constellation may not be fully *d'accord* with the rationale of the legal provisions of the VCLT, which was adopted in 1969. However, Art. 1 VCLT stipulates that it is applicable to treaties concluded between states, which would apply to the future BHR treaty, since even if intended to address businesses, the only actual parties to the treaty will be states. Although this is a case, thus, covered by the material scope of application of the VCLT, there are no explicit provisions in the VCLT to deal with such situations. Neither is there a general legal prohibition to address non-state third parties by international treaties *per se*, nor does the VCLT provide for general requirements for the treatment of non-state actors and actors not participating in the treaty.[1158] However, there are relevant rules in Arts. 34 *et seqq*. VCLT concerning the effects of treaty provisions to third states, which apply depending on the content of the provisions, i.e. whether the provisions provide for rights or obligations for these states. The concept to address non-participating third parties by means of a treaty beyond the circle of its parties, is, thus, not new to PIL. The general rule governing such tripartite relationships is contained in Art. 34 VCLT and stipulates that a treaty shall, in principle, have no effect on states not party to it and not willingly submitting to its effect. This applies, in principle, to both advantageous and detrimental provisions. This rule is arguably an expression of sovereignty, autonomy, and reciprocity in treaty law.[1159] When concluding a treaty, states make a declaration of intent by which they commit themselves to certain obligations owed to each other. If this step is missing, there shall be no legal effect imposed by a treaty. Reciprocity in the sense of the principle of *do ut des* does not only mean that one party enters into a commitment in order to get a consideration from the other party in return, but also that no party should be burdened by a contract if it does not also directly benefit from it.

However, Art. 36 of the VCLT provides for a liberalisation of this general prohibition for advantageous provisions. According to Art. 36 Sec. 1 of the VCLT, rights granted to third states by means of a treaty should have legal effect upon assent of these states, which shall

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[1156] Chinkin, *supra* note 75, at 65.

[1157] Shaw, *supra* note 79, at 685.

[1158] Arts. 1, 3 VCLT merely stipulate that the VCLT does not apply to treaties concluded with non-state actors, but does not provide for a special regime for treaties concluded exclusively between State parties – thus, within the scope of the VCLT – but the contents of which, however, concern non-state actors.

[1159] Cf. Paulus, '8 Whether Universal Values can Prevail over Bilateralism and Reciprocity', in A. Cassese (ed.), *Realizing Utopia*: *The Future of International Law* (2012), 89 at 93; Shaw, *supra* note 79, at 703.

be assumed for such beneficial provisions. Consequently, provisions in a treaty providing for benefits or rather granting rights for third states are presumed to have legal effect, unless there are indications to the contrary. The situation is different with contractual provisions that impose obligations on third parties and, thus, disadvantage them. According to Art. 35 VCLT, a state that is not itself a party to a treaty must accept in writing an obligation provided for in the treaty in order for it to have legal effect to its detriment. These provisions, particularly Art. 34, codify the so-called *pacta tertiis* rule.[1160] The *pacta tertiis* rule as enshrined in the VCLT, is, according to its wording, only applicable to states and only protects these from burdensome provisions in treaties to which they have not consented. The applicability of this provision in the BHR context, vis-à-vis businesses, would counteract the approach to codify obligations from PIL that are directly applicable to businesses.[1161] Thus, when considering the introduction of direct corporate Human Rights obligations in a future BHR treaty, it should at least be raised briefly – especially in light of the customary character of the VCLT and the fact that some of its codified provisions may be outdated given the age of the VCLT – whether Art. 35 might have a universal character or be applied *mutatis mutandis* with regard to non-state actors.[1162]

The practice of PIL to include non-state actors in the material scope of intergovernmental treaties, thus, extending the operation of these treaties to non-state actors has been identified repeatedly. The traditional role model and evidence for such application to both, non-participating and non-state entities is ICL and its codified fundament, the Rome-Statute of the ICC.[1163] Additionally, there are findings of the Human Rights Council and other relevant Human Rights experts and representatives of the UN, such as the Office of the High Commissioner with regard to armed non-state actors, concluding that these are bound by obligations set out in Human Rights treaties,[1164] namely the ICCPR[1165] and even provisions of the Optional Protocols to the Convention of the Rights of the Child.[1166] Generally, with regard to asymmetrical armed conflicts, there seems to be agreement that at least

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[1160] Proelß, 'Section 4 - Treaties and Third States: Article 34', in O. Dörr and K. Schmalenbach (eds), *Vienna convention on the law of treaties*: *A commentary* (2018), 655 at 655, 699, 711.

[1161] Cf. Peters, *Beyond Human Rights, supra* note 868, at 72.

[1162] *Ibid.*

[1163] International Criminal Court, 'Rome Statute of the International Criminal Court: Rome Statute', *United Nations Treaty Series* (2002) Vol. 2187; The corresponding parallels and connections will be discussed in more detail below.

[1164] Clapham, 'Challenges', *supra* note 143, at 576.

[1165] Referring to the freedom of religious belief of Art. 18 para. 3 ICCPR, H. Bielefeldt, 'Report of the Special Rapporteur on freedom of religion or belief: Mission to Cyprus, UN Do. A/HRC/22/51/Add.1' (2012), at para. 82.

[1166] Independent Commission of Inquiry on the Syrian Republic, 'Report of the independent international commission of inquiry on the Syrian Republic: UN Doc. A/HRC/22/59' (2013), at para. 44.

International Humanitarian Law and its relevant Conventions can be applied to non-state actors, without regulations of treaty law standing in the way of such application, when the situation requires such application.[1167] As regards findings in relation to the law of treaties, comparisons with these areas of law and situations of application are, however, only viable to a limited extent. The legal provisions applied are not necessarily derived from the relevant treaties, but from unwritten legal principles behind the codification, such as customary law and *ius cogens*, the effectiveness of which is not dependent on the VCLT.

However, there are situations where treaties subject to the VCLT are *de facto* applied to non-state third parties, but the VCLT does not provide for any rules directly applicable to such a situation. Apparently, this may lead to inconsistent application and legally abusive exploitation of regulatory gaps. If the decision was made to codify comprehensive direct obligations for businesses with the future BHR treaty, the application *mutatis mutandis* of Art. 34 et seq., in particular Art. 35, cannot be denied with the argument that their wording explicitly refers to states only. Legal progress must be sought in a normatively coherent manner and not by way of exclusion of certain unwelcome norms. If treaty obligations are introduced for businesses in a way that was previously only reserved for states, relevant protection mechanisms and validity requirements that were reserved for states must, in principle, be extended accordingly. Any other approach would be inconsistent and conceptually difficult to justify. On the contrary, it would create the potential for cherry-picking.

In principle, it is reasonable to assume that businesses deserve protection from disadvantageous treaties as well, the adoption of which they did not contribute to and from which they eventually may not derive any benefit. In this context it might be argued that the necessity to apply the *pacta tertiis* rule in favour of businesses is low, as the latter are frequently granted rights by means of other international treaties. In the academic discourse on the question of whether a future BHR treaty creates direct obligations for businesses, a comparison is frequently drawn to trade and investment treaties whose parties are equally states, but whose treaty effect extends beyond them, benefiting businesses immensely.[1168] It seems to imply that if businesses have the ability to benefit directly from international treaties, they must also be able to be burdened by such treaties. This argument might be invoked when justifying the normative necessity of direct obligations in order to create a

[1167] However, some commentators and advocates of this approach to International Humanitarian Law will deny the applicability of International Human Rights Law to non-states actors with the very same argument already mentioned several times, that Human Rights only have an effect between States, see Breitegger, 'The legal framework applicable to insecurity and violence affecting the delivery of health care in armed conflicts and other emergencies', 95 *International Review of the Red Cross* (2013) 83, at 88; Clapham, 'Challenges', *supra* note 143, at 572.

[1168] See, for instance, Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 41.

balance of power and justice in PIL, but not in the context of issues of treaty law. The VCLT explicitly differentiates between the possibility to oblige third parties and the possibility to grant rights to third parties. The latter option is subject to fewer restrictions than the former. It is expressly provided in Art. 36 VCLT that certain parties may become unilaterally empowered by means of treaty rights, without a contractual counterpart of any kind being determined. Thus, the fact that rights are already granted by way of treaties is of little relevance regarding the possibility to create obligations and cannot be used as an argument against the application of Art. 35 VCLT to non-state actors such as businesses.

However, the application of the *pacta tertiis* rule of Art. 35 VCLT to non-state third parties is inappropriate due to teleological considerations. The major object and purpose of the prohibition of disadvantageous treaties at the expense of third states is to protect their sovereignty.[1169] In PIL, all states are, at least in theory, regarded equal actors and enjoy equal sovereign authority.[1170] States shall be enabled to meet on an equal footing on the international stage regardless of their economic and political situation or any other internal circumstances.[1171] It shall therefore not be legally possible for two states to join forces and impose contractual obligations or other disadvantages on another state against its will.[1172] After all, any form of obligation entails a loss of sovereignty. The decision to waive sovereignty under certain circumstances and to a certain extent cannot be forced by a third state but should lie solely in the will and discretion of the state as holder of sovereignty. If states were allowed to decide upon legal obligations of other states arbitrarily by means of treaties, this would amount to unlawful interference with a third state's sovereignty.[1173] This rationale behind Art. 35 VCLT, however, is not transferable to businesses.

As non-state actors, businesses are by nature supposed to be subordinate and subject to the state's regulatory power. They do not enjoy the protection of sovereignty as recognised in Art. 2 Sec. 2 UNCh. The adoption of obligations to the detriment of businesses as non-participating third parties to a BHR treaty does not conflict with the rationale of Art. 35 VCLT. A restriction or unequal treatment of state sovereignty and businesses is even welcome, as it could contribute to the restoring of the balance of power between businesses and states. Thus, there is no necessity to apply the *pacta tertiis* rule of Art. 35 VCLT with regard to the implementation of direct corporate obligations in a future BHR treaty and, consequently, cannot be considered a legal barrier to this approach.

[1169] Shaw, *supra* note 79, at 703.

[1170] *Ibid.*, at 166.

[1171] See Art. 2 Sec. 1 UNCh.

[1172] Peters, *Beyond Human Rights, supra* note 868, at 71 ff.

[1173] Cf. Shaw, *supra* note 79, at 703 f.

Additionally, the relationship of Art. 35 VCLT to Human Rights Treaties is not entirely free of ambiguity anyway. Human Rights treaties are somewhat of a rarity with regard to International Treaty Law, as they do not follow the legal principle of *do ut des* or reciprocity.[1174] Provisions and treaties which serve the interest of the international community in general and benefit parties other than the parties to the contract, such as Human Rights treaties, go beyond reciprocity and the rules created in order to operationalise this notion.[1175] States commit themselves bindingly to respect Human Rights towards other states, without establishing any remuneration in return.[1176] By nature, Human Rights treaties are not reciprocal.[1177] This does not harmonise with various principles of treaty law. For example, Art. 60 of the VCLT provides that states may temporarily suspend their own obligations and thus breach a treaty, or even withdraw from a treaty entirely, if their contracting partners likewise fail to fulfil their obligations. This does not apply to Human Rights treaties, which may only be suspended in extremely exceptional situations, and not dependent on the performance of other states. Thus, Human Rights treaties, by nature, do not follow the principles of *do ut des* or reciprocity in treaty law. Art. 35, which is based on the latter principles, has only limited relevance in relation to Human Rights treaties in general and the future BHR treaty in concrete terms. To bind businesses by means of a BHR treaty without providing for remuneration would be no anomaly from an IHRL point of view. Human Rights treaties are not intended to be synallagmatic. Rather, it is the nature of Human Rights treaties to unilaterally entitle individuals. While the compatibility of Art. 35 VCLT with Human Rights treaties is questionable, I do not intend to make a general statement on the validity and effect of Art. 35 VCLT on Human Rights treaties. However, there is no case for an analogous application of Art. 35 VCLT in the BHR context. There is no regulatory gap for which Art. 35 VCLT would have to be applied beyond its wording, which is limited to states.

III. Identification of Business-Related Human Rights

Whether or not the intermediary approach will be retained in the future BHR treaty, it will concern a very specific and unprecedented regulatory purpose, which will require a certain degree of creationism with regard to its provisions. The material scope of the future BHR treaty in terms of the Human Rights it is supposed to cover is a major point, and one that still has not been sufficiently revised. What Human Rights norms will the treaty apply to businesses?[1178] Even if the definition of the material scope of treaty application is treated less

[1174] On the notion of reciprocity within the sources of International Law, seePaulus, *supra* note 1159, at 91 ff.
[1175] *Ibid.*, at 93.
[1176] Johansson, *supra* note 186, at 20; Chinkin, *supra* note 75, at 66.
[1177] See Monnheimer, *supra* note 73, at 261; Chinkin, *supra* note 75, at 66.
[1178] Cassell and Ramasastry, *supra* note 311, at 42.

prominently and seems less contentious than the question of personal scope or the introduction of direct corporate obligations, the drafts and documents on the negotiations show that there does not seem to be a uniform approach here either.

The Zero Draft refrained from a BHR-specific Human Rights catalogue altogether, sticking closely to the legal design of the UNGP, and defined the material scope of the future BHR treaty by means of a blanket reference in Art. 3 Sec. 2 to '*all international human rights*. Such a reference implies that the notion of 'Human Rights' describes a mass clearly and uniformly definable in PIL. Unfortunately, the exact opposite is the case. As will be shown in more detail in the following sections, there is no such thing as a universally and uniformly acknowledged understanding or set of Human Rights.[1179] The Third Revised Draft ('***TRD'***) from August 2021 provides for a more concretised response to this issue. Art. 3 Sec. 3 TRD defines the material scope of the future BHR treaty as follows:

> *"3. This (Legally Binding Instrument) shall cover all internationally recognised human rights and fundamental freedoms binding on the State Parties of this (Legally Binding Instrument), including those recognised in the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, all core international human rights treaties and fundamental ILO Conventions to which a State is a Party, and customary international law."*

Subsequently, Art. 4 para. 1, 2 stipulates:

> „*1. Victims of human rights abuses in the context of business activities shall enjoy all internationally recognised human rights and fundamental freedoms.*
>
> *2. Without prejudice to the paragraph above, victims shall:*
>
> *a. be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured;*
>
> *b. be guaranteed the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement […]"*[1180]

Art. 4 TRD seems like a concretisation of Art. 3 Sec. 3 TRD. In fact, however, it is evident from the terminology of the provision that Art. 4 does not directly codify the rights that are to be protected in the individual-business relationship. Rather, the provision only concerns the situation in which individuals have *already become victims*, i.e. a Human Right protected in

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[1179] Methven O'Brien, *Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty, supra* note 729, at 4.

[1180] The subsequent paragraphs of Art. 4 refer rathe to the concrete design of the legal remedies which should be accessible to victims of Human Rights violations covered by the scope of the future BHR treaty, but do not provide for a definition of such Human Rights and the acts or omissions amounting to a violation.

the relationship between the business and the individual has already been violated.[1181] This function becomes crystalised more evidently in the further subparagraphs. Art. 4 Sec. 2 lit. c – lit. f TRD specify rights and guarantees that ought to be applied in the aftermath of a corporate violation of Human Rights to ensure that it is adequately addressed and legally remedied. Accordingly, the rights enumerated there are limited to a large extent to basic judicial rights and procedural standards. However, such stipulations do not define what kind of business conduct amounts to a respective violation in the first place. Art. 4 can thus at best be understood as an aid to interpretation of Art. 3 Sec. 3 TRD, concretising the material scope of the future BHR treaty. However, it cannot be assumed blanketly that the rights defined in Art. 4 are to be applied in the same way in Art. 3 Sec. 3 TRD, as Art. 4 TRD relates to rights that individuals may claim against states after they have been harmed. It, thus, contributes only little to the resolution of the regulatory subject of BHR. The material scope to be determined on the basis of Art. 3 Sec. 3 TRD is about what *actions and omissions individuals can demand from businesses*. The different nature of the respondents must somehow be valued within such an interpretation.

For that reason, excessive reference to existing legal sources in the BHR context, e.g. the Human Rights defined in the ICCPR, is generally counterproductive. Traditional Human Rights cases are fundamentally different from the tripartite relationship that ought to be regulated by the future BHR treaty. Here, the state is supposed to protect individuals against violations by third economic actors occurring on the horizontal level. Ideally, a future BHR treaty would stipulate specific provisions as to the conditions under which a legally relevant act of corporate infringement or rather violation exists. The existing Human Rights instruments do not relate to business actors at all. Accordingly, to make a reference to these instruments in order to determine the material scope of the future BHR treaty can hardly be considered sufficient. A concrete definition of the material scope of the future BHR treaty, including a comprehensive catalogue of applicable Human Rights and their substantial content, comparable to the catalogues which can be found in the major Human Rights instruments (e.g. Part III of the ICCPR, Part III of the ICESCR or Art. 6 ff. of the UN Convention on the Rights of the Child) is necessary in order to promote a legally reliable, harmonious and practicable application of the treaty across states.

As regards the definition of a material scope, the drafts of the future BHR treaty are strongly aligned to the UNGP. The UNGP do not contain a concrete catalogue of ‘BHR-specific’ Human Rights that refer to the obligations addressed to states or businesses responsibility to respect. It refrained from identifying individual Human Rights applicable in BHR situations, as

[1181] See only the title of Article 4 - 'Rights of victims' and the exclusive reference to the protected individuals as 'victims'.

it has been found that there are only *"few if any internationally recognised rights business cannot impact (…) because companies can affect virtually all internationally recognised rights, they should consider the responsibility to respect in relation to all such rights."*[1182]

Principle 12 UNGP reads as follows:

> *"12. The responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."*

The corresponding commentary stipulates explicitly that, since generally businesses have the inherent potential to violate the entire spectrum of Human Rights, all such rights should be covered by their responsibility to respect Human Rights.[1183] The subsequent considerations in the commentary imply that the broad reference to practically all conceivable Human Rights in Principle 12 UNGP is expected to ensure the most flexible and dynamic handling of the regulatory issue. On the one hand, no Human Rights should be excluded from the scope of application of BHR regulation by design and, on the other hand, a flexible and responsive handling of future issues should be ensured, since the open reference, in principle, is also suitable to include newly arising Human Rights and unforeseen circumstances into the material scope.[1184] Thus, in order to safeguard flexibility, the UNGP introduce a *'Human Rights-neutral'* or rather in fact '*BHR-neutral'* approach to the material scope of the future treaty, referring to the International Bill of Rights and ILO core conventions for an authoritative definition of applicable Human Rights.[1185] This has been adopted by the OEIGWG drafts as well. Additionally, the UNGP were designed to focus on concretising the obligations and responsibilities that should exist with regard to states and businesses in the BHR context with respect to all rights, rather than focusing on identifying applicable rights that should apply in relation to vague and unspecific obligations and responsibilities.[1186] The vagueness which was intended to be eliminated in this regard has been replaced at the cost of a vague material scope. Ideally, both regulatory issues ought to be sufficiently addressed. However, different to the intentions of the future BHR treaty, the

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[1182] Ruggie, *supra* note 8, at para. 52, 24.; Taylor, *supra* note 609, at 90.

[1183] See the commentary on Principle 12 UNGPUnited Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 13 f.

[1184] Deva, 'Alternative Paths to a Business and Human Rights Treaty', *supra* note 7, at 28.

[1185] Cf. commentary on Principle 12 UNGP, United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 14.; Cf. commentary on Principle 12 UNGP, United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 14.

[1186] This, in Ruggie's view, was a predominant shortcoming in the BHR debate prior to the endorsement of the UNGP, see Ruggie, *supra* note 8, at para. 51.

UNGP do not stipulate binding norms neither in relation to states nor in relation to businesses. Due to this lack of binding force, it might be regarded as acceptable for soft law instruments to provide for some undetermined and rather vague stipulations. A higher degree of legal clarity and certainty is not necessarily indispensable, especially when a general consensus is to be reached with regard to a specific subject of regulation.[1187] In turn, if a conventional hard law instrument is created which has regulatory harmonisation at the international level as its object, this will be hardly achievable with a heterogenic understanding of its material scope of application.[1188]

Different Human Rights are recognised in different states in different ways and to different degrees. The lack of a homogeneous understanding can be observed in the negotiations on the future BHR treaty itself. During the elaboration of the Second Revised Draft in the fifth session of the OEIGWG, states criticised the lack of clarity of the provision of Art. 3 para. 3 of the Revised Draft, particularly its failure to link the scope of the future BHR treaty to *explicitly declined Human Rights instruments*.[1189] In the sixth meeting of the OEIGWG, in which the Second Revised Draft was negotiated article by article, the disagreement on this provision was maintained.[1190] It was argued that the clause lacks precision and that the reference to internationally recognised Human Rights, on the one hand, and major international Human Rights treaty and ILO Conventions, which the respective state parties are subject to, on the other hand, could lead to a heterogeneous interpretation and application of the treaty across states.[1191] Art. 3 Sec. 3 TRD, just as its predecessor versions, lacks a common reference point for the material scope of the future BHR treaty that is actually the same for all contracting states. However, instead of identifying the highest possible common denominator of minimum Human Rights standards that must not be compromised, state delegations proposed to dissolve the link to Human Rights instruments created by the reference in the preamble of the Second Revised Draft, as such referrals would not take sufficient account that certain conventions and declarations have not been endorsed by states on a deliberate basis and therefore do not intend to recognise or support the contents and standards contained therein.[1192]

[1187] Cf. Chetail, *supra* note 506, at 129.

[1188] Cf. Backer, 'Considering a Treaty on Corporations and Human Rights', *supra* note 430, at 102 f.

[1189] Methven O'Brien, *Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty, supra* note 729, at 153.

[1190] United Nations Human Rights Council, *supra* note 277, at 6.

[1191] United Nations Human Rights Council, *supra* note 712, at 5 f.

[1192] Cf. United Nations Human Rights Council, *supra* note 277, at 5.Ibid; The preamble of the Second Revised Draft makes a rather generous reference to various international Human Rights Instruments, such as the nine core International Human Rights Instruments adopted by the United Nations and the eight fundamental Conventions adopted by the International Labour Organization as well as further specific declarations the

The advantages of an open and indefinite material scope of application as introduced by the UNGP and retained within the future BHR treaty are obvious. It creates room for flexibility and is particularly future-proof, i.e. might withstand the development and emergence of new rights and regulatory approaches as well as economic, political, and technological developments. According to Principle 12 UNGP, the intention behind the decision not to integrate a Human Rights catalogue into the UNGP was precisely to create a scope of application that is as flexible as possible and covers the widest possible range of application cases; the same considerations with regard to the future BHR treaty.[1193] However, such an approach also entails an unspecific substantive legal situation which can create difficulties for victims to assess their own legal position and, thus, to strive for legal enforcement. The lower the level of harmonisation at the international level, the more likely it is that different standards will arise in different states and that national courts will apply them differently, which in turn is detrimental to the regulatory goal of preventing a 'race to the bottom' for Human Rights regulation. The vaguer the material content of the future BHR treaty, the higher the risk of abusive practices. Above all, however, if there is a binding regulation that intends to result in punitive sanctions and civil liability, as is generally envisaged in the drafts of the future BHR treaty, a vague material scope of application regarding the applicable rights is unjustifiable on the basis of legal certainty. The advantages of flexible treaty design arguably cannot outweigh the risks associated therewith. What is necessary for a coherent regulatory BHR system, and what the UN Draft Norms of 2003 were appreciated for despite their failure, is a brief summary of minimum Human Rights that can be violated by businesses in the first place and the obligations arising therefrom.[1194]

There are many reasons to consider BHR no longer a mere sub-niche but rather as its own scholarly field and its own autonomous pillar of IHRL, based on its own *raison d'etre*, containing its own separable regulatory subject matter as well as its own dynamics.[1195] BHR affects a high number of potential victims or rather subjects of protection globally, as well as

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Vienna Declaration nd Programe of Action or the UN Declaration on Human Rights Defenders and the Delaration on the rights of Indigenous Peoples. By means of reference within the preamble of the treaty, these instruments are at least included into the scope of the treaty as authoritative means of interpretation which generally should be refered to by the contracting parties.

[1193] Rüntz, *supra* note 694, at 293.

[1194] See Special Representative of the Secretary-General, *supra* note 477, at para. 57. The summary of applicable rights itself is arguably considered useful and necessary, however, Ruggie criticises the fact that in relation to the identified rights, the same responsibilities and competences that exist for States are supposedly assigned to businesses, para. 60.

[1195] Cf. L. C. Backer, *Reflections on the Development of the Emerging Field of Business and Human Rights: Current Opportunities and Future Challenges* (2018), available online at https://lcbackerblog.blogspot.com/2018/06/reflections-on-development-of-emerging.html.

a high number of potential duty-bearers. The rationale of BHR does not only affect IHRL, rather, it is intertwined and affects many other areas, such as unfair competition law, corporate law, labour law and other parts of both, private and public law. Thus, BHR extends far beyond exclusive Human Rights dimensions. It is an entirely new emerging subject of law in terms of legislation as well as scholarly work and research, which is still in the process of constitution and requires both definition and differentiation from other branches of law.[1196] Defining and codifying a comprehensive, clear, and precise material scope within the authoritative and first international legally binding instrument, which will lead to the emergence of a new regulatory environment, could contribute substantially to the legitimisation of BHR as its own scholarly field and autonomous pillar of IHRL.[1197]

1. Lacking 'Translation Work' as Source of Uncertainty, Conflict and Misinterpretation

As long as it creates a possibility to be misread – deliberately or accidentally – even by expert lawyers, poor wording of substantively relevant treaty provisions ought to be further elaborated.[1198] For several reasons, a lacking differentiated catalogue of Human Rights constitutes a risk for coherent application and, ultimately, the regulatory purposes of the future BHR treaty. Not only is the mere notion of 'Human Rights' or even 'internationally recognised Human Rights' in general in need of interpretation as indicated above; but requires clarification specifically in the context of corporate responsibilities and obligations as well.[1199]

Naturally, the content and scope of a duty or responsibility is determined by the nature of its addressee to a great extent. This is the most evident inconsistency if one wants to define the material scope of the future BHR treaty by reference to traditional legal sources of Human Rights protection. At this point, it could be objected that the future BHR treaty arguably will not be designed to directly address businesses at all, but rather, as its drafts currently imply, the intermediary approach will be maintained. Consequently, the future BHR treaty would not impose any obligations and responsibilities on businesses and thus would not require any adaptation of the scope of application to these atypical actors as argued before. However, this reasoning does not work. Although the obligations stipulated in the future BHR treaty

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[1196] Cf. *ibid.* Cf. Backer, *supra* note 1195

[1197] Cf. W. Anderson, *Mandatory Human Rights Due Diligence*: *A business perspective* (2019), available online at https://www.business-humanrights.org/en/blog/mandatory-human-rights-due-diligence-a-business-perspective/.

[1198] See J. Ruggie, *Comments on the "Zero Draft" Treaty on Business and Human Rights* (2018), available online at https://media.business-humanrights.org/media/documents/files/documents/Zero_Draft_Blog_Compilation_Final.pdf.

[1199] Cf. Deva, 'Alternative Paths to a Business and Human Rights Treaty', *supra* note 7, at 16.who also finds it necessary to clarify the understanding of Human Rights with regard to businesses before proceeding any further.

only apply in relation to States if the intermediary approach is retained, the content of the material scope of application, the Human Rights that the future BHR treaty seeks to protect, is nevertheless intended to have an effect on businesses and not on the State. The State is only intended to contribute to the realisation of this effect, but it is the businesses that are ultimately to be affected by the material content of the treaty. When determining the content of duties and responsibilities in connection with Human Rights, businesses are therefore to be considered as its 'addressees', even though this label is not technically correct. Accordingly, the material scope of application should also be tailored to these.

From a perspective of IL hierarchies, businesses are generally regarded as 'less' than a State and therefore should not have a comparable scope of duties.[1200] As actors who are naturally inferior to the state from this theoretical legal perspective, they are granted a certain degree of protection from the law. Businesses enjoy protection from IL *vis-à-vis* states, in some cases even rights enshrined in IHRL such as fair trial or property rights.[1201] In some ways, this ought to be reflected in the obligations imposed on them on the basis of IL, as BHR legislation consequently intends to regulate a relationship between two subjects who both enjoy the legal protection of their interests. Businesses, unlike states, are both political and economic actors. The future BHR treaty must allow them to perform both roles. Therefore, although serving individual interests in the first place, entrepreneurial freedom and business interests that are also worthy of protection must be reflected in a future BHR treaty as well and cannot be excessively reduced.[1202] This will naturally require a balancing of interests in the determination of duties and rights, which would generally not be necessary in relation to the state.[1203] In principle, it is conceivable that one and the same Human Right may create different duties on the state and on business actors, as both serve different functions in society and require a different evaluation or balancing of interests.[1204]

While assessing Human Rights obligations of International Organisations*, Alvarez* came to similar conclusions. The Human Rights obligations owed by states and created explicitly for them within the traditional sources of IHRL cannot simply be transferred to International Organisations; rather serious and substantial 'translation work' will become necessary in order to appropriately apply the rationale of IHRL to such actors.[1205] This can and must apply all the more to businesses. For in the case of International Organisations, its members are states with democratically legitimised sovereignty and thus relatively comparable to states as

[1200] Pentikäinen, *supra* note 371, at 153.

[1201] Cf. Nowak and Januszewski, *supra* note 38, at 128.

[1202] Peters, *Beyond Human Rights, supra* note 868, at 108. Ratner, *supra* note 45, at 517.

[1203] Nowak and Januszewski, *supra* note 38, at 128.

[1204] Ratner, *supra* note 45, at 493.

[1205] Alvarez, *Are Corporations "Subjects" of International Law?, supra* note 661, at 34.

regards their tasks, objectives, and capacities.[1206] Consequently, the translation work required for an intended effect on businesses is much more intensive. The general reference in Art. 3 Sec. 3 TRD does not, however, provide for any act of translation or even limitation of the Human Rights applicable in BHR situations. Rather, the reliance on established Human Rights standards and legal sources as per Art. 3 Sec. 3 TRD implies a comparability of the norm addressees at hand, and the necessary translation work is left to the discretion of the contracting state parties.

Irrespective of the differences between states and businesses that are not taken into account in the material scope of the future BHR treaty, a blanket reference and over-reliance on existing IHRL is inappropriate, even when considering the role of businesses in IHRL alone. The unrestricted and unspecified reference to traditional sources of IHRL as provided for in Art. 3 Sec. 3 TRD does not do justice to the content of the subject matter of BHR. Many of the individual rights that are standardised in the referenced Human Rights treaties and other sources, especially in the ICCPR, are simply not relevant or cannot be fulfilled within the context of business activities in the first place.[1207] One must only consider the various judicial as well as *habeas corpus* rights enshrined in Art. 9 ff. and Art. 14 ff. of the ICCPR. The implementation of most of these rights lies, by nature, within the exclusive authority of the State and cannot be complied with by any other actors.[1208] From the outset, therefore, the stipulation of the material scope of application of the future BHR treaty, as envisaged by the drafts to date, is in need of interpretation and, in particular, teleological reduction. The future BHR treaty is supposed to be the first legally binding instrument to create a legal source in the field of BHR and to extend the scope of IHRL to business relations. However, the expansion of IHRL should never be an end in itself, but should rather be sought only where expansion is necessary and should be limited to these subjects of regulation.[1209] The regulations of IHRL binding on States are too broad and diverse to simply be transferred to businesses, while the primary rules binding on individuals, namely International Criminal Law are too narrow to sufficiently address the issue of BHR and provide a solid answer to the new social and political order post globalisation, namely to counterbalance the shift of power in favour of businesses. Thus, it would be appropriate and arguably normatively necessary to define the material scope, i.e. to differentiate ‘simple’ Human Rights from BHR-specific Human Rights at some point. Only then can a restrictive limitation become possible. Additionally, the need for interpretation always involves the immanent risk of inconsistent

[1206] See above at Sect. **B.III.1.b)ii.**

[1207] Monnheimer, *supra* note 73, at 22. Ratner, *supra* note 45, at 492.

[1208] Ratner, *supra* note 45, at 493.

[1209] Decken and Koch, *supra* note 14, at 20.

application as well as of circumvention and abuse. With respect to aspects of legal certainty and effectiveness, such concretisation is, thus, required for an appropriate treaty design. This applies all the more in view of the envisaged liability and possibilities for legal redress in the event of violations of the substantive scope of application.

Furthermore, the regulatory instruments referenced by Art. 3 Sec. 3 TRD that have not been adapted to the BHR context, by their very nature, simply set a wrong focus within their material scope of application, so that this could not be easily annexed by the future BHR treaty. Thus, they not only regulate 'too much' of regulatory subjects and obligations that cannot be assigned to businesses as outlined before, but arguably also fail to place an emphasis where this would be normatively necessary. If certain traditional sources of law such as the ICCPR are simply transferred as a common minimum standard of internationally recognised Human Rights, there is a high probability that the 'focal points' of the subject of regulation of Human Rights are not sufficiently addressed. After all, BHR was only identified as a regulatory subject in the course of certain changes in external circumstances, in particular globalisation. The natural process of creation of new legal norms begins with a change in certain circumstances and realities, such as the development of new technologies or emergence of new threats, that give rise to new societal needs, which in turn give rise to the need to better protect certain human interests which ought to be addressed by law.[1210]

The design and focus of the existing regulatory instruments can therefore naturally not be *d'accord* with the content and material requirements of BHR, to which the future BHR treaty should respond. An example could be the rights of indigenous minorities and women, whose state of recognition is not yet clear, but in any case, does not result explicitly from the referenced legal sources such as the ICCPR. Most traditional legal sources of the IHRL lack an awareness of the special needs of minorities.[1211] However, the two aforementioned groups are particularly vulnerable and often affected by business activities. Women are often economically particularly dependent and worse off, which makes them easier to exploit, especially in employment relationships. In addition, due to their weaker position in many social and legal systems, they are often in a worse position to defend themselves legally.[1212] The same applies to indigenous people, for whom Human Rights violations in such circumstances are even more likely to remain legally unprosecuted.[1213] Eliminating the

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[1210] *Ibid.*, at 9.

[1211] See S. Deva, *Slavery and gender-blind regulatory responses* (2019), available online at https://www.cambridge.org/core/blog/2019/03/08/slavery-and-gender-blind-regulatory-responses/.

[1212] *Ibid.*

[1213] Cf. on the protection of indigenuous people in IHRL Tauli-Corpuz, Victoria, Special Rapporteur on the Rights of Indigenous Peoples, *Statement at the 12th Session of the United Nations Expert Mechanism on the Rights of*

blindness of IHRL's legal sources to the needs of minorities is, of course, not a concern reserved for BHR. However, it is precisely in relation to such nascent regulatory issues that traditional legal instruments such as the ICCPR, in addition to their fundamental inappropriateness to business, reach their limits. If the future BHR treaty annexes the material scope of application of these sources of IHRL, it will also annex the corresponding weaknesses in a hardly understandable way, even though the adoption of the treaty offers an opportunity to compensate for such weaknesses and to adapt IHRL to the circumstances of the present.

The definition of special Human Rights applicable to businesses in a separate, different, and also necessarily reduced catalogue compared to what is relevant and necessary in the state-citizen relationship would lead to a clear separation between responsibilities. This should be in the interest of both fundamental treaty sceptics and advocates of ambitious approaches. As set out above, it is often argued by sceptics of a rather progressive future BHR treaty that there is a risk of blurring the boundaries between state obligations and the obligations of private business actors, which might allow states to attempt to marginalise their own obligations and responsibilities.[1214] This could be decisively counteracted by a more detailed definition of the material scope of the future BHR treaty, as it would draw a clear and readable line between both regulatory addressees. It would take into account that there are a number of obligations specified in the main codifications of IHRL, primarily the ICCPR, which are simply not within the province of business conduct, such as most procedural rights of criminal defendants or governance rights.[1215] An artificial and contrived application of existing standards and obligations that were created for a completely different nature of addressees would thereby be avoided. Additionally, considering that due to the cross-border effect in relation to transnational corporations, third States could possibly, on the basis of the future BHR treaty, intervene in the business operations of corporations that have been established under the law of another home State and may be essential for the economy of the latter, it also appears the more sovereignty-friendly solution to codify a clear and limitable catalogue of Human Rights applicable in the BHR context. Because in this way, these access possibilities would be limited accordingly. In the following, the reasons for a concretisation of Human Rights in BHR situations and against a referral solution as currently envisaged in the drafts, which leaves the determination of such rights to a large extent to the States themselves, shall be outlined.

Indigenous People (2019), available online at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24836&LangID=E.

[1214] See above at Sect. **C.II.1.c).**

[1215] Ratner, *supra* note 45, at 492.

a) Cross-Border Harmonisation of Minimum Human Rights Standards

One of the basic problems underlying the regulation of BHR is that different Human Rights standards are enforced to different degrees against business actors in different States, and there are many corporations taking advantage of this lack of harmonisation. There is no internationally common minimum standard that applies across borders. As long as this is the case, the Human Rights situation will be a similarly flexible efficiency factor for businesses to take into account when choosing their headquarters or the location of certain business activities as, for example, tax burdens, customs and market access regulations.

It was briefly mentioned above that the reference solution as envisaged in the drafts of the future BHR treaty is based on the model of the UNGP. There is no concretisation and thus no harmonisation of BHR-related Human Rights in these either, which in particular is due to flexibility considerations. Moreover, by linking the future BHR treaty to the wording of the UNGP and to existing IHRL, the uniformity of the legal order is automatically achieved to a certain extent. In principle, a uniform legal order is a factor that can contribute to legal certainty. However, the case at hand refers to an already vague regulation and thus an undefined approach is maintained, by which the opposite outcome is achieved. It is highly likely that such a material scope will mean formal coherence and functional failure for the future BHR treaty. An indeterminate material scope of application, especially if the intermediary approach is retained, is detrimental to the effectiveness of the treaty. In two respects, the treaty relies on the individual implementation of the state parties to realise the objectives of the treaty. On the one hand, they have to set up the infrastructure for a formal and administrative national BHR regime and on the other hand, the concrete material contents of this regime have to be determined on their own, based on the least possible guidance by reference to 'internationally recognised human rights'. The reliance on state design only seems particularly problematic in view of the fact that businesses are completely new actors whose behaviour is to be measured here against the legal standards of IHRL. Thus, there is no real reference point against which states can evaluate business conduct, rather respective responsibilities and obligations require definition in a new framework.[1216] The future BHR treaty thereby fails, in a similar way to the UNGP, to determine a coherent set of baseline Human Rights standards on which any project of business regulation building ought to be founded.[1217]

The consequence of the provision on the scope of the future BHR treaty in Art. 3 Sec. 3 TRD is that states themselves have to determine the substantive scope and content of their national BHR legislation autonomously when implementing the future BHR treaty and

[1216] Cf. Strahovnik, *supra* note 285, at 175.

[1217] Backer, 'Considering a Treaty on Corporations and Human Rights', *supra* note 430, at 102.

enacting a corresponding legal regime. This discretion applies, for example, when specifying which rights businesses ought to include in the context of a Human Rights impact assessment, pursuant to Art. 6 Sec. 3 lit. a) TRD, when specifying which Human Rights ought to be included within consultations with the relevant groups of persons, pursuant to Art. 6 Sec. 3 lit. d) TRD, and which conduct in relation to which right should result in liability according to Art. 8 Sec. 1 TRD. This is not compatible with the objectives of the future BHR treaty because, as already mentioned above, there is no heterogeneous international understanding of what the term 'Human Rights' actually means or covers which would allow the delegation of the concretisation of the material scope to states. The content and scope of certain Human Rights are interpreted differently from state to state, even if it concerns one and the same Human Right stipulated in an international treaty.[1218] A right guaranteed in the ACHPR, for instance, may eventually have a different material content than a similar right within the system of the IACHR.[1219] Even if contracting States to the future BHR treaty were parties to the same other Human Rights instrument, such as the ICCPR, this would not necessarily result in harmonisation of BHR standards in both such States due to regional divergences, unless the BHR treaty defines such standards itself.[1220] The future BHR treaty would adopt the divergent interpretation of Human Rights by maintaining the approach taken so far. This would make the future BHR treaty an inconsistent body of law with varying IHRL standards.[1221] The regulatory objective of preventing the exploitation of the different Human Rights situations in the various States by businesses would, thus, fall far short of the goal.[1222] The right to privacy[1223] might serve as an illustrative example here. The right to privacy is a dynamic and constantly developing Human Right, which practically only came into existence as a (late) response from the international community to technological changes, progressing digitisation and a generally increasing standard of recognition and protection of human and basic constitutional rights around the globe.[1224] Particularly in the Member States of the European Union, the right to privacy is highly valued – by means of the GDPR, the European Union has set an exceptionally high standard of data and privacy protection as well as the right to informational self-determination, and, additionally, there is Art. 8 para. 1 of the ECHR,

[1218] McBrearty, *supra* note 346, at 13.

[1219] Decken and Koch, *supra* note 14, at 20.

[1220] Cf. *ibid.*, at 9.

[1221] K. Mahmutaj, *Observations on the Zero Draft - a Detailed Proposal for a System of Arbitration* (2018), available online at https://www.business-humanrights.org/en/blog/observations-on-the-zero-draft-a-detailed-proposal-for-a-system-of-arbitration/. Mahmutaj, *supra* note 1221

[1222] Cf. Lopez, *supra* note 604.

[1223] See Art. 17 ICCPR.

[1224] See Humble, 'Human rights, international law and the right to privacy', 23 *Journal of Internet Law* (2020) 1-15.

which supranationally constitutionalises the general importance of the right to privacy in the European Union.[1225] European data protection supervisory authorities are empowered to ensure the effective enforcement of GDPR provisions and may prohibit illegal data processing as well as sanction privacy violations based on it with heavy fines.[1226] On the other hand, there are states such as Israel and the US, where the right to privacy is formally recognised as well,[1227] but with a significantly smaller scope of protection in reality. The different handling of this right within different states has recently manifested in context of responses to the Covid19-pandemic in 2020. Israel introduced a controversial tracking technology allowing the evaluation of location data in order to trace chains of Covid19 infections and combat the spread of the pandemic.[1228] Concomitantly, Germany has introduced an app to track infection chains as well, but with a completely different design regarding privacy protection.[1229] Here, location data was tracked by virtue of an app that could be downloaded by data subjects on a completely voluntary basis, while preserving the anonymity of the evaluated data to the largest possible extent.[1230] From the perspective of German privacy protection standards, anything else would not only be an unjustifiable violation of the GDPR, but also an intolerable encroachment on the right to informational self-determination and privacy of the individual.

In the context of the heterogeneity of the understanding and application of IHRL, the reference to the ILO conventions in Art. 3 Sec. 3 TRD seems to be particularly problematic, as it actually supports a heterogeneous design of the national BHR regulations of the States. Based on the wording of Art. 3 Sec. 3 TRD, one decisive factor for determining what exactly is meant by 'internationally recognised human rights' should be the material content laid down in the ILO conventions to which the contracting states are parties. This reference is, thus, based and dependent on the membership of individual state parties to certain treaties. If no concretisation of content regarding the referenced Human Rights will be included in the

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[1225] Cf. CJEU, decision from 19th September 2013 – 8772/10 (*Hannover v. Germany*), particularly at para. 41.

[1226] See only Art. 83, 84 GDPR.

[1227] See for Israel Sect. 7(a) of the '*Basic Law: Human Dignity and Freedom'*. Israel has ratified the ICCPR on the 3rd of October 1991. The United States have ratified the ICCPR on June 8th 1992. However, the right to privacy is neither recognised in the constitution nor any other specific laws of the US, except regional laws such as the California Consumer Privacy Act. In the United States, the right to privacy has been recognises and developed mainly by virtue of case law.

[1228] A. B. Silveira, *Digital Tracing and Covid-19 - The Israeli Case* (2021), available online at https://www.internetjustsociety.org/digital-tracing-and-covid-19-the-israeli-case.

[1229] Notwithstanding that even here there was certainly room for improvement and security gaps despite the generally more data-protection-friendly design.

[1230] Bundeszentrale für gesundheitliche Aufklärung, *Corona-Warn-App Nutzen*, available online at https://www.infektionsschutz.de/coronavirus/alltag-in-zeiten-von-corona/corona-warn-app-nutzen/#tab-1236-c14088-2.

future BHR treaty, the determination of when BHR compliance by businesses is actually achieved and under what corporate actions give rise to liability and legal claims by victims will, ultimately, be left to the contracting state parties. The latter, in turn might be easily tempted to specify the applicable standard under the treaty according to their own interests in case of dispute.[1231]

In concrete terms, this means that in state A, a corporation will be obliged by A's national laws to include certain Human Rights into its Human Rights impact assessment, which in turn are negligible in state B. In the worst case, civil law compensation could be due for one and the same act of infringement in State A, while it would remain without consequences in State B. Harmonisation and unification of the Human Rights standards to be complied with is particularly important when due diligence obligations and related liability provisions are created that are to apply across an international supply chain. The duty of diligence that a parent company in home State A has to fulfil ought to be comparable with the standards applicable in host State B, at least with regard to the legal goods and interests to be protected. Otherwise, this could lead to contradictory results, which would not be in the interest of the companies involved, in which purchasers or parent companies would be liable for damages caused by their foreign subsidiaries and suppliers, although these actions would constitute permitted conduct in their own home State. Such inconsistent standards would arise even though both States involved are parties to the treaty and have enacted corresponding BHR laws to implement it. At any rate, if the intermediary approach is retained, the national legal situation will be decisive. Due to the lack of concretisation and specification of the Human Rights to be realised within the framework of the BHR treaty, it is conceivable that contracting States will enact contradictory material BHR laws, as there is a different perception in the States towards some of the 'internationally recognised Human Rights' that the future BHR treaty refers to. In reality, only very few States have implemented the entirety of the Human Rights set out in the International Bill of Rights in national law, and even where this has been formally accomplished, there are significant differences in practical application and enforcement.[1232]

Materially not harmonised BHR implementation laws in the various contracting States are neither a victim-friendly nor a business-friendly outcome, as it simply does not provide legal certainty. The fulfilment of these obligations is made more difficult for the businesses addressed by the obligations, and victims in turn are hindered in identifying and exercising their rights and claims, especially where redress is sought abroad. In addition to the affected

[1231] Stressing the lack of specification of the term Human Rights in connection with the Hague Rules on Business and Human Rights Arbitration Gläßer and Kück, *supra* note 256, at 132.

[1232] Backer, 'Considering a Treaty on Corporations and Human Rights', *supra* note 430, at 103.

businesses and victims, the contracting States are unlikely to benefit from such a vague scope of application. This is because legal uncertainty also exists with regard to the State's own compliance with the treaty. If it is not specifically defined which Human Rights protection should be introduced into national law vis-à-vis businesses, and to what (approximate) minimum extent, the States must decide on this alone. This entails a great risk of actually falling short of the requirements of the future BHR treaty, even if this is not deliberately intended. In any case, other States are likely to perceive the implementation as inadequate because they themselves interpret the vague material scope of the treaty differently. It should therefore be in the interest of the States to define the material scope of the treaty as precisely as possible with regard to the Human Rights it covers. Only when it comes to deliberate exploitation of loopholes or terminological inconsistencies in the treaty text and, thus, circumvention of higher standards, will vague wording benefit legally abusive parties. The desired added value with regard to flexibility and a future-proof open material scope of application along the lines of the UNGP will, according to the view expressed here, only rarely be realised and in practice will most probably not be worth the price of susceptibility to abuse and difficulties in application. The concern to create a flexible treaty that covers as many cases of application as possible is a legitimate one. However, it cannot be satisfactorily pursued at the expense of legal certainty and clarity of the law. Flexibility and adaptability of law must and should not be anchored at the expense of legal precision and certainty within the main provision on the material scope of the future BHR treaty, but rather ought to be countered by other means, such as opening or hardship clauses in order to achieve a future-proof and just material scope of application. Further useful legal instruments are enabling clauses granting competent authorities or legislators an appropriate degree of discretion in the application of the law in case of unforeseen cases, keeping the law open to novel abuses and issues.[1233] The concretisation of certain minimum standards as propagated here does not necessarily have to go hand in hand with the exclusion of regulations that go beyond them.

Ultimately, it is the very purpose of the future BHR treaty to create a uniform and universal framework for businesses affecting Human Rights and to harmonize standards that should apply throughout a business' supply chain and not only in its home State. Businesses should be prevented from forum shopping and from taking advantage of lower Human Rights standards in certain states by virtue of the future BHR treaty.[1234] This will require the creation of equivalent standards within international supply chains and business processes.

[1233] Cf. Eben, 'Fining Google: A missed opportunity for legal certainty?', 14 *European Competition Journal* (2018) 129, at 135.

[1234] Cf. Garrido Alves, *supra* note 39, at 13 f.

Exploitation and lower costs for occupational health and safety should no longer be criteria for business decisions, which will only become reality if differences are minimised. Ideally, a textile worker in Bangladesh is to be entitled to comparable safety standards in the workplace and a minimum living wage appropriate to her country, as a comparable worker in Germany could demand, because their employer is subject to a substantially comparable set of rules in both States as regards Human Rights standards in the workplace. In order to achieve these regulatory goals of international Human Rights promotion in the business sector, however, it is not enough to merely situate the subject matter in IL and, thus, allocate it in an international regulatory sphere. Rather, the material content of the law must provide for international harmonisation. If the intermediary solution is maintained, a decentralised regulation of the laws which are directly applicable to businesses and victims will take place. These two groups will, although substantially affected by the regulatory matter of BHR, be able to rely solely on national law with regard to their legal positions. Especially in that case, it is of utmost importance to specify the material scope of application in a rather centralised manner, in order to counterweigh the heterogeneity of the legislative implementation and not to jeopardize the regulatory objective of the future BHR treaty as a whole.

It is notable that Art. 3 para. 3 also refers to the internationally recognised Human Rights in CIL for the material scope of the future BHR treaty. It shall not be questioned here that such customary Human Rights standards principally exist in a legally binding manner – partially, they may even constitute mandatory law for all states independent of any treaty ratifications, as implied above. However, CIL, albeit being hard law, is an unwritten source of law that is difficult to define and grasp. This applies particularly in the context of the future BHR treaty, which, although it might only address states directly, is at least implicitly directed at the other parties affected by its subject matter of regulation as well, i.e. the business community and the potential victims of corporate Human Rights violations. In order for those parties to effectively exercise their rights or fulfil their obligations, they must be able to identify relevant Human Rights in the first place, even if the legislative implementation of the future BHR treaty of a certain State is inadequate (because victims may be entitled to claims and remedies in another contracting state). CIL is in itself a difficult source of law to determine and identify, and this is especially true for the determination of IHRL within this source of law, as the latter is a particularly dynamic regulatory matter that can be severely influenced by external circumstances. The reference of Art. 3 Sec. 3 TRD to this source of law, therefore, hardly contributes to the definition of the material scope of the future BHR treaty and to the harmonisation of international minimum Human Rights standards in business transactions.

In conclusion, it can be stated that without further clarification, the content conveyed by Art. 3 para. 3 TRD will not generate the same material scope of application of the future BHR treaty for all state parties. Due to a different understanding of IHRL and the referenced instruments,

states would introduce different laws and measures to ensure that corporations respect different Human Rights. Not only would this indirectly require states to provide a different quality of treaty performance, but it would also require or allow businesses that might operate in various States to introduce different standards of protection. Generally, such a result is neither in the interest of the businesses, nor of the states or of the individuals at risk. New regulations should therefore always be created as clearly as possible while maintaining the necessary flexibility. This applies in particular to IHRL, where there is a dense forest of different regulations, sources and rights whose authenticity, effectiveness, binding force, scope and existence is anything but unanimously recognised among states, as has already been pointed out at the beginning of this section.

An omnipresent legal uncertainty with regard to the material scope of the future BHR treaty will arguably exist in case no severe modification of the TRD takes place. This occurs regardless of whether the treaty follows the intermediary approach or introduces direct obligations for businesses. In both cases, there is no way to avoid a determination of the rights to be protected when trying to create an effective treaty, as in both cases it should not be the material scope of application left to the disposal of the individual contracting state parties. However, it appears that since positively no direct corporate Human Rights obligations will be introduced by way of the treaty, many stakeholders of the negotiations have the impression that there is no need to define BHR-specific Human Rights either: as no such rights will be directly applicable to businesses anyway, there is no need for the definition of such rights. However, the above considerations show that such reasoning constitutes a misconception. Rather, it is precisely the intermediary solution, leaving the implementation of the BHR treaty to the contracting states, that requires the most comprehensive and detailed concretisation possible, if an internationally uniform and harmonious regulation of BHR issues is to be achieved.

b) The Principle of Legality and Legal Certainty

If the reference to the general sources of IHRL is maintained, consequential problems may arise that go beyond the determination of applicable material Human Rights. All standards for application and interpretation of individual Human Rights imposed by the traditional state-centric instruments, i.e. under what circumstances a Human Rights violation might be justified or what concrete measures are required (by States) in order to sufficiently fulfil a Human Rights guarantee, will be generally transferred to businesses as well.[1235] However, this again is lacking in any necessary translation work and leaves it up to States and practitioners. This concerns questions such as: is there justification for the infringement and do the benefits of this infringement outweigh the harm caused? In the light of economic

[1235] Cf. Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 211.

efficiency and profitability as the maxim of entrepreneurial activity, should businesses be required to meet higher, lower, or equivalent standards compared to states when justifying any shortcomings with regard to Human Rights? Thus, the question of what exactly the required action of businesses ought to look like in order to comply with the undefined protected Human Rights remains undefined as well. If such issues, which are decisive for determining the applicability and legal consequences of a law, remain open, there is potential for collision with principles of the rule of law. The abstract weighing of legal interests and positions necessary in order to define the legally required conduct of businesses should take place within democratically legitimised institutions and on the basis of formal procedures, not by way of academia or the judicial development of imprecise laws.[1236] A lack of concretisation *rationae materiae* in relation to rights that ought to be granted and obligations that ought to arise therefrom will result in a conflict with the requirement of legal certainty and the principle of legality.[1237]

The rule of law provides for various legal principles which legislation ought to adhere to in order to be considered just, one of which is the principle of legal certainty and legality.[1238] The principle of legal certainty is an internationally recognised legal principle and can be found in all jurisdictions based on the rule of law.[1239] It states that the legislative design of law must enable norm addressees to receive an adequate indication of the circumstances of legal rules applicable to a given case.[1240] Laws must be clear, predictable and accessible in order for legal subjects to differentiate which conduct is lawful and which is prohibited and to organise their actions according to this assessment.[1241] A specification of the requirement of legal certainty is the rule of *nullem crimen, nulla poena, sine lege certa*, also labelled the legality principle, and mainly relevant in criminal law.[1242] It concretises the general requirement of legal certainty with regard to laws that impose legal burdens on their addressees.[1243] The idea behind these legal concepts is that individuals should have a real choice between conduct which is in conformity with the law and conduct which is unlawful, and should be held liable only if they choose the latter behaviour. The principle of legality

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[1236] Peters, *Beyond Human Rights, supra* note 868, at 108.

[1237] *Ibid.*, at 101 f., 108.

[1238] Maxeiner, 'Some Realism About Legal Cetainty in the Globalization of the Rule of Law', 31 *Houston Journal of International Law* (2008) 27, at 28.

[1239] Eben, *supra* note 1233, at 130; Cf. Popelier, 'Legal Certainty and Principles of Proper Law Making', 2 *European Journal of Law Reform* (2000) 321, at 325.

[1240] Bingham, 'Rule of Law', 66 *Cambridge Law Journal* (2007) 67, at 70.

[1241] Eben, *supra* note 1233, at 130; Carrillo, *supra* note 99, at 84.

[1242] See H. Olásalo, *A Note on the Evolution of the Principle of Legality in International Criminal Law* (2007), available online at https://link.springer.com/content/pdf/10.1007/s10609-007-9042-9.pdf.

[1243] Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 252.

arguably constitutes a general principle of law in its own right and is common to most legal orders based on the rule of law.[1244] According to the rule of law and its principle of legality, no one can be legitimately accused of any unlawful conduct if the illegality of such conduct is not sufficiently clear and perceptible from the law – because everyone must be given the opportunity to actively refrain from unlawful conduct and such a possibility requires knowledge of what the law is.[1245] In other words, the imposition of adverse legal consequences such as sanctions or liability obligations requires a consciousness of wrongdoing on the part of those affected. In order to comply with the legality principle, obligations imposed by law must be accessible and foreseeable.[1246] The legality principle is also considered a judicial guarantee and right; it protects the individual from arbitrary exercise of State power, as the latter can only exercise its sovereign power within the scope of predetermined laws, and individuals are enabled to foresee the exercise of power.[1247] Therefore, a twofold rationale of the principle of legality can be observed, namely to implement the rule of law and to ensure accountability.[1248]

Legal certainty serves primarily the protection of the norm addressees obliged by material laws, which with regard to BHR are ultimately businesses. From the perspective of the latter, a precise material scope of BHR legislation, allowing them to identify their own obligations and restrictions in the best way possible is most certainly desirable. Accordingly, there is a call for more legal certainty and streamline of the expectations of the legislator even among the business community.[1249]

The future BHR treaty envisages liability of businesses for compensation of victims of corporate Human Rights violations as well as administrative and even criminal sanctions, if a corporation's conduct is in conflict with the requirements of the treaty transposed to national law. Both, civil law regulations on damages and compensation as well as the legal instrument of punitive sanctions, are legislative mechanisms that require a high degree of predictability of the law.[1250] They constitute legal consequences the realisation of which is directly linked to

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[1244] Peters, *Beyond Human Rights, supra* note 868, at 79 f.

[1245] Eben, *supra* note 1233, at 132. For further details on the requirement of legal certainty to establish legal liability and impose sanctions, see Sect. C.III.1.b) below.

[1246] Cf. Olásalo, *supra* note 1242, at 302.

[1247] See Peters, *Beyond Human Rights, supra* note 868, at 79. Finding that according to the idea of the legality principle, individuals owe obedience to the State only on the basis pf clearly established rules and, otherwise, are free.

[1248] *Ibid.*, at 85.

[1249] Anderson, *supra* note 1197; Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of Climate Due Diligence', 6 *Business and Human Rights Journal* (2021) 93, at 110.

[1250] Cf. Eben, *supra* note 1233, at 131.

certain legally relevant conduct on the part of the norm addressee. Potential addressees of such laws must be enabled to determine whether and when their actions amount to such a kind of legally relevant conduct. Businesses must be able to determine which Human Rights are protected in relation to their business activities and how they might adapt them in order to respect such rights.

According to the standards of legal certainty, a coherent treaty should, thus, contain clarifications on the kind of corporate conduct which gives rise to legal liability under its regulatory scope of the BHR treaty and opens the way for the initiation of legal remedies.[1251] Given the vagueness of the notion 'internationally recognised human rights', the reference in Art. 3 Sec. 3 TRD is not sufficient. Even if the starting point is that all conceivable Human Rights of the IHRL may be violated by businesses and must therefore be respected and taken into account during their activities, a concretisation is required at this point.[1252] This applies in particular in light of Art. 12 Sec. 1 lit. a) TRD. Although the drafts have so far not specified the scope and content of Human Rights applicable in the BHR context within the material scope of application and thereby imply that practically 'all' Human Rights which may come into question are covered by its scope of protection, there shall obviously be certain limits regarding the application of the general sources of IHRL to the future BHR treaty. Based on the provision on mutual legal assistance in Art. 12 Sec. 1 lit. a) TRD, the authorities of the contracting states shall have the possibility to refuse requests for mutual legal assistance from foreign authorities, if such requests do not concern Human Rights covered by the future BHR treaty. The future BHR treaty, thus, implicates that there are international Human Rights that are not covered by its scope of application. Against this background, the lack of concretisation of the applicable Human Rights is particularly problematic. As already mentioned, there is no definition of when business conduct is considered to violate the material scope of the future BHR treaty – probably precisely because the material scope of application as a whole remains undefined. If legally relevant conduct is not apparent to the addressees of certain norms, it cannot be considered legitimate from a legal perspective to attach disadvantageous legal consequences to such conduct, even if it results in damages. This is because, as noted above, the awareness of breaking the law by the addressee of an obligation is required in order to impose legal consequences. Accordingly, legal certainty is arguably all the more important where the laws establishing liability and sanctions are not dependent on the intent or negligence of the norm addressees – as in the case of due diligence liability in supply chains – since intent and negligence imply some form of awareness and, thus, mandatorily satisfy an aspect of legal certainty at least to a certain

[1251] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 73.

[1252] Cf. Cassell and Ramasastry, *supra* note 311, at 43.

extent.[1253] However, as regards Art. 3 Sec. 3 TRD, the open and vague wording on the material scope of the future BHR treaty may eventually not serve its intended purpose to cover the broadest possible spectrum of protected rights, but rather result in a situation in which, due to the indeterminacy, in case of doubt no application of IHRL in relation to businesses takes place.

A lack of legal certainty in law, eventually, can be outweighed by means of sufficiently clear, precise, and permanent jurisprudence on the regulatory subject matter.[1254] The future BHR treaty is not intended to be an additional protocol or similar instrument that joins an existing regulatory regime and supplements it with regard to a single aspect. Rather, the future BHR treaty will be the founding stone for an international BHR regime, addressing a new and still emerging subject of regulation. Naturally, therefore, any available legal and interpretational aids are limited. In contrast to IHRL governing the relationship between the state and the individual, there is no reliable case law or established principles of application for the relationship between businesses and individuals.[1255] At least not to an extent that would guarantee a legally secure application of the future BHR treaty, also by its addressees, the states, which are burdened with the implementation, creation, and design of legal norms on the relationship between business and individual. While it is broadly recognised that Human Rights treaties by virtue of the 'duty to protect' oblige states to introduce laws governing Human Rights impact on the horizontal level, these treaties lack specification as to the scope and extent to which their provisions were transferable to businesses.[1256] The object of the BHR treaty is precisely to fill this *lacunae* and adapt the state of the law to BHR constellations.[1257] By means of the referral solution, however, the problem will be simply carried on into the future BHR treaty, meaning that one of the main reasons why BHR regulation is needed will remain unaddressed. This not only makes the liability regime unpredictable for businesses, but also counteracts a proportionate and differentiated design of the BHR provisions. The UNGP itself imply the application of the principle of proportionality or a risk-based approach when determining responsibilities.[1258] In principle, IHRL itself prioritises certain rights and allows that the extent of a duty and the liability in question

[1253] Cf. Eben, *supra* note 1233, at 136.

[1254] *Schindler Holding et al. v. the Comission,* C-501/11 P European Court of Justice (2013), at para. 57.

[1255] The difficulties preventing the mere transferability of the principles existing for the relationship state-individual have already been addressed in the previous section.

[1256] Cassell and Ramasastry, *supra* note 311, at 16.

[1257] Cf. *ibid.*, at 29.

[1258] See commentary on Principle 14 of the UNGP United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 15.

depend on the significance of the Human Right concerned.[1259] The possibility of such a gradation of different rights might be derived from Art. 8 para. 8 of the TRD as well, which calls on states to take care when determining administrative or criminal legal consequences that these correspond to the gravity of the offence in question which is likely to depend on the substantive content of the Human Right concerned. However, since the drafts are non-specific with regard to the applicable Human Rights, they naturally do not indicate a prioritisation of Human Rights. There is therefore no gradation in which the effort to be demanded from the businesses is linked to the relevance of the affected Human Rights, the likelihood of the violation or the extent of the threatened damage. There is no concrete starting point for a weighting based on proportionality. If there was a prioritisation, particular individual Human Rights or a particularly large number of potentially affected persons could result in special measures such as a 'Compliance Officer' or a whistleblowing system that would have to be introduced by the businesses, which in turn could be dispensed with if a Human Rights impact assessment does not show that the highlighted Human Rights are affected.[1260] Thus, under certain circumstances, the concretisation of the material scope could already fill the obligations to be imposed on businesses, namely the measures to be taken within the due diligence process, with content.

In general, law should attempt to be as unambiguous as possible in order to set a stable and safe set of standards of behaviour for its legal subjects.[1261] However, the necessary degree of concretisation and specification of the particular applicable Human Rights in the material scope of the future BHR treaty also depends strongly on the legal consequences foreseen by the treaty. The more drastic the consequences provided for a treaty violation, the greater the need and the requirements for concretisation. In particular, if serious or even existentially threatening interventions in the finances or entrepreneurial freedoms of a business are considered, it must be foreseeable for the latter when and under what conditions these legal consequences will occur. Therefore, the clear definition of corporate offences with regard to certain Human Rights in the future BHR treaty is of utmost importance. This is not sufficiently reflected in the present drafts of the future BHR treaty, as illustrated by the amendment of Art. 6 para. 7 Revised Draft to Art. 8 para. 8 TRD. The provision of Art. 6 para. 9 of the Revised Draft listed a number of particularly serious Human Rights violations which ought to be qualified as criminal offences of international concern and which were highlighted by the Revised Draft in the context of the state's duty to establish a national liability regime. The Revised Draft still left States much room for discretion as to the nature of liability and

[1259] Shaw, *supra* note 79, at 216.

[1260] Cf. Rüntz, *supra* note 694, at 294.

[1261] Cassese, 'Introduction', *supra* note 435, at xviii.

sanctions that the latter ought to establish for such criminal offences. The states were free to choose between all forms of liability, civil, criminal, or administrative. Art. 8 Sec. 8 TRD now concretises this obligation to impose legal consequences and obliges States to introduce criminal sanctions or at least a functional equivalent for violations of IHRL amounting to criminal offences. Additionally, the severity of the sanctions introduced by the states ought to correspond to the severity of the violation in question. This development is – in principle – very welcome and most probably normatively necessary. States are required by their own Human Rights obligations, regardless of a BHR treaty, to ensure that their legal system does prevent international criminal offences and provide for sufficient prosecution and remediation. If this obligation is addressed by means of disproportionately 'light' measures that do not do justice to the severe character of the violated rules, the State obligation will not be fulfilled. This is now manifested in Art. 8 para. 8 of the TRD. However, along with this positive development, the enumeration of the specific criminal offences covered by this requirement of strict liability has disappeared. The future BHR treaty itself therefore no longer specifies and prioritises which of the Human Rights violations to be applied in the BHR context should constitute a criminal offence and, thus, be addressed in a special manner. Rather, Art. 8 para. 8 TRD is limited to a reference to *'criminal offences under international human rights law binding on the state party, customary international law, or their domestic law*'. It is now comparable to the general clause of Art. 3 Sec. 3 TRD. The development to be observed here, thus, constitutes a step away from the principle of legality. In the context of corporate criminal offences, such a development is particularly problematic since in cases where the violation of a legal obligation is punishable by a criminal penalty or a comparable sanction, the principle of legality applies in its strictest form.[1262]

A future BHR treaty compliant with the principle of legal certainty not only serves the protection of businesses, but also the potential victims and individuals who are to be protected. Potential victims must be able to identify their entitlements and the protective scope of Human Rights in order to legally enforce them and to seek redress in case a violation occurs. A clear articulation of the different relevant actions and involvements in BHR-related matters which give rise to corporate legal liability is a precondition in order to enable victims of Human Rights abuses to seek and gain effective remedies.[1263] It requires a definition of what constitutes a business-related Human Rights abuse in the first place. Victims of corporate Human Rights violations must be able to identify particular acts and

[1262] Peters, *Beyond Human Rights, supra* note 868, at 84.

[1263] United Nations Human Rights Council, 'Improving accountability and access to remedy for victims of business-related human rights abuse: Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/32/19' (2016), at 7.

business conduct as remedial Human Rights violations. The more concrete the international framework set by the future BHR treaty is for dealing with BHR matters and transnational corporate activities, the more beneficial and effective the contribution to the protection and empowerment of victims will be. This applies both within their own jurisdiction as well as to international enforcement. Coherent international standards will reduce the effort required by victims to ascertain the legal situation abroad in cases where rights and claims are not enforced in their own state. According to Art. 9 TRD, under certain circumstances, namely if effective remedial enforcement is not guaranteed in the state of occurrence of a Human Rights violation, it shall be possible to bring the complaints of victims to court in other states, e.g. the home states.[1264] *De facto,* the TRD requires states to establish jurisdiction of courts independently of the principle of personality and territoriality, but rather on the basis that a violation of IL has occurred. However, it is indispensable to enable addressees and victims to clearly determine when that is the case, i.e. what constitutes business conduct violating IL, or as *Karp* puts it: '*if national and regional courts are going to start to hold companies to account for 'human rights violations', regardless of where in the world those violations occur, on the grounds that companies are violating PIL, it makes sense to establish more clearly and explicitly what the PIL on the matter actually is'*.[1265] It is questionable whether Art. 3 Sec. 3 TRD in conjunction with the referenced legal sources actually allows for this. The TRD leaves the actual material formulation of rights and obligations applied on the horizontal level to the discretion of contracting States and provides only for a vague framework of orientation. Enforcement by national courts bears in itself a risk of inconsistent application of the law.[1266] However, it might be a tolerable risk if considered necessary in order to achieve more practicability, a healthy ratification rate or considerations of pragmatism. But to additionally create a heterogeneous material scope of application by lack of substantiation is unnecessary and avoidable. Obviously, it will be detrimental to the functioning of the national courts involved, which lack a uniform assessment basis as regards both their own competences as well as the merits of the case at hand.

Creating legal certainty in as concrete a manner as possible by concretising the material scope of the future BHR treaty would be particularly essential if the treaty was intended to stipulate direct corporate obligations. In this case, the future BHR treaty would be the only

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[1264] Art. 9 Sec. 1 stipulates the regular jurisdictional competences which are founded on the principles of territoriality (lit. a and lit. b) and personality (lit. c and lit. d), while Art. 9 Sec. 5 provides for the possibility to bring a claim before courts of a forum state where there is neither a personal nor a territorial link with the incident in question. Additionally, the possibility of recourse to the doctrine of *forum non conveniens* is limited with regard to issues falling under the future BHR treaty as per Art. 7 Sec. 5.

[1265] Karp, *Responsibility for human rights, supra* note 47, at 152.

[1266] Mahmutaj, *supra* note 1221.

legal reference point for businesses to assess which conduct is legally relevant or not, i.e. what business models are compliant with the law. Contrarywise, if the intermediary approach is retained, direct legal effect would result from the national implementation laws of the contracting States only. It appears, thus, that in the latter case, which currently constitutes the more probable outcome, the stipulation of a specific catalogue of BHR-related Human Rights is less important. However, there are several arguments illustrating that it will still be desirable to provide for a certain amount of legal certainty within the future BHR treaty even in case the intermediary approach is maintained.[1267] As already noted, businesses are the parties who should be and in fact are affected by the material provisions of the future BHR treaty, albeit not being its formal addressees in case the intermediary approach is retained. Therefore, they will still have an interest in the greatest possible legal certainty with regard to the material scope of the future BHR treaty.

Furthermore, if the concretisation of the applicable Human Rights and related corporate obligations is left to the States alone, there is actually hardly any possibility, according to the principles of legality and legal certainty, to hold businesses liable for violating the law if the specification in national legislation has failed. If State parties fail to define the scope of application of the BHR provisions in their national laws in a way compliant with the principle of legal certainty, it would constitute a violation of the rule of law to hold businesses violating the interests of individuals accountable on the basis of the indeterminate laws, even if damage has occurred. An example for such a scenario is *the Loi de Vigilance*, where the French Constitutional Council had to revoke an originally envisaged fine provision because the corresponding breaches of obligations were insufficiently defined by the national legislator.[1268] Although in this case the deficiency was revised, it does not always have to turn out that way. In such ambiguous cases, the current provision of Art. 3 Sec. 3 TRD offers only little potential as an interpretation aid for corresponding national provisions. A misguided overemphasis on flexibility with regard to the material scope of application can also lead to ineffective application of BHR regulations even where the parties concerned do not intend such insufficiency. For example, when businesses comply with their obligation to conduct a Human Rights impact assessment but due to a lack of guidance do so in a non-specific way, i.e. not in relation to the potential violation of specific rights and obligations, it is more likely that adverse Human Rights impacts of certain business operations will not be detected (as

[1267] Carrillo-Santarelli, *Direct international human rights obligations of non-state actors, supra* note 38, at 252 ff.

[1268] Cf. Rüntz, *supra* note 694, at 293 at footnote 30.However, the author advocates for a rather broad reference to certain Human Rights treaties and against a concrete and precise enumeration of affected Human Rights within a law on due diligence.

compared to specific Human Rights impact assessments).[1269] However, the more precise the future BHR treaty itself would be in determining a material scope of application, the more account could be taken of the rule of law and legal certainty, as even if national laws were imperfect, they could be operationalised by reference to the material scope of the treaty. However, a material scope of application that is as concrete as possible can also have a positive effect on the compliance of States with the future BHR treaty and reduce the risk or probability of imperfect national laws as an outcome of their treaty implementation in the first place. If the future BHR treaty itself defines precise specifications of what the material content of the regulatory system to be created should look like, it will be more difficult for States to hide their lack of willingness behind symbolic gestures or only half-hearted implementation, sold as effort. For whether their efforts and measures are sufficient or not will be measurable on the basis of the treaty and thus evident for all other State parties to the treaty, as well as outside interest groups. Such increased transparency and the associated pressure may well be a motivating factor for the lack of willingness in the attitude of States towards BHR regulation and enforcement. This also applies to States that are committed to Human Rights protection in general but do not submit to the BHR treaty, for instance because they consider it superfluous against the background of already existing guidelines, such as the UNGP. In these cases, too, the future BHR treaty can have an expressive effect and serve as a yardstick for evaluating State efforts (as well as those of businesses), even without the emergence of binding legal effect.

Given the large number of internationally operating corporations that may be exposed to significantly different obligations and liability requirements across States if the intermediary approach is retained, a concrete catalogue of Human Rights defined in the future BHR treaty itself as a minimum standard would be desirable in order to safeguard predictability and certainty of the law. It would mean planning security and reliability for businesses internationally. The risk of surprising and unpredictable standards in single States across a supply chain, for example, would be minimised in this way. Situations of 'damned if you do, damned if you don't' for businesses obliged by two or more jurisdictions are to be avoided, which could be realised most effectively when there is an internationally valid set of rules one can refer to in case of doubt.[1270] If the legal order of two different states requires a corporation to perform contradictory acts, the corporation cannot be required to assess for itself which obligation it needs to comply with in order to meet international BHR standards and thereby violate another national obligation. Even if the intermediary approach is retained, the future BHR treaty, provided that its material scope of application is specified, could serve

[1269] Wettstein, 'The history of BHR and its Relationship with CSR', *supra* note 47, at 41.

[1270] See Karp, *Responsibility for human rights, supra* note 47, at 55 ff.

as a yardstick for determining whether the State has permissibly exercised its granted discretion in creating national BHR laws and whether the legal requirements imposed upon businesses meet the objectives of the future BHR treaty. Businesses subjected to different regulations could refer to the future BHR treaty to make decisions. The BHR treaty itself could, thus, serve as an international guideline in situations where its national implementation laws fail to provide sufficient guidance. International laws serve as a textual and interpretative template for domestic courts.[1271] Naturally, the more authoritative and binding the legal nature of a text, the greater the incentive and perceived pressure to refer to it. Thus, even if a state party to the future BHR treaty fails to implement the provisions of the treaty in self-explanatory national laws, the domestic courts or other arbitration bodies consulted may nevertheless deal with the matters covered by the BHR treaty in accordance with its telos and interpret national transposition laws in the light of the treaty. Generally, it is reasonable to assume that the more precise the standards set by the future BHR treaty on the international level are, the less likely it is that inadequate national implementation laws will be enacted and subsequently also applied in a respectively inadequate manner.

In summary, it can be said that, while maintaining the intermediary approach, a violation of legal certainty is not as intrusive as to consider the provisions of the treaty necessarily incompatible with the rule of law on this basis. Nevertheless, it would still be very beneficial for the purposes and effectiveness of the future BHR treaty to concretise the material scope of application by means of a catalogue of applicable minimum Human Rights standards.

In connection with the preceding considerations, the question arises whether, due to the importance, imperative nature and universality of Human Rights, exceptions to the principle of legality and legal certainty could apply. For with regard to the protection of most Human Rights, it seems reasonable to assume a general awareness of what behaviour is right or wrong, even without an explicitly relevant legal provision for the individual case. There is also a broad spectrum of general and specific Human Rights instruments that allow actors who are not directly addressed to form a picture of what behaviour towards individuals is acceptable and what is not, i.e. to distinguish and choose between illegality and legality. It is therefore questionable whether businesses are worthy of protection under these circumstances and should actually benefit from the rule of law. However, even if one were to allow such a line of thought, it is questionable whether in the case of BHR a situation actually exists in which unlawful conduct is evidently recognizable. As explained in the section above, there is no heterogeneous understanding of the material scope of IHRL, not even among states and legal experts. It therefore seems questionable to leave it to the businesses to decide what is covered by the law and what is not. If the international community decides not

[1271] Luban, *supra* note 21, at 264.

to clarify which legal obligations for businesses are correlative to the internationally protected Human Rights, it loses an opportunity to counteract inconsistency among the various Human Rights standards applied to business activities in different domestic jurisdictions, and the inability or unwillingness of some States to enact obligations in such matters.[1272] Even with regard to the widely recognised Human Rights treaties that already exist and which contain a catalogue with definitions of their rights and entitlements, it is difficult at times to determine which rights are applicable in specific situations and which not, or to what extent certain rights may have been developed and expanded – there is no "litmus test" for HR entitlements.[1273] For this very reason, it is all the more incomprehensible and paradoxical that the BHR treaty misses an opportunity to adapt and shape Human Rights to the current situation explicitly and through a formal legislative process.

2. Opportunity for Development and Revitalisation of IHRL

The definition of a concrete catalogue of applicable Human Rights is desirable not only for the purposes of the future BHR treaty as set out above, but it would also bring added value to the subject matter of BHR in general and IHRL as a whole. The time when the core codified sources of IHRL, the International Bill of Rights,[1274] was drafted and adopted, the international political, economic, societal, and legal order was completely different from the realities and relations international society faces nowadays. Generally, the vast majority of the UN instruments forming the international Human Rights regime are relatively old and outdated.[1275] This status quo of legal sources of IHRL does not correspond to the normative necessities of this field of law. By nature, IHRL is a vibrant, living, and ever-changing area of law and a regulatory subject inherently requiring some form of dynamism in order to remain capable of solving problems faced by individuals in a changing society and developing political, social and technological environment.[1276] The redistribution of power between businesses and States, digitisation, climate change or a changed societal perception of commercial practice are such events triggering dynamism. In particular, such developments may require an expansion of IHRL with regard to its material content, i.e. the identification and recognition of new Human Rights.[1277] However, as regards treaty law, it is not being

[1272] López Latorre, *supra* note 535, at 71.

[1273] See Chinkin, *supra* note 75, at 64 f.

[1274] See Sect. **B.I.1,** above for details.

[1275] The last major treaty, which is regarded part of the general UN Human Rights system and which modifies and refines the original established Human Rights was probably adopted in 2011. See Chinkin, *supra* note 75, at 66 f., 68.

[1276] Decken and Koch, *supra* note 14, at 9, 20. Cf. Talapina, *supra* note 11, at 17.

[1277] Decken and Koch, *supra* note 14, at 9 ff.

authentically developed with the necessary frequency, which is certainly also due to the time-consuming nature of treaty negotiations.

The pending legislative project on the future BHR treaty offers a rarely suitable opportunity to set in motion legal advancement and adaptation of international Human Rights standards to the circumstances of the present-day societal, political, and economic order. The impulses set with regard to BHR regulation could well have an impact beyond this regulatory subject and contribute to a more contemporary and future-oriented protection of Human Rights. Albeit the primary subject matter of the future BHR treaty being the regulation of the relationship between businesses and individuals as well as the distribution of power between States and business, material issues relating to individual Human Rights which are present in the academic and political agenda of IHRL but have not yet been addressed legislatively could also be dealt with 'on occasion' or 'in one fell swoop'. This appears especially reasonable with regard to those regulatory concerns that, taken on their own, would eventually not be regulated by means of a stand-alone formal treaty negotiation process.

The process leading to the emergence of new Human Rights can basically be divided into three phases: the idea, the emergence and full recognition of rights.[1278] In the idea phase, it is determined on the scientific and political level – predominantly by non-legislative norm entrepreneurs – that the law is no longer able to respond to everyday realities and that it needs to be expanded in order to meet the protective purpose of IHRL and ultimately human dignity.[1279] In the following phase of emergence, the idea is initially translated into a source of law, which can be achieved most easily and explicitly by means of a treaty (this then also offers the best starting point for full recognition in the final phase).[1280] With the introduction of a specific BHR-related catalogue of Human Rights in the future BHR treaty, the opportunity could be taken to identify new Human Rights in the phase of idea and to help them achieve legal recognition. The drafts, however, do not address this issue at all, although a need for updating the Human Rights regime might be observed in various respects, both in the specific BHR context and beyond.

The very fact that Human Rights issues are being regulated for the first time in the relationship between individuals and business might give rise to the need to consider new Human Rights and to update IHRL accordingly. *Susi* distinguishes between two categories in connection with the need to regulate new Human Rights: these are Human rights that need to be newly created because they relate to a particularly vulnerable group whose special need for protection has only been identified over time (resulting in a decrease in universality

[1278] *Ibid.*, at 8 ff.

[1279] *Ibid.*, at 9.

[1280] *Ibid.*, at 11 ff., 15.

as compared to traditional Human Rights) and Human Rights that need to be newly created due to changed external circumstances affecting their inherently guaranteed values (this category resulting in a decrease in abstractness of the new Human Rights).[1281] In the context of the BHR, however, another category of newly created Human Rights can be identified and distinguished, namely those that are only identified in connection with a new group of (indirectly) obligated addressees. According to the view advocated here, this is to be considered a category of its own within the reasoning of *Susi*, as it predominantly concerns the unconditionality of Human Rights protection and not the characteristics of abstractness or universality as identified within the 'decrease of universality and abstractness thesis'.[1282] However, one could arguably assign this to the category of new Human Rights resulting from changed circumstances, since the recourse to businesses is only conditioned by changes in external circumstances, particularly globalisation. Ultimately, however, the categorisation of new Human Rights resulting from the specific BHR context is not decisive. The only decisive factor is that a change in the opponent of a Human Rights claim might result in a necessary change to the content of the claim, and thus, the codification of new Human Rights ought to be considered. As *Deva* notes, '*it would be naïve to think that the existing state-focal human rights instruments could be taken off the shelf and applied to business actors'*, which is why Human Rights obligations should be 'reoriented' in accordance with the particularities posed by these new actors.[1283] If a specific norm addressee is added, such as businesses, then it may be necessary to supplement the catalogue of obligations originally designed for another actor in this respect in order to preserve the credibility of the law. This is exemplified by the 2014 Protocol to the African Court for Human Rights. With the expansion to include corporate criminal liability, i.e. an actor was added, the regulatory instrument was at the same time expanded to include certain offences that are typically realised on the corporate side.[1284] The material scope of application was adapted to the extended personal scope of application in order to enable a coherent application of the law. This rationale also applies if the 'new' addressees are only indirectly addressed by the treaty, but the substantive regulatory content is predominantly directed at them. The future BHR treaty would create a comparable, unique

[1281] Susi, 'Novelty in New Human Rights: The Decrease in Universality and Abstractness Thesis', in A. von Arnauld, K. von der Decken and M. Susi (eds), *The Cambridge handbook of new human rights*: *Recognition, novelty, rhetoric* (2020), 21 at 26 ff.

[1282] See in detail*ibid.*, at 25 ff.

[1283] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 83; S. Deva, *The Human Rights Obligations of Businesses*: *Reimagining the Treaty Business* (2014), available online at https://media.business-humanrights.org/media/documents/files/media/documents/reimagine_int_law_for_bhr.pdf.

[1284] Cf. Cassell and Ramasastry, *supra* note 311, at 36.

opportunity for the further development of law, which, however, remains unused as things stand with the TRD.

It was stated above that the material scope of application of the future BHR treaty as envisaged in the TRD will be in need of a teleological reduction, as it does not sufficiently take into account that some of the Human Rights referred to are not within the power of business enterprises, but depend exclusively on the state to fulfil them.[1285] Conversely, businesses pose a major threat to entirely new types or categories of Human Rights or to Human Rights that have hitherto been considered rather marginal in their valuation and which may not yet be fully recognised in relation to the state. In other words, there might be Human Rights the fulfilment of which is less frequently or intensively endangered by sovereign state conduct than by private business actions. This is likely to apply to many of the ICESCR rights whose fulfilment depends heavily on the performance of economic actors such as employers, e.g. with regard to dignified conditions at the workplace or payment of sufficient wages in order to finance an adequate living standard. Another example is digitisation, a phenomenon which dominates the private economic sector and which affects the Human Rights interests of individuals, such as integrity of personal data or access to essential services, e.g. the internet, in the telecommunications sector. These interests are frequently assessed as candidates for new Human Rights and become relevant primarily in the individual-provider or individual-business relationship. Although the State bears responsibility for the protection and realisation of such Human Rights related to economic activity, in the sense that it has to create a legal order that grants such rights and enforcement mechanisms on a horizontal level, the State is not the actor directly realising and deciding upon their fulfilment. Particularly such Human Rights, most likely to be affected by business operations, ought to be a reasonable focus of a BHR-related material scope.

However, irrespective of the specific business context that gives rise to the evaluation of new Human Rights limited to this context, there are various Human Rights that are still in the 'idea' or 'emergence' phase, so-called 'candidates for recognition', and whose codification in the framework of the future BHR treaty should be assessed in order to contribute to the emergence of a more contemporary regime of Human Rights protection.[1286]

The International Commission of Jurists, for instance, classifies the question of collective Human Rights as relevant in the BHR context, which is not explicitly addressed in the traditional treaty sources of IHRL.[1287] As until now, only the collective right to self-determination may be considered legally recognised under IHRL, in particular with regard to

[1285] Cf. Peters, *Beyond Human Rights, supra* note 868, at 109.

[1286] Cf. Decken and Koch, *supra* note 14, at 8.

[1287] International Commission of Jurists, *supra* note 290, at 41.

the protection of rights of indigenous people.[1288] The future BHR treaty would have been an opportunity to establish a legislative position on the doctrine of collective Human Rights. The codification of certain collective Human Rights would contribute to their emergence and legal recognition of IHRL. To not explicitly include collective Human Rights within a BHR-specific Human Rights catalogue, in turn, would constitute an identifiable legislative decision as well and contribute to further progress. However, referring to the status quo of IHRL is equivalent to a reference to opacity on this issue. From a non-existent Human Rights catalogue, no guidance can be derived at all - neither positive nor negative. The right to water and sanitation is another example. It is derived from the more general right to an adequate standard of living in Art. 11 para. 1 ICESCR and was officially recognised by the UN General Assembly already more than ten years ago[1289] and has been subject of resolutions and other forms of acknowledgement.[1290] However, it has not been codified and sufficiently specified by means of a binding regulation yet.[1291] These are rights that certainly passed the phase of emergence albeit not being explicitly introduced within a formal treaty. However, their operationalisation and enforcement by affected persons or authorities will remain difficult and uncertain without an explicit foundation. The future BHR treaty constitutes an opportunity to finally legislate on their content for the first time and bring about legal certainty for carious stakeholders.

Environmental rights also represent a category of rights whose extent of recognition as well as their qualification as Human Rights as a whole – whether as individual or collective rights – is not clearly determined at the present time.[1292] There is hardly a topic that nowadays can be surpassed in terms of actuality and urgency as environmental protection and its significance as a regulatory issue of IHRL, or climate change as a concern regarding the

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[1288] *Ibid.* MacKay, 'The Evolution and Revolution of Indigenuous Rights', in A. von Arnauld, K. von der Decken and M. Susi (eds), *The Cambridge handbook of new human rights*: *Recognition, novelty, rhetoric* (2020), 233 at 236 ff.

[1289] Special Rapporteur on the human rights to safe drinking water and sanitation, *10th Anniversary of the recognition of water and sanitation as a human right by the general assembly* (2020), available online at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26116&LangID=E#:~:text=Ten%20years%20ago%2C%20on%2028,realisation%20of%20all%20human%20rights.

[1290] Resolution 64/292. the human right to water and sanitation, UN Doc. A/RES/64/292, 28 July 2010; Resolution 15/9 Human rights and access to safe drinking water and sanitation, UN Doc. A/HRC/RES/15/9, 6 October 2010; United Nations Economic and Social Council, *supra* note 998.

[1291] See the following overview, showing instruments related to the two Human Rights, which serve as source for the derivation of the latter but do not explicitly refer to the Human Rights to water and sanitation United Nations Human Rights Office of the High Commissioner, *Instruments related to the right to water and sanitation*, available online at https://www.ohchr.org/EN/Issues/ESCR/Pages/InstrumentsWater.aspx.

[1292] For a more detailed analysis of the state of IHRL with regard to climate change and environmental claims against States and businesses, see Macchi, *The Climate Change Dimension of Business and Human Rights, supra* note 1249, at 95 ff.

protection of human interests. And this is especially true in connection with the impact and responsibilities of the business industry and the expectations of society with regard to sustainable practices, making the future BHR treaty all the more a suitable platform and means for the emergence of this regulatory subject.[1293] Cases of climate change litigation have made it to the courts in the past decade and are a growing trend, but it is difficult to predict the outcome of such cases or to identify a pattern in adjudication practice, as the regulatory issue is still at too early a stage of development.[1294] Rulings made in this context attract great international attention due to their inherent revolutionary character, even if they are made in national courts, such as the judgement against Royal Dutch Shell issued by the District Court of The Hague on 21 May 2021.[1295] However, as long as there is no clear legal basis for the courts' decision-making, such rulings generate just as much uncertainty regarding their appealability and the question of whether decisions made by the court will prevail beyond the individual case as they generate attention. The legal uncertainty that exists cannot be eliminated by only sporadic case law, but if there is legal uncertainty, remedies and case law are only pursued with restraint. An important role in consolidating and disseminating judicial findings is the broad discussion of the relevant decisions by academics, which is taking place. But if one follows the three phases of the creation of new Human Rights outlined above, the actual legal recognition of climate and environmental rights in IHRL will sooner or later require a basis in a formal legal source. Precisely the concept of Human Rights due diligence by business actors is in need of substantive specification, e.g. as regards the attribution of responsibilities (when does a business contribute in a legally relevant way to environmental damage that results in individual violations of the law?) and the definition of concrete required measures in business operations.[1296] It would be obvious to develop such a concept within the framework of the future BHR treaty in connection with the general due diligence obligation of businesses. According to Art. 1 Sec. 2 TRD, a violation of environmental rights might qualify as a Human Rights abuse in terms of the future BHR treaty, and accordingly businesses ought to take such rights into account when complying with their due diligence obligations, i.e. within the Human Rights impact assessment due to Art. 6 Sec 3 lit. a TRD. Thus, the environmental dimension of Human Rights is picked up in the future BHR treaty. Beyond this reference, however, the TRD does not provide for any further guidance or concretisation on the issue of environmental rights. Art. 3 Sec. 3 TRD neither contain an allocation of such rights to the

[1293] Deva, *supra* note 576.

[1294] Macchi, *The Climate Change Dimension of Business and Human Rights, supra* note 1249, at 93 f.

[1295] A. Golia, JR, *Reducing is Caring*: *The Durch climate case against Shell* (2021), available online at https://voelkerrechtsblog.org/de/reducing-is-caring/; Nollkaemper, *supra* note 1111.

[1296] Macchi, *The Climate Change Dimension of Business and Human Rights, supra* note 1249, at 94, 110 ff.

material scope of the future BHR treaty, nor does it refer to a regulatory instrument dealing with the subject of environmental law and environmental rights. The unspecific manner in which the TRD includes the regulatory subject of environmental rights of individuals to the subject matter of the future BHR treaty, despite the early phase of emergence of these rights, gives rise to critique and might well be regarded as a further dilution of the material scope of application of the future BHR treaty.[1297] The vague notion of environmental rights seems to be assigned to the equally vague umbrella term of internationally recognised Human Rights. In any case, the general mention of such vague legal terms and subjects of regulation neither contributes to their own emergence and development nor to the concretisation of the material scope of the future BHR treaty itself. Yet, especially with regard to environmental rights it would be so obvious to shape and develop them within the framework of BHR regulation and thus contribute to their emergence as a recognised regulatory issue of IHRL as a whole.

At the level of the European Union, the 'we move' initiative identifies six new fundamental rights, which, in its view, are necessary to create a contemporary legal regime that can withstand the realities of the present and serve the protection of human interests.[1298] The initiative is driven by a CSO and is exemplary for the phase of idea in the process of creation of new Human Rights, initiated by individual norm entrepreneurs. While such initiatives can only be processed in the light of legal and political feasibility, they are nonetheless a source and point of reference for identifying societal and normative needs and demands and deserve some from of attention and evaluation, especially where the content of claims finds support in academia. Only if such currents and initiatives are addressed in the creation of new IHRL, even in the context of such supposedly special regulatory issues as the future BHR treaty, can a responsive and effective Human Rights regime be created and maintained. To completely neglect progressive considerations on the material content of Human Rights, whether in the specific context of BHR or the protective needs of IHRL in general, would not adequately take into account the telos of neither subject matter.

In principle, it may be countered that open wording and the use of generic terms are intended to convey a future-proof and neutral understanding of newly created Human Rights and pave the way for an evolutionary interpretation. Evolutionary interpretation is a recognised method of legal application.[1299] But it cannot lead to the creation of entirely new laws by way of interpretation and create rights the concretisation of which was deliberately omitted by the

[1297] Cf. Methven O'Brien, *supra* note 727, at 188.

[1298] Including inter alia environmental rights and rights related to digitization. See YouMoveEurope & Stiftung Jeder Mensch e.V., *For New Fundamental Rights in Europe*, available online at https://you.wemove.eu/campaigns/for-new-fundamental-rights-in-europe.

[1299] Wheatley, *supra* note 29, at 120.

legislator.[1300] This would exceed the competences of jurisprudence and legal practitioners, which do not entail a legislative dimension, although codification of new Human Rights in treaties is not the only means by which legal recognition is realised; it might also take place by way of identification in customary PIL or derivation from existing Human Rights.[1301] The decisive factor for the legal recognition of certain 'new' Human Rights is that there is a basis for such rights in one of the existing legal sources of PIL, which is not limited to treaty law but requires some kind of expression of will on the part of the legislature – i.e. the community of States in PIL – in accordance with the recognised processes for this.[1302] As regards Customary PIL, such a process would require State practice and *opinio juris*.[1303] Treaty law is thus not exclusive, but merely the easiest way to identify such an expression of will serving as a reference point for the emergence and legal recognition of new Human Rights. However, in order to provide room for the broadest possible diversity of State practice and *opinio iuris* for the emergence of customary PIL and as many options for interpretation as possible, an open material scope of application as enshrined in Art. 3 Sec. 3 TRD could certainly prove beneficial. However, in comparison to recognition by way of a formal treaty, customary PIL and derivation are weak methods to promote the emergence of new Human Rights, because they are difficult to identify, justify and defend on a large scale, especially with regard to regional divergencies.[1304] Thus, if there is an opportunity to create new Human Rights by way of a treaty, which States can commit to in a clearly identifiable manner, this opportunity should be pursued in principle. Especially since a treaty neither necessarily excludes the emergence of customary PIL, nor a derivative interpretation going beyond the explicit provisions of the treaty. In the end, it is the very purpose of specialised Human Rights treaties such as the proposed future BHR treaty to clarify the scope and specialised content of more generally articulated rights and duties with regard to a particular regulatory issue.[1305] The OEIGWG Drafts, including the most recent TRD, do not meet this purpose. Quite the contrary, instead of adapting and tailoring the provisions of general and universal Human Rights instruments to the circumstances of BHR matters, they merely reference these instruments without providing any BHR-related specification. Arguably, a material scope of application as envisaged by Art. 3 Sec. 3 TRD, which is largely based on regulation dating back half a century, is simply not suitable as a legal response to new phenomena such as the threats posed by businesses and the power shifts resulting from globalisation that the future

[1300] *Ibid; Case of Johnston and Other v. Ireland,* 9697/82 European Court of Human Rights (1986), at para. 53.

[1301] Decken and Koch, *supra* note 14, at 12 ff.

[1302] *Ibid.*, at 8.

[1303] See Shaw, *supra* note 79, at 53 ff.

[1304] Decken and Koch, *supra* note 14, at 12 ff.

[1305] Macchi, 'A Treaty on Business and Human Rights', *supra* note 477, at 73.

BHR treaty is intended to provide. The approach of the legislators to the material scope that has been pursued so far simply does not meet the purposes of the BHR treaty and standards of responsive law.

IV. Means of Individual Law Enforcement

A decisive aspect with regard to the effectiveness of the future BHR treaty is the way in which its enforcement ought to take place. The lack of sufficient enforcement mechanisms is one of the major weaknesses of general PIL, considered and referred to as its '*Achilles' heel'*.[1306] And it is a perpetual embarrassment of IHRL more specifically.[1307] Responsive legislation in PIL requires addressing this problem and providing guidance on a solution to it. Also, due to certain specificities of BHR disputes, the future BHR treaty in particular should provide for a sufficiently determined enforcement regime.[1308] There are two different dimensions of law enforcement to be differentiated: on the one hand, public law enforcement by means of administrative and criminal law measures, and on the other hand, *individual law enforcement*, which shall mean enforcement of individual claims by affected victims through private law remedies. Criminal and administrative measures serve sovereign prevention, deterrence, and punishment, while individual law enforcement primarily has compensation of individual injustice as its object.[1309] The following section shall focus on individual law enforcement on the horizontal level, taking place between businesses and individuals, by means of private or civil law remedies. To provide effective remedies was identified as one of the main shortcomings of the UNGP and the future BHR treaty should attempt to compensate for this deficiency. No matter how ambitious, victim-oriented, and innovative its

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[1306] Roberts, 'Comparative Internationa Law?: The Role of National Courts in Creating and Enforcing International Law', 60 *The International and Comparative Law Quarterly* (2011) 57, at 58.

[1307] Luban, *supra* note 21, at 266.

[1308] Cf. van Ho, *supra* note 151, at 113.

[1309] Nowak and Januszewski, *supra* note 38, at 154; Although deterrence is not the primary goal of individual law enforcement and civil liability, in practice it may well constitute an additional argument for the establishment of civil remedial mechanisms. The publicity generated by the initiation of legal proceedings based on Human Rights violations alone should regularly exert enough reputational pressure on the defendant corporations in order to force them to fundamentally rethink their Human Rights compliance management, even if the financial impact is limited. A key end of the entire regulatory process in the BHR context is to minimize the lucrativeness of the neglect of Human Rights for corporations and the neutralization of financial risks for private law enforcement is one essential measure to achieve this. The example of Yahoo in November 2007 shows how deterrent – and effective for individual compensation – the mere risk of civil law litigation for Human Rights violations or participation in such violation can be: the corporation was accused of having contributed to Human Rights violations by the Chinese government. Yahoo denied such contribution, both on its own behalf and on behalf of its Chinese subsidiary, until a lawsuit was filed in the US under the ATCA and accepted as admissible by the court - a few months later the victims and relatives were compensated with an undisclosed sum. See Karp, *Responsibility for human rights, supra* note 47, at 17 f.

material provisions and obligations are – if individual rights cannot be enforced and come to effect in reality, they will hardly generate a practical effect.

The provision of effective remedies to victims of corporate Human Rights violations is determined as a key point for the regulatory resolution of the subject matter of BHR by the third pillar of the UNGP, which is entirely dedicated to the design and provision of such remedies. According to the valuation of the UNGP, the provision of effective remedies requires States to take appropriate steps to ensure, by judicial, administrative, legislative or other appropriate means, that in case a relevant Human Rights violation occurs, such a violation will be investigated, punished and redressed.[1310] The State's duty to protect Human Rights against business-related violations, thus, encompasses the introduction of preventive as well as repressive instruments into the legal order of the respective State. However, albeit the interdependence of the practical effect of a treaty and its remedial component, the third pillar of the UNGP was arguably the least prominently implemented part after the endorsement of the UNGP.[1311] Various evaluations of State efforts to realise and implement the UNGP find that the objectives of the third pillar are regularly the most seriously neglected.[1312] It is even referred to as '*the forgotten pillar'*.[1313] To provide effective remedies, however, is particularly perceptible for victims. Accordingly, adequate regulation of this subject matter is and ought to be a core concern of the victim-oriented future BHR treaty, which aims to dissolve existing barriers to access to remedies and justice in practice.[1314] In order for the future BHR treaty to meet this objective, it must oblige States to include a liability regime within their implementation laws and proactively address typical BHR-specific barriers, peculiarities and obstacles of individual law enforcement.[1315] In various jurisdictions, theoretical access to justice by means of legal remedies is often thwarted by practical and

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[1310] Principle No. 25, Commentary, United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 27. Principle No. 25, Commentary, United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 27.

[1311] United Nations Human Rights Council, *supra* note 1263, at 4. United Nations Human Rights Council, *supra* note 1263, at 4.

[1312] Garrido Alves, *supra* note 39, at 31; R. Meeran & L. Day, *The "Zero Draft": Access to judicial remedy for victims of multinationals' (MNCs) abuse* (2018), available online at https://media.business-humanrights.org/media/documents/files/documents/Zero_Draft_Blog_Compilation_Final.pdf; Cassell and Ramasastry, *supra* note 311, at 9; Ramasastry, *supra* note 53, at 248.

[1313] Macchi, *The Climate Change Dimension of Business and Human Rights, supra* note 1249, at 116; L. McGregor, *Activating the Third Pillar of the UNGPs on Access to An Effective Remedy* (2018), available online at https://www.ejiltalk.org/activating-the-third-pillar-of-the-ungps-on-access-to-an-effective-remedy/.

[1314] Cf. Deva, *supra* note 688.

[1315] Cf. Cassell and Ramasastry, *supra* note 311, at 29.

technical barriers such as limits of jurisdiction, statutes of limitation, litigation costs, lack of legal aid or intimidated participants.[1316]

The provision of effective remedies and remedial mechanisms is envisaged as a direct obligation of the state parties in the future BHR treaty according to Art. 7 Sec. 1, Art. 4 Sec. 2 lit. c TRD. Generally, it is not less of a treaty obligation than the introduction of preventive regulations for businesses supposed to avert corporate Human Rights violations, such as due diligence obligations, or the establishment of legal liability of businesses.[1317] While the latter require the introduction of corresponding material law, such as special BHR-related tort law or competition law, the provision of effective remedies requires the introduction of adapted procedural law and institutions implementing it. At the core of individual law enforcement is the realisation of civil liability for damages and harm suffered by individuals due to business conduct. The future BHR treaty obliges state parties to introduce civil liability of businesses for Human Rights abuses and damages arising therefrom, Art. 7, 8 Sec. 1, 3. In Art. 7 TRD, there are concrete requirements and standards defined, that are to be applied in processes of individual enforcement of corporate liability. Art. 8 Sec. 6 TRD extends the civil liability of businesses to the entire supply chain. Civil liability for BHR-related violations, according to the TRD, should not be at the disposal of the State parties implementing the future BHR treaty. Rather, Art. 8 TRD implies that the introduction of civil liability is a mandatory measure in order to comply with the future BHR treaty. To incorporate civil liability and respective means of enforcement is arguably the only way to fully meet the perception of justice of IHRL, which goes beyond mere criminal prosecution and administrative sanctions, but will also require restoration of individual injustice and restitution of individual damages and impairments of human dignity.[1318] The future BHR treaty, thus, goes further than some national laws ought to implement BHR standards set by the UNGP, such as the abovementioned German *Sorgfaltspflichtengsetz* or the Swiss legislation on BHR that was passed as a counter-proposal to the *Swiss Responsible Business Initiative*. In both cases, the States decided to refrain from the stipulation of a specialised regime of civil liability and to limit the enforcement regime of their BHR legislation to administrative and criminal sanction mechanisms.[1319] Both approaches stand exemplary for the aforementioned collective failure

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[1316] *Ibid.*

[1317] These legislative obligations of State parties are provided for in Art. 6 and Art. 8 TRD.

[1318] Nowak and Januszewski, *supra* note 38, at 154; see D. Shelton, *Remedies in international human rights law* (1st ed., 2000), at 10.

[1319] L. Knöpfel & C. Lopez, *Responsible Business Initiative*: *A hope of legal accountability in the parliamentary counter-proposal* (2020), available online at http://opiniojuris.org/2020/12/17/finding-a-silver-lining-in-the-rejection-of-the-swiss-responsible-business-initiative-a-hope-of-legal-accountability-in-the-parliamentary-counterproposal-part-1/; Krebs, *supra* note 296.

to adequately implement the third pillar of the UNGP in national law, as they do not provide specified remedies for affected persons adapted to the particularities of BHR disputes. The limitation to sovereign measures of law enforcement alone does not take into account that compensation for individual injustice and the restoration of balance between the disputing parties will require both material and non-material civil law remedies such as an apology or an admission of guilt, as implied by the commentary on Principle No. 25 UNGP. Most certainly, victims of corporate Human Rights violations will still be able to seek individual redress and remediation, as in most jurisdictions where an individual damage has occurred there will be room for application of general tort law. It might, thus, be argued that the creation of a specialised BHR liability regime is not necessarily required in order to provide effective remedies to victims of corporate Human Rights violations. However, general rules of tort law might often not be adapted to particularities of BHR cases, for instance as regards the question of which legal interests and goods are protected and might be violated in a way giving rise to legal liability, who the correct claimant in the case of measures and decisions taken by a collective such as a corporation is, as well as rules of attribution in a supply chain or other legal and business relationships. Although such questions can regularly be clarified by courts and general rules of norm application, as long as they are not clearly and legislatively answered they are likely to make it more difficult for victims to enforce their rights, especially in cross-border situations. This, in turn, renders such regular remedies ineffective and unrealistic pathways in many situations of BHR disputes. To harmonise issues of individual law enforcement internationally is therefore precisely one reason giving rise to the regulatory necessity with regard to the future BHR treaty in the first place.

Remedies provided to individuals in the context of substantial Human Rights violations must meet the international standard of *adequate, effective and prompt reparation for harm suffered* in order to be effective and restore justice.[1320] Accordingly, the State duty to ensure access to effective remedies for victims of business-related Human Rights violations is not limited to the creation of a legal framework providing formal redress mechanisms, but is subject to further substantive requirements. These are mainly enshrined in Art. 7 TRD, as well as partly in Art. 8 TRD and have been rooted in Principles No. 25 ff. UNGP as well. Remedies must be tailored to practical circumstances and provide the best possible response to potential obstacles in practical application by individuals, which they might face in the special procedural situation of BHR and Human Rights disputes in general.[1321] The

[1320] Cf. United Nations Human Rights Council, *supra* note 1263, at 3. Cf. United Nations Human Rights Council, *supra* note 1263, at 3.

[1321] United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at Principle No. 25. Cf. United Nations Human Rights Council, *supra* note 1263, at 3. United Nations Office of the High Commissioner

response to BHR-related procedural deficiencies and obstacles refers to two dimensions. First, there are somewhat 'technical' difficulties with regard to exercise of remedies, i.e. situations in which formally available remedies are codified in national laws, but fail in realisation.[1322] Places of jurisdiction for business-related Human Rights violations are often States where domestic courts are either dysfunctional, not accessible, not suitable or judges are subject to political influence, biased to corruption or simply lack sufficient expertise with regard to IHRL and BHR in particular.[1323] Thus, victims of corporate Human Rights violations are eventually left with a lack of any accessible and effective remedy, even if formally the legal situation allows for individual law enforcement in the case at hand. The second dimension of BHR-responsive design of remedies relates to cases where a technically appropriate judicial infrastructure exists and material law provides for enforceable claims, but actual legal defence and enforcement of such claims might still not be feasible in individual cases in practice. Frequently, the most vulnerable groups of potential victims of corporate Human Rights violations face obstacles like procedural delays, high costs, time consuming and complex appeals or difficulties in enforcing their obtained judgements and titles, which in actuality will deprive the remedies provided to victims of their effectivity.[1324] Differences in the factual and legal situation of the parties to a BHR dispute should be reflected in the substantive requirements for the design of remedies, in order to establish procedural fairness. The following section will be dedicated to a closer evaluation of the specificities and difficulties of individual law enforcement in BHR disputes, and the responses envisaged by the OEIGWG drafts.

However, it should be briefly noted that individual law enforcement comes into effect only if a Human Rights violation occurs. Before a damage from a corporate Human Rights violation emerges, there is no possibility to issue reprimands, remedial measures (prohibition, restriction, conditions) or sanctions against the relevant businesses for simple negligence or risk-prone activities without sufficient safeguards. State supervision through administrative, sovereign procedures and mechanisms is the only means of law enforcement that also has a significant preventive effect in countering risk-prone but not yet harmful corporate conduct. The necessity of such procedures, in addition to means of individual law enforcement, in order to realise the objective of the third pillar of the UNGP is also recognised in Principle No. 27. Accordingly, Art. 8 para. 3 TRD stipulates that, in addition to civil liability, states shall introduce administrative or criminal sanctions appropriate to the violation in question. In

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on Human Rights, *supra* note 692, at Principle No. 25. Cf. United Nations Human Rights Council, *supra* note 1263, at 3.

[1322] Bilchitz, *The Necessity for a Business and Human Rights Treaty, supra* note 24, at 218.

[1323] Gläßer and Kück, *supra* note 256, at 125.

[1324] *Ibid.*

contrast, Art. 6 Sec. 4 Revised Draft appeared to provide freedom of choice for states on this question. In the case of civil law enforcement only, there is an inherent risk that no legal redress takes place at all, where victims have no actual access or cannot make use of his or her legal remedy due to individual reasons, or where an amicable settlement or a severance payment is agreed upon, preventing a public judgement. Administrative and criminal law measures might therefore significantly contribute to publicity and deterrence. A combination of both dimensions is therefore required in order to achieve the desired effects of BHR regulation in practice.

Administrative law enforcement could be implemented, for instance, by State-designated national supervisory authorities, which monitor BHR compliance in corporations. Supervisory authorities could be granted the power to oblige particularly high-risk businesses or sectors to provide reports, to implement predetermined technical and organisational measures in order to reduce adverse impact and to impose fines or other administrative remedies and sanctions. Dutch law against child labour, for example, provides for similar mechanisms.[1325]

1. Responding to BHR-Related Particularities

The reason why there are special features in BHR disputes that have to be balanced within the framework of individual law enforcement is, that subordination relationships between individuals and businesses as identified above do not only materialise in the capability of businesses to endanger Human Rights, but will also permeate at the procedural level after a violation has occured.[1326] The object of legislative responses to BHR-related particularities ought to be the creation of a level playing field for all parties to a BHR dispute, which will require the empowerment of victims of corporate Human Rights violations, without inappropriately disadvantaging businesses.[1327] The TRD, in contrast to the Revised Draft and Zero Draft, already contains facilitations for victims seeking justice, dissolving some of the common obstacles to access effective legal remedies.[1328]

An issue not explicitly addressed by the treaty, which does not directly concern the design of redress procedures but will nevertheless be essential for their impact, is the sufficient information and education of individuals who could potentially become victims of corporate Human Rights violations. Individuals must be enabled to identify when they have become a victim of a corporate Human Rights violation qualifying for legal redress, whether as employees, consumers or individuals only indirectly associated with a business.[1329] This will

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[1325] Rüntz, *supra* note 694, at 292.

[1326] See also Sect. **C.I.2.**

[1327] Deva, *supra* note 576.

[1328] *Ibid.*

[1329] See in this context also United Nations Human Rights Council, 'Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms:

require both education, which should be imposed on businesses as employers or distributors of consumer products, and more general and far-reaching public campaigning.[1330] The most sophisticated and victim-friendly procedural law is of no use to the individual if he or she lacks the necessary information and awareness to make use of it. This is particularly relevant in a new and nascent area of law such as BHR. Art. 15 TRD envisages the creation of a committee, supervising and monitoring general compliance with the BHR treaty. States shall be obliged to report to the latter about the laws and measures which have been introduced in the national legal order, Art. 15 para. 2 TRD. Additionally, States shall provide copies of the laws and regulations intended to give effect to the provisions of the future BHR treaty to the Secretary-General of the UN, which subsequently are to be made public. However, whether and to what extent this actually reaches the individuals concerned is questionable. The main function of this mechanism is to monitor State efforts in treaty implementation. The Draft Optional Protocol ('***Draft OP'***), in turn, addresses this issue partly and assigns the task to inform and educate victims of corporate Human Rights violations to the so-called National Implementation Mechanisms that States ought to establish in accordance with the Draft OP.[1331] However, there is arguably still considerable room for improvement and more prominent regulation – in the treaty itself – especially in light of the indispensability of the education of victims in relation to BHR and the fact that such measures have only little impact on States and businesses alike.

a) Procedural Inequality of Arms in BHR Disputes

There is a procedural inequality of arms between individuals and businesses. Usually, businesses will possess financial, organisational, and human resources as well as the necessary expertise to make it as difficult as possible for victims to enforce their rights.[1332] For an individual, the decision whether and to what extent the judicial assertion of his or her rights is pursued will often also constitute a financial decision of considerable consequence, even where there is a victim-friendly material legal situation in the respective State. At least the initiation of formal judicial proceedings regularly requires the willingness of an already injured party to make financial sacrifices, while the defence against such claims on the corporate side is often a calculable part of their natural business risks, which they are willing and prepared to cover without question. For victims, in turn, the allocation of costs will often render the assertion of smaller damages or the pursuit of matters with uncertain outcome

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Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/38/20' (Geneva, 2018), at 10.

[1330] E.g. as regards educational measures to be undertaken by businesses, it is conceivable to take the mandatory information and privacy policies in terms of Art. 13 GDPR as a role model here.

[1331] See Art. 3 Sec. 1 Draft OP.

[1332] See UNGP, Principle No. 31 and commentary.

economically unprofitable, since the procedural cost risk as well as the time and organisational effort are out of proportion to the expected compensation.

The negative effects on the procedural equality of arms which the financial discrepancy between claimants and defendants in BHR disputes might emanate is recognised by Art. 7 Sec. 4 TRD. The provision stipulates that state parties „*shall ensure that court fees and other related costs do not become a barrier to commencing proceedings in accordance with [the future BHR treaty] and that there is a provision for possible waiving of certain costs in suitable cases".* However, the TRD does not provide for any guidance and concretisation by which means states ought to attempt to give effect to this general clause. In essence, Art. 7 Sec. 4 TRD, thus, provides no inherent added value for the realisation of this objective as compared to the UNGP, which in its Principle No. 31 and the accompanying commentary identifies litigation costs and financial imbalance of the parties in BHR disputes as a procedural obstacle to be compensated. The reduction of the financial burden for victims in state-based law enforcement mechanisms is a circumstance on which the state can exert a clear and unimpeded influence. It would, thus, be desirable to include an indicative list of concrete measures in the future BHR treaty itself. The future BHR treaty, as a hard law supplementation on the regulatory issue governed by the UNGP ought to concretise the rather vague and general soft law. For instance, the predecessor Revised Draft in its Art. 4 Sec. 13, included an explicit prohibition to require victims of corporate Human Rights violations to provide a warranty when initiating legal proceedings and was, thus, more far-reaching in this context. It would also be conceivable to shift the allocation of costs, which usually lies with the claimant, mandatorily to business parties in BHR disputes, or to require States to introduce the possibility to seek collective redress by way of representative action, which might also significantly reduce the financial risks imposed upon the parties to a dispute. To provide for possibilities of collective redress is identified as a measure to operationalise the third pillar of the UNGP and envisaged in Art. 4 Sec. 2 lit. d) TRD as an instrument to provide effective remedies, but without more specific details on its functioning, implementation and rationale.[1333] By way of collective redress mechanisms, designated entities are enabled to bring a representative claim before courts in a situation where a number of persons assert to have suffered harm from the same illegal action. By virtue of such action, it might be adjudicated representatively that the legal requirements for compensation of the alleged damage claims are fulfilled.[1334] Thereby the litigation and

[1333] See Commentary on Principle No. 26 UNGP, at p. 29 of the UNGP.

[1334] Cf. with the same intent, Recommendations on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), 26 July 2013.

financial risks of the injured parties will be reduced, as they can infer the likelihood of success of their own proceedings based on the outcome of the representative action and thus make a more informed decision. Individuals are therefore less likely to be deterred by the risks and costs of legal proceedings. Following such representative collective redress proceedings, the individual injured persons still have to pursue individual legal action to determine and enforce the type and amount of the claim for damages to which they are entitled individually. The instrument of collective representative redress mechanisms is already recognised in the consumer law of various national legal systems and serves precisely to compensate for the regularly weak procedural starting position compared to corporations acting in a commercial capacity. The rationale of this instrument fits very well into the regulatory purposes of BHR, particularly the balancing of power asymmetries, which is due to the general proximity between the regulatory matters of consumer protection and BHR and their overlap in object and purpose. In addition, as the examples presented above show, Human Rights violations caused by businesses often precisely affect a large number of victims and might qualify as 'mass harm situations', the legal redress of which representative class actions have been designed for.[1335] The impairment of a large number of potential claimants by the same wrongful business conduct is a characteristic inherent to BHR disputes, which generally ought to be reflected within the means of procedural remediation. Enforcement mechanisms related to the BHR treaty should take this into account and allow for the handling of such large numbers of potential plaintiffs and victims and guarantee efficient processing, not only by means of representative action but ordinary instruments of mass class action as well. This is not least because mass proceedings are associated with a higher deterrent effect and potential reputational damage compared to individual proceedings. Even if compensation in the amount of several millions might be awarded in individual proceedings as well, the publicity generated by mass action will regularly be higher.[1336] It is, thus, an objectively necessary and welcome development that Art. 4 Sec. 2 lit. d) TRD also contains a provision on this issue for the first time (compared to its predecessor drafts).

Noteworthy is the intended establishment of an international fund for victims, as stipulated in Art. 15 Sec. 7 TRD and already provided for in the Zero Draft, see here Art. 8 para. 7. A fund to provide victims of corporate Human Rights violations with legal and financial aid could relieve victims of Human Rights violations immensely from the financial hurdles they face when seeking remedies if such a fund ought to apply in the stadium of initiation of remedial processes already. The relevant provisions on the functioning and implementation of the

[1335] *Ibid.*, at No. 3 lit. b), recital 2.

[1336] Karp, *Responsibility for human rights, supra* note 47, at 19.

envisaged fund, however, will only be defined in a 'Conference of Parties' stipulated by the TRD as only in the later course after ratification of the treaty.

Another factor enhancing the procedural inequality of arms is the disparity of information between victims and corporate perpetrators. Business conduct resulting in a harmful situation for individuals is normally preceded by some form of internal chain of action and decisions. Multi-level and complex decision-making processes and business procedures within a corporation, especially in the case of transnational supply chains, will often make it impossible for individual claimants to trace causal chains and attributions and even to prove them before a body of jurors or judges in accordance with procedural standards. As a general rule, derived from the Romanian law principle *actori incumbit probatio,* it is up to the supposedly injured parties making an assertion – i.e. the claimants – to substantiate their claims by providing evidence in order to successfully enforce legal rights in remedial proceedings.[1337] In the case of due diligence obligations, claimants must not only show that they have suffered a damage attributable to the respondent, they must also show in a substantiated manner if and why the measures taken by the respondent to prevent damage were not diligent enough.[1338] Conversely, it is usually sufficient as a defence for an unsubstantiated claim that the respondent, i.e. the business party in most BHR disputes, superficially denies it. The facts on which a claim is based, and which ought to be substantiated by victims are not only limited to the occurrence of damage – the proof of which will be regularly less of a challenge – but relates to the causal chain leading to damage, attribution and culpable conduct on the part of the business party against which the claim is asserted. Access to all necessary information by victims of corporate Human Rights violations in order to substantiate a claim before court, however, will be available in very few cases only.[1339] It will not be easily feasible for plaintiffs to substantiate the detailed facts of a claim when suing a corporation that in most cases will control the relevant information and evidence regarding its own internal decision-making processes.[1340] Art. 4 Sec. 2 lit. f) TRD addresses the need for access to information in the context of access to effective remedy by victims superficially.[1341] When designing remedies in BHR disputes, special disclosure and

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[1337] Foster, 'Burden of Proof in International Courts and Tribunals', 29 *Australian Yearbook of International Law* (2010) 27, at 35; see also Pauwelyn, 'Defences and the Burden of Proof in International Law', in L. Bartels (ed.), *Exceptions in international law* (2020), 88

[1338] Monnheimer, p. 139

[1339] Bright *et al., supra* note 267, at 676; see J. Zerk, 'Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies - A report prepared for the Office of the UN High Commissioner for Human Rights' (2014), at 84.

[1340] Stephens, *supra* note 855, at 55.

[1341] As do the UNGP, which address this remedial barrier in Principle No. 26, commentary at p. 29 and Principle No. 31, commentary at p. 35.

surrender obligations should therefore also be considered in order to take into account the particularities of the procedural situation.[1342] However, the origin of the necessity of such a measure in procedural law is the default rule on the distribution of the burden of proof. There will always be a risk of concealment and circumvention on the part of businesses as regards information under their initial influence, which should not be at the expense of victims. Cases in which relevant information is not accessible due to reasons outside the sphere of the victim seeking redress ought to be addressed by responsive BHR regulation on remedies. It should provide for facilitations in favour of victims with regard to the procedural rules on the provision of evidence in order to establish actual procedural equality of arms. Specifically, the instruments of secondary burden of proof or a rebuttable presumption of liability to the detriment of businesses, as an exception to the general 'presumption of compliance' ought to be considered.[1343] Legislation on remedial mechanisms within BHR disputes should at least allow flexible application of rules on the burden of proof at the discretion of the decision-making bodies.[1344]

Most of the inconsistencies of procedural fairness and obstacles for victims and claimants in BHR disputes are due to the fact that the legislative design of remedies in civil law suits is adapted to two equal litigants acting in a balanced, horizontal power relationship, whereas the relationship between individuals and businesses in reality is asymmetrical (see Sect. **C.I.3**), and in some cases even more comparable to the relationship with a State rather than with another private actor.[1345] For this 'new' power asymmetry, the civil procedural law of most States does not yet provide for any compensatory mechanisms or counterweights. This is a regulatory gap that a future BHR treaty as a regulatory response to the redistribution of power and globalisation-related societal, economic, and political developments must necessarily address.

b) Gender-Transformative Remedial Mechanisms

In addition to the equality of arms and the consideration of large numbers of potential claimants and plaintiffs, there is a third circumstance particularly relevant with regard to BHR disputes, which is gender inequality in remedial mechanisms and procedural law. Gender inequality as such is an issue of general IHRL, but also of particular relevance in relation with BHR disputes due to the overall socially, economically and legally weaker position of women and persons of diverse gender identity within many societies. Women constitute one of the most vulnerable groups affected by businesses operating in transnational supply chains,

[1342] United Nations Economic and Social Council, *supra* note 289, at para. 45.

[1343] Cf. Deva, *supra* note 576; Cf. Foster, *supra* note 1337, at 36.

[1344] Regarding flexible judicial application of the burden of proof in order to produce fairness seeFoster, *supra* note 1337, at 50 ff.

[1345] Cf. International Commission of Jurists, *supra* note 290, at 18.

particularly exposed to exploitation and abuse.[1346] Legal recognition of the special need for protection of minorities usually lags behind universal Human Rights protection.[1347] While women may not constitute a 'minority' in the literal sense of the term, they still are a minority as regards protection of fundamental rights and interests as well as their human dignity. Patriarchal orders and views are anchored and often persist even in progressive societies, and reforms have progressed only slowly in recent decades.[1348] Accordingly, the UN Working Group on the issue of Human Rights and transnational corporations and other business enterprises has published a report on the gender dimensions of the UNGP after their endorsement.[1349]

The exploitation of women (as well as children) as a highly vulnerable group of potential victims is a particularly relevant issue in the context of BHR. Over seventy percent of modern slavery victims nowadays are women and girls.[1350] The predominant group of workers in the international garment industry, excessively often attracting attention for neglect of Human Rights and labour rights, are women.[1351] The victims killed in the collapse of the Rana Plaza building in Bangladesh were mainly female.[1352] Globally, women are overrepresented in informal and part-time work as well as in supply chains of large corporations, where they face sex segregation and are more vulnerable to abuse and exploitation than their male counterparts.[1353] An examination of 189 economies revealed that 59 of them do not contain legislation protecting women from sexual harassment at work.[1354] Additionally, in many States the general legal situation puts women in a legally disadvantaged position, promoting and contributing to women's dependence on corporations, discouraging them from seeking

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[1346] See the research article S. Akhter, S. Rutherford & C. Chu, *Sewing shirts with injured fingers and tears*: *exploring the experience of female garment workers health problems in Bangladesh* (2019), available online at https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/s12914-019-0188-4.

[1347] See Pejic, 'Minority Rights in International Law', 19 *Human Rights Quarterly* (1997) 666.

[1348] Cf. The World Bank, 'Women, Business and the Law 2019: A Decade of Reform' (Washington, DC, 2019), at 2 f.concluding that economies such as Denmark, France and Sweden have only just reformed in the last decade and reached a standard that comes close to full equality between men and women in the areas covered by the study.

[1349] Working Group on the issue of Human Rights and transnational corporations and other business enterprises, 'Gender dimensions of the Guiding Principles on Business and Human Rights: Report of the Working Group, UN Doc. A/HRC/41/43' (2019).

[1350] Deva, 'From 'business or human rights' to 'business and human rights': what next?', *supra* note 38, at 20.

[1351] Akhter, Rutherford and Chu, *supra* note 1346.

[1352] *Ibid.*, at 2.; see Sect. **B.II.d)** above.

[1353] Working Group on the issue of Human Rights and transnational corporations and other business enterprises, *supra* note 1349, at 4; N. Götzmann *et al.,* 'Women in Business and Human Rights: A Mapping of Topics for State Attention in United Nations Guiding Principles on Business and Human Rights Implementation Process' (2018), at 14.

[1354] Working Group on the issue of Human Rights and transnational corporations and other business enterprises, *supra* note 1349, at 5.

defence and remedies when harm occurs.[1355] A report by the World Bank estimates that the average economy grants women three quarters of the legal rights of men in the measured areas, such as freedom of movement, influence with regard to employment decisions, payment, legal constraints relating to marriage and post-maternal working conditions, asset management and pension regulations.[1356] And even where there are formally non-discriminatory laws, in practice women frequently continue to experience various forms of discriminatory social norms, patriarchal power structures and gender stereotypes.[1357] In practice, women are also often excluded or not consulted in decision-making processes – even where they are directly affected by such decisions – and are therefore severely restricted in their possibilities of defence due to a lack of information and participation possibilities, which means that they cannot realise their rights and claims.[1358] Without male supporters, women are often at the mercy of negative external influences, including business conduct. In addition, there are cultural circumstances that can prevent women from defence against their perpetrators to a much greater extent than men. In summary, it can be observed that in the vast majority of States the legal situation either formally and positively discriminates against women or is blind to the factual discrimination of women in reality. Socio-cultural norms and, in absence of legislative responsiveness, legislation on access to remedies of many States is designed patriarchally.[1359] International regulatory responses to BHR issues ought to outweigh this gender-blindness, by taking into account gender-related disadvantages in both substantive and procedural law in order to ensure that law enforcement and the pursuit of remedies takes place non-discriminatorily and efficiently in practice.[1360] A gender-neutral approach to BHR legislation cannot provide equality; in effect it will result in the promotion and marginalisation of existing discriminatory injustice, as negative impacts on Human Rights are not gender-neutral and therefore cannot be countered by gender-neutral regulations either.[1361]

[1355] Cf. Gläßer and Kück, *supra* note 256, at 126.

[1356] The World Bank, *supra* note 1348, at 3 f.

[1357] Working Group on the issue of Human Rights and transnational corporations and other business enterprises, *supra* note 1349, at 4.

[1358] *Ibid.*, at 5.

[1359] Deva, *supra* note 1211.

[1360] *Ibid.*

[1361] Cf. Working Group on the issue of Human Rights and transnational corporations and other business, 'Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms (UN Doc. A/72/162)' (2017), at para. 26 ff; Working Group on the issue of Human Rights and transnational corporations and other business enterprises, *supra* note 1349, at para. 17 et seqq.

The TRD repeatedly gives account to the necessary gender-sensitivity within its provisions: gender-related differences in relation to women are referred to both in the identification and in the prevention (Art. 6 Sec. 4 lit. b), Art. 16 Sec. 3, Sec. 4) as well as remedial processing of negative corporate Human Rights impacts (Art. 4 Sec. 2 lit. e)).[1362] Additionally, the general need for gender-sensitivity is anchored in the preamble of the TRD. Although no concrete measures for resolution of gender-related differences are specified in the TRD itself, the drafts of the future BHR treaty are thereby ahead of the national BHR-related and modern slavery legislation of many States.[1363] The latter fail to address gender-based differences, although the UNGP recognize gender inequality as an issue to be responded to within the operationalisation of its principles as well.[1364]

However, given the particular relevance of gender inequality in labour regulation, modern slavery and BHR issues in a more general regard, a more positivist approach than the drafts implement to date will arguably be required. In order to not only formally empower women in comparison to their male counterparts, it will be essential to shape gender-transformative remedies. Such a gender-transformative legal enforcement system has been proposed in connection with the UNGP already – remedial laws are considered gender-transformative when they actively address the problems of patriarchal norms and one-sided power relations and provide compensation particularly for such inequalities.[1365] Mandatorily, this will require not only the neutralisation of formally discriminatory regulations, but rather the positive discrimination of women enshrined in law.[1366] Such positive discrimination of women in order to resolve inequalities might materialise in simplified access to financial legal aid, increased protection for female victims and witnesses, the possibility of anonymous complaints or legal actions in special circumstances, facilitation of evidence, mandatory participation of women's rights organisations or specific acceleration of proceedings. In addition, the gender-sensitivity of the judiciary and decision-making bodies should be increased.[1367] Judges, arbitrators and judicial staff might be required to undergo further training and education in this respect. However, arguably the most effective and transformative measure would be to stipulate a mandatory composition of judicial and other decision-making bodies requiring at least one woman wherever possible, or, at least, to require the consultation of a female expert where

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[1362] See Deva, *supra* note 1211 Promoting the necessity of a gender-sensitive approach with regard to identification, prevention/mitigation and remediation of Human Rights risks and abuses.

[1363] Cf. *ibid.*

[1364] See the preamble of the UNGP as well as the commentary on Principle 26, United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 29.

[1365] Working Group on the issue of Human Rights and transnational corporations and other business enterprises, *supra* note 1349, at 10.

[1366] See Deva, *supra* note 1211.

[1367] The World Bank, *supra* note 1348, at 24.

gender-related impacts of the case at hand become relevant. Obligatory female appointments are usually a subject of discussion with regard to the regulation of the private sector, i.e. in the boards of directors and management positions of business enterprises in order to enhance societal and economic gender equality and the protection of women. Such regulations will improve the situation of women with regard to BHR issues, raising awareness for women's rights and preventing the occurrence of violations in the first place (it would reduce the incidence of gender-based Human Rights violations and at the same time reduce the risk of marginalisation of gender-based inequalities). However, in addition to such a bottom-up approach, women should also be directly involved in the process of judicial and non-judicial remediation after a gender-related violation has occurred, in order to guarantee sensitised application and enforcement of the law.

2. State-Based Judicial Mechanisms and the Hague Rules on Business and Human Rights Arbitration

In addition to the substantive requirements that ought to be met by remedial mechanisms for enforcement of the future BHR treaty, there is also the question of the type of means or procedures required to provide victims with effective remedies. As briefly outlined above, in some jurisdictions victims of corporate Human Rights violations might face 'technical barriers', preventing them from asserting legal claims. Such technical barriers can be, for instance, dysfunctional courts, a lack of resources and infrastructure for state-based enforcement (i.e. leading to over-burdened courts and significant delays), a lack of expertise with regard to Human Rights abuses in the BHR-context, underdeveloped judicial systems or corruption issues among representatives of the judiciary and the State government.[1368] Domestic state-based judicial remedial systems have been insufficient in the past when it comes to redressing business-related Human Rights abuses, especially in cases with a transnational dimension. They have been identified as '*patchy, unpredictable, often ineffective and fragile*'.[1369] Flawed judicial systems often coincide with an already unsatisfactory Human Rights situation, particularly in low-wage, economically weak developing states. These States will often lack the resources or the will to establish an independent and resilient judiciary in accordance with the rule of law. However, it must be noted that the NAPs which many, primarily European, states have adopted to date in order to implement the recommendations of the UNGP reveal that precisely these states tend to only poorly reflect on existing structural malfunctions and barriers within their remedial systems

[1368] European Parliament, Directorate-General for External Policies, 'Access to legal remedies for victims of corporate human rights abuses in third countries' (2019), at 15; Gläßer and Kück, *supra* note 256, at 125.

[1369] United Nations Human Rights Council, *supra* note 1263, at 3.; Cronstedt and Thompson, *supra* note 1094, at 66.

when it comes to BHR.[1370] Arguably, the negligence with regard to their own insufficiencies might be due to the conviction of functioning of their own established judicial order. However, the Human Rights Committee has identified deficiencies with regard to the judicial order in many industrialised states that hinder victims in their attempts to claim judicial remedies.[1371] Therefore, obstacles to be compensated for in individual law enforcement relating to the organisation of state-based processes are by no means exclusive to developing states with a supposedly weak or poorly functioning judicial apparatus. However, there are jurisdictions in which such 'technical' barriers of judicial redress are likely to accumulate and to deprive affected persons of effective remedies at a more intensive scale. These states, in turn, precisely attract such corporations and investors, which tend to set low standards for their Human Rights compliance, but all the more demanding standards regarding the cost-efficiency of their operations. In jurisdictions where both attractiveness as a low-cost business location and susceptibility to dysfunctionalities with regard to the rule of law coincide, the main case of application of the future BHR treaty will be found.

Human Rights violations attributable to businesses are not subject to geographical borders. Rather, they can occur and do occur anywhere in the world where there is business and economic activity. In reality, however, the phenomenon of severe corporate Human Rights violations occurs disproportionately often in developing states in the regions of Southeast Asia and Northern and Central Africa. This is not surprising, since the regularly inferior legal position of both workers and consumers in these national legal orders, as well as the economic dependence on foreign investment of many of these states, make this ground a paradise for these kinds of businesses – less diligent and concerned in the protection of Human Rights. Transnationally operating businesses often deliberately choose locations to outsource commercial processes in jurisdictions where an immature legal Human Rights situation and a weak judicial infrastructure can be exploited. Additionally, states with weak democratic institutions are more vulnerable to corporate pressure and may be hindered more easily by business actors to change an inadequate legal situation.[1372] In other words, legal leniency in some states attracts *transnationally* operating businesses and provides fertile ground for both corporate Human Rights violations on a frequent basis and denial of effective remedies.[1373] Those jurisdictions that are most often the scene of corporate misconduct concomitantly expose victims to institutional deficits.[1374] The main application of the future BHR treaty, thus, will be in those jurisdictions where there is a particular need to balance the

[1370] Cf. van Ho, *supra* note 151, at 115 f.

[1371] *Ibid.*, at 118.

[1372] Garrido Alves, *supra* note 39, at 12.

[1373] *Ibid.*

[1374] Cf. *ibid.*, at 32.

situation of fair and effective remedies. To illustrate this interplay, one must only imagine the fire in the Pakistani garment factory in 2012 happening in the home country of the factory's largest customer, Germany, instead. Not only would the subsequent remedial procedure have turned out more beneficial for the victims, but – more importantly – a fire would arguably not have occurred in the first place. Human Rights violations, especially of this size and effect, will not occur or at least occur less often in States where businesses actually must calculate with consequences, thus, where legal protection of and compensation for victims works. The largest practical area of application of the future BHR treaty will in all probability arise in States where access to justice is in need of improvement anyway. Therefore, a future BHR treaty that is practically based on an assumption of a reliable remedial enforcement mechanism at the national level, without providing for safeguards to correct any possible barriers with regard to a dysfunctional or unjust national judiciary ~~regard~~, lacks responsiveness, preventive effect and to some extent even a sense of reality. Thus, to provide for an accessible alternative to domestic judicial redress for victims is essential for the treaty's effectivity.

The drafts for the future BHR treaty are not blind to this challenge. Art. 9 Sec. 5 TRD appears to respond to the risk of unfair remedial processes in host states and provides for the possibility of extraterritorial law enforcement, granting jurisdiction to courts abroad where there is some link to the envisaged place of trial.[1375] The provision of extraterritorial jurisdiction to foreign courts will be of great significance. On the one hand, it creates the possibility of recourse to neutral institutions outside one's own legal and political order and, on the other hand, it creates the possibility of effective and direct action against parent companies or buyers abroad, which is often the more promising option, as the latter have more extensive resources to satisfy the victims' claims for compensation as compared to host state subsidiaries and suppliers.[1376] In this respect, extraterritorial jurisdiction is in some ways the necessary procedural consequence of the extension of due diligence obligations across entire supply chains, since liability for the downstream parts of the supply chain is realised in procedural terms. Nevertheless, extraterritorial jurisdiction will not serve to provide victims with effective remedies, if the substantive law on the basis of which a competent foreign court has to decide is not designed in accordance with the rationale of BHR regulation.[1377] Purposeful substantive standards are essential in order to revitalise jurisdictional provisions. Even where the national judiciary is functioning properly, courts will

[1375] Cf. *ibid.*, at 33; Sanger, 'Transnational Corporate Responsibility in Domestic Courts: Still Out of Reach?', 113 *AJIL Unbound* (2019) 4, at 5.

[1376] Garrido Alves, *supra* note 39, at 32 f.

[1377] Cf. the *KiK-case,* which has been filed before German courts but dismissed on the basis of Pakistani law, see Sect. **B.II.1.c)** above.

only be able to apply BHR regulation if the future treaty has been fully implemented in the national legal order of the contracting states before. If the treaty is not or not correctly transposed into national law, national courts will be deprived of a sufficient basis for a decision and opportunity to hold a balanced process in accordance with the BHR to effective remedies in the first place. A legal regime which covers relevant abuses and clearly articulates the different forms and levels of corporate involvement giving rise to legal liability is the first precondition for the realisation of effective remedies.[1378] Principally, national state courts may also refer to international treaties as a basis for their decisions, e.g. as an interpretative aid – the applicable scope and the status of PIL in the national legal orders varies according to the domestic constitution[1379] – this will usually not be possible in a way that is not covered by the national legal framework of the respective State. Ultimately, it is the national legal order that national courts have to adhere to, are used to and may legally deviate from to a limited extent only. Even if theoretically possible, one cannot speculate on the fact that national courts will necessarily apply international standards and, moreover, do so in a way that questions and challenges the national legislator.[1380] Additionally, the permanent composition of national courts regularly lacks the necessary expertise for the assessment of cases relevant to PIL, especially where international standards have not been properly transferred into the national legal system or individual claims even contradict national laws. Arguably for some of the above reasons it may often be observed in practice that victims of corporate Human Rights violations who have not been able to access justice in their own home state find it difficult to do so abroad, even where formally legal recourse is available.[1381]

Second, while extraterritorial jurisdiction will extend the possibilities for individuals seeking remedy and could remedy the problem of unjust law enforcement mechanisms on the ground, it creates entirely new challenges for victims. To seek remedy in a foreign legal order provides for challenges such as language, increased costs and organisational efforts, lack of factual accessibility as well as familiarity with and understanding of the laws and legal system.[1382] There is a risk that litigants will already fail due to the many formalities connected with formal court proceedings abroad, especially if the target State of proceedings itself has

[1378] As has been already briefly mentioned above under Sect. C.III.1., cf. United Nations Human Rights Council, *supra* note 1263, at 7, 8. As has been already briefly mentioned above under Sect. C.III.1., cf. United Nations Human Rights Council, *supra* note 1263, at 7, 8.

[1379] Arnauld, *supra* note 465, at 202.

[1380] Cf. for instance the elaboration of domestic adjudication in Sanger, *supra* note 1375, at 7, 8.

[1381] Cf. *ibid.*, at 8 f.

[1382] European Parliament, Directorate-General for External Policies, *supra* note 1368, at 15.

not taken the necessary mechanisms to create a BHR adequate procedural and material law situation.

Given this background, in particular cases it might be the more advantageous route to delegate the decision on a BHR dispute away from the legal system of an individual state and its national courts to non-state-based remedial mechanisms. However, the drafts for the future BHR treaty imply that traditional state-based judicial proceedings remain the main envisaged remedial mechanism for individual law enforcement. This results at least from Art. 7 TRD, which predominantly refers to judicial remedies as regards the requirements for the procedural design of remedial mechanisms it sets. General IHRL requires states to provide effective remedies for Human Rights violations by third parties, even outside the BHR-context.[1383] The domestic judicial systems are the core point of justice and law enforcement and regularly prioritised within initiatives to establish effective remedial mechanisms.[1384] A respective prioritisation is required for reasons of sovereignty, since adjudication over persons subject to the jurisdiction of a state is a classic expression and also a claim arising from the sovereignty of a state.[1385] However, given the abovementioned shortcomings of state-based judicial remedies and the difficulties in compensating for them, it appears appropriate to pay greater attention to alternative remedial mechanisms, i.e. non-state based and non-judicial law processes, as envisaged in Principles No. 27 ff. UNGP as part of the operationalisation of access to effective remedy. Alternative remedial mechanisms are generally recognised as part of the possible remedial framework in Art. 7 Sec. 1 TRD, but only of little relevance in the drafts of the future BHR treaty itself. Where the judicial infrastructure does not realistically allow for access to effective remedy in terms of the third pillar of the UNGP in certain states, there should be a possibility to extract this aspect from the influence of that state. Furthermore, the risk posed by mere ritualistic commitment of individual states becomes less of a real risk to individuals, if the accessibility of remedies is at least partially removed from state discretion.[1386]

The UNGP provide for three categories of remedial mechanisms, which might serve as an instrument to operationalise the objective to provide effective remedies in BHR disputes. These are traditional judicial state-based redress procedures before the regular courts of a state and non-judicial procedures such as arbitration and dispute resolution before public bodies, but also purely private, internal business grievance mechanisms entirely independent

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[1383] Cf. United Nations Human Rights Council, *supra* note 1263, at 3; see the commentary on Principle 25 UNGP, United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at 27.

[1384] United Nations Human Rights Council, *supra* note 1263, at 3.; United Nations Economic and Social Council, *supra* note 289, at para. 39 ff.

[1385] Shaw, *supra* note 79, at 483.

[1386] Cf. Ford and Methven O'Brien, *supra* note 558, at 1247.

from State resources.[1387] Accordingly, legal remedies by which remediation of individual damages might be sought must not necessarily require a court proceeding. On the contrary, the Working Group on BHR finds that in order to meet the need for effective remedies, a variety of different means should be sought, including non-judicial state-based mechanisms such as arbitration or mediation facilitated by state institutions, as well as non-judicial non-state mechanisms such as internal company grievance mechanisms for employees and consumers or customers.[1388] Non-state-based grievance and remedial mechanisms generally have the potential to fill the existing accountability gap in BHR and provide effective remedies to victims.[1389] Recently, Human Rights experts have elaborated a framework for another special kind of remedial mechanism, non-state based and non-judicial arbitration of BHR disputes, called *The Hague Rules for Business and Human Rights Arbitration (**'The Hague Rules'**)*.[1390] Whereas the UNGP already require States to facilitate access to non-state-based and non-judicial grievance mechanisms in order to comply with the requirement to provide effective access to remedy in Principle No. 29 UNGP, the arbitration procedure as envisaged in the Hague Rules does not fit into any of the categories of remedial mechanisms of the third pillar of the UNGP. It is independent of the judicial resources of states, yet not business-internal and, additionally, it is internationally applicable. However, international arbitration under the regime of the Hague Rules ought to serve the implementation of the remedial component of the UNGP and is, according to the view expressed here, a particularly promising and feasible mechanism for the realisation of effective individual law enforcement with regard to the future BHR treaty. [1391]

Outside the context of BHR, arbitration has already proven to be an effective instrument for the operationalisation and enforcement of international treaties. International Trade and Investment Law, which is based on the arbitration system of the ICSID arguably constitutes the currently most effectively applied field of IL. Most certainly, its success is enhanced by the fact that the investors protected by this field of law are granted, secure and direct access to independent international arbitration mechanisms, to which States as defendants have

[1387] Principles 26 ff. of the UNGP, United Nations Office of the High Commissioner on Human Rights, *supra* note 692.

[1388] McGregor, *supra* note 1313.

[1389] United Nations Human Rights Council, *supra* note 1263, at 3; See as well United Nations Office of the High Commissioner on Human Rights, *supra* note 692, at Principle 31.

[1390] Center for International Legal Cooperation, 'The Hague Rules on Business and Human Rights Arbitration' (The Hague, 2019).

[1391] Kriebaum, 'Protecting Human RIghts Through International Adjudication: The Hague Rules on Business and Human Rights Arbitration', 114 *Proceedings of the ASIL Annual Meeting* (2020) 149, at 149.

committed themselves by way of investment treaties.[1392] The future BHR treaty, which in a way is supposed to be the counterpart to the Trade and Investment Law, ought to become a similarly effective legal regime by way of a subtle combination with the Hague Rules. In the following, I intend to demonstrate to what extent the remedial regime developed by the Hague Rules already addresses many of the procedural peculiarities the future BHR treaty ought to respond to. At the time of the endorsement of the UNGP, the Hague Rules did not yet exist as an operationalisation measure to include in the protect, respect, remedy framework. The future BHR treaty, on the other hand, could explicitly include the Hague Rules as a measure for the provision of effective remedies and thereby outweigh the risk of further negligence of individual law enforcement as a key element and concern of domestic BHR regulation.

Just as direct corporate Human Rights obligations cannot and are not supposed to substitute for State Human Rights obligations, non-judicial or non-state-based grievance mechanisms cannot and should not replace or substitute for the regular judicial law enforcement regimes of States. However, they may well complement these traditional mechanisms where just results and equality in remedial processes cannot be guaranteed.[1393] The project leading to the adoption of the Hague Rules was initiated precisely in order to elaborate an alternative mechanism by which victims of corporate Human Rights violations could seek remedy where the traditional judicial process reaches its limits, prompted by the outcome of the case *Kiobel v. Shell*, which has already been briefly touched upon in this paper.[1394] The Hague Rules ought to be regarded as a way of complementing other remedial mechanisms, particularly state-based domestic court proceedings.[1395]

The Hague Rules were published in December 2019, developed by the Business and Human Rights Arbitration Working Group, assisted by the Centre for International Legal Cooperation and under the lead of former judge at the ICJ *Bruno Simma*. Their goal is to establish a framework regulation for non-state BHR-related grievance mechanisms, as foreseen in Art. 31 of the UNGP.[1396] They provide a procedural framework for international arbitration, based

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[1392] Alvarez, '3 State Sovereignty is Not Withering Away', in A. Cassese (ed.), *Realizing Utopia*: *The Future of International Law* (2012), 26 at 31.

[1393] Cf. United Nations Human Rights Council, *supra* note 1263, at 5.Just as, in the view held here, direct corporate Human Rights obligations could complement State obligations, where the latter do not appear to be appropriate or sufficient. Cf. United Nations Human Rights Council, *supra* note 1263, at 5.Just as, in the view held here, direct corporate Human Rights obligations could complement State obligations, where the latter do not appear to be appropriate or sufficient.

[1394] Kriebaum, *supra* note 1391, at 149.

[1395] Cf. Cronstedt and Thompson, *supra* note 1094, at 69.

[1396] As pointed out within their preamble, see Center for International Legal Cooperation, *supra* note 1390, at 13; Kriebaum, *supra* note 1391, at 149.

on the general 2013 UNCITRAL Arbitration Rules, but adjusted selectively where necessary in order to respond to the special circumstances and particularities related to BHR disputes.[1397] In order for a non-judicial mechanism to be sufficient to provide effective remedy in terms of IHRL, the envisaged processes must at a minimum enjoy independence; have the competence to adjudicate complaints applying fair hearing standards; make declarative determinations as to whether a violation impairing rights has occurred; and order appropriate reparation, including, but not limited to, compensation.[1398] In general, international arbitration as based on UNCITRAL meets these requirements. Arbitration as a concept therefore is suitable to address the challenges relating to the half-hearted realisation of the third pillar of the UNGP.[1399]

The Hague Rules and the future BHR treaty have been created independently of each other, however, both on the basis of and with the aspiration to concretise and shape the guidance provided by the UNGP. The Hague Rules and the future BHR treaty have great potential to complement one another, benefiting from each other's strengths and making up for eventual weaknesses. International arbitration offers certain differences compared to state-based judicial mechanisms for remedies, which in the context of BHR-related disputes can be advantageous for victims of Human Rights violations. In arbitration, the parties consensually submit a dispute to an independent, non-governmental decision-making body.[1400] Adjudication takes place before an independent tribunal, consisting of experts to the selection of which the parties to a dispute can contribute to a certain extent, subject to any predetermined requirements regarding the person and qualities of the arbitrator.[1401] Arbitration may, thus, offer a neutral forum of dispute resolution, independent of both the affected States and any influence by business parties.[1402] Dispute resolution by means of arbitration is to be distinguished from mediation, which is explicitly provided for in Art. 6 Draft Optional Protocol to the future BHR treaty. States joining the Optional Protocol are meant to create a National Implementation Mechanism, which is supposed to have investigative and reporting powers to a certain extent, but as regards dispute resolution is designed to take on

[1397] Kriebaum, *supra* note 1391, at 149 f.

[1398] International Commission of Jurists, *supra* note 290, at 16.

[1399] Cf. Mahmutaj, *supra* note 1221.

[1400] For a detailed elaboration on the definition of arbitration see G. B. Born, *International Arbitration* (2021), at 2 ff.

[1401] *Ibid.*, at 3.

[1402] M. Doe, S. Ratner & K. Yiannibas, *Arbitrating Business and Human Rights Disputes*: *Public Consultation on the Draft Hague Rules on Business and Human Rights* (2019), available online at http://arbitrationblog.kluwerarbitration.com/2019/06/27/arbitrating-business-and-human-rights-disputes-public-consultation-on-the-draft-hague-rules-on-business-and-human-rights-arbitration/.

the role of a mediator only.[1403] A differentiation is therefore necessary in view of the question as to what extent the inclusion of the Hague Rules offers added value in addition to this National Implementation Mechanism, which already provides for specifications for the operationalisation of a non-judicial grievance mechanism, in accordance with the third pillar of the UNGP. Both arbitration and mediation are non-judicial processes based on the consent of the parties to a dispute. However, mediation is a process moderated by a neutral party, which provides for one possibility of successful termination only, namely an amicable solution agreed to by all parties.[1404] However, mediation cannot result in a final decision resolving the dispute between the parties, which is precisely the objective of adjudication by means of arbitration. In this regard, arbitration is rather comparable to a state-based judicial mechanism than to mediation. In particular, the decisions of the arbitrator are usually legally enforceable, even against the will of a burdened party, whereas the parties to a mediation are basically free to decide whether or not to implement the outcome of the mediation.[1405] Arbitration, thus, brings with it the strengths of state-based court proceedings without necessarily being dependent on insufficient State resources and judicial infrastructure in individual cases. This makes arbitration a particularly suitable tool with regard to the technical barriers to access to remedy that have been identified above. Mediation as a remedial mechanism, thus, provides for a lower escalation level compared to arbitration.[1406] The Hague Rules on arbitration could be combined with the Draft OP to the future BHR treaty in a respectively graded manner. They could come to application in predetermined cases only, i.e. where an amicable dispute resolution by means of mediation has failed or where it is foreseeable from the outset that such a procedure brings no prospect of success for the case at hand.

The arbitration procedure is not bound to permanent procedural laws and therefore offers the parties to the dispute greater flexibility in the design of the process and allows for the adaptation of the process to individual needs in special procedural situations. Generally, this flexibility of design extends to the choice of location, language, application of laws and the choice of arbitrators.[1407] Accordingly, the advantages of arbitration are particularly perceivable in disputes of international dimensions, as it allows for the overcoming of any barriers of language and conflicting laws, but – perhaps more importantly in BHR disputes – enables the parties to establish greater neutrality when granting the possibility to select

[1403] N. Bernaz, *A Commentary of the Draft Optional Protocol to the Business and Human Rights Treaty* (2018), available online at https://rightsasusual.com/?p=1292.

[1404] Born, *supra* note 1400, at 4.

[1405] *Ibid.*, at 3, 4.

[1406] Cf. Cronstedt and Thompson, *supra* note 1094, at 68.

[1407] See Born, *supra* note 1400, at 6 ff.

arbitrators and a procedural environment operating independently from political and economic influences streaming from a particular host or home State.[1408] Additionally, adjudication of BHR-related disputes by means of arbitration could allow relatively easy, harmonious and particularly speedy enforcement of awards everywhere around the world on the basis of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and UNCITRAL, thus, exploiting another existing and recognised legal resource to deal with the regulatory matter of BHRs at the enforcement level.[1409] Such operationalisation could contribute significantly to legal certainty and facilitate work for domestic institutions.

The remedial process as envisaged by the Hague Rules intends to exploit the natural flexibility and advantages of arbitration in a purpose-oriented manner, designated to create a balance of interests adapted to the procedural situation in BHR-related disputes. While based on the *Arbitration Rules of the United Nations Commission on International Trade Law of 2013*,[1410] the Hague Rules precisely attempt to respond to and balance the inherent procedural inequality of arms.[1411] In order to achieve this objective, the Hague Rules provide for special regulations and possibilities with regard to the burden of proof and allocation of costs in the proceedings, both of which have been identified as two of the greatest barriers and sources of deterrence to victims of corporate Human Rights violations.[1412] However, it must be noted that the Hague Rules do not contain restrictions regarding the circle of potential parties to the dispute.[1413] Thus, they are generally applicable to all kinds of potential stakeholders to a BHR dispute, namely individuals, businesses, States, NGOs, international organisations, labour unions and similar institutions.[1414] Still, the protective provisions of the Hague Rules will have a particularly great impact on individuals and appear primarily victim-oriented. Necessarily so, as individuals are the most vulnerable group from the aforementioned stakeholders, and BHR as regulatory subject-matter aims to legally balance the subordination relationship between businesses and individuals, as has been found above.

Art. 18 para. 1 of the Hague Rules is one particularly victim-oriented provision. As a general principle, this provision calls for the arbitrators to arrange the proceedings in an *appropriate*

[1408] *Ibid.*, at 8.

[1409] *Ibid., at 9 f.* Cassell and Ramasastry, *supra* note 311, at 34; Gläßer and Kück, *supra* note 256, at 125 f.

[1410] UNCITRAL Arbitration Rules, 15 August 2010.

[1411] Winarsky Green and McKenzie, *supra* note 897..

[1412] Cf. Center for International Legal Cooperation, *supra* note 1390, at 3; for the identified issues procedural law needs to respond to in BHR dispute settlement see above, Sect. C.V.1.

[1413] Winarsky Green and McKenzie, *supra* note 897.

[1414] *Ibid.*

manner. According to the commentary to the provision, appropriateness refers to the fairness and efficiency of the arbitration process.[1415] It follows that in exercising their discretion, arbitrators would be generally required to consider means to compensate the regularly disadvantageous procedural position of victims. Art. 18 para. 5 concretises such an appropriate exercise of discretion, allowing arbitrators to protect the confidentiality of the identity of a party even *vis-à-vis* the other party to a dispute.[1416] Consequently, in specific individual constellations, business parties to a BHR arbitration based on the Hague Rules will not know the identity of their claimant, which would not be possible under general rules of civil procedural law. As has been noted above, victims of corporate Human Rights violations, especially women, might be afraid to enforce their rights due to further imminent victimisation or discrimination. The possibility to enforce rights and claims anonymously or at least under strict confidentiality might therefore constitute a great relief for victims and contribute to their willingness to enforce their rights after an abuse has occurred.

Art. 32 Sec. 2 of the Hague Rules provided for another possibility for the tribunal to exercise discretion in order to establish procedural fairness and equality of arms. It addresses the difficulties with regard to evidence and proof that victims of corporate Human Rights violations are likely to face when substantiating their claims. It allows arbitrators to deviate from the legal maxim of *actori incumbit onus probandi* referred to above, which normally would constitute the default-rule in arbitration according to Art. 31 Sec. 1 of the Hague Rules.[1417] Although this maxim may not seem to impede procedural fairness at first sight, in BHR disputes it will often factually prevent victims from realisation of their claims and fuel their inferiority in relation to businesses, as found above. To provide evidence will often require insight and intervention into a business' internal organisation and processes, which is simply beyond the claimant's control and influence. In addition, it will often involve a financial and organisational effort that is difficult to bear for the regularly economically weak claimants of BHR disputes. Inflexible allocation of the burden of proof may consequently counteract procedural fairness.[1418] In response, Art. 32 Sec. 2 of the Hague Rules has been designed to

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[1415] Center for International Legal Cooperation, *supra* note 1390, at 38. Center for International Legal Cooperation, *supra* note 1390, at 38.

[1416] See the commentary on Art. 18 para. 5 of the Hague Rules Center for International Legal Cooperation, *supra* note 1390, at 38.

[1417] This legal maxim arising from Roman Law is recognized in varoious kegal orders, such as the United States, France or Germany (where it is better known as the "Rosenbergsche Formel"); However, it has also been explicitly referred to within the application of Intenational Law, such as by the ICJ in *The Case of Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* International Court of Justice (2010) International Court of Justice Reports of Judgements, Advisory Opinions and Orders, 639, at 660.

[1418] Cf. United Nations Human Rights Council, *supra* note 1263, at 17. Cf. United Nations Human Rights Council, *supra* note 1263, at 17.

grant arbitrators a broad, general, and flexible discretion to valuate evidence and any presentation of parties in a manner adjusted to the circumstances of the case and in line with the general provision of Art. 18 Sec. 1. Namely, arbitrators are enabled to reverse the burden of proof, to order the production of particular documents by a party, to limit the scope of necessary evidence and to sanction failure to produce requested evidence with adverse inferences.[1419]

Art. 19 of the Hague Rules provides for the possibility of multiparty claims and, thus, responds to another specific feature of BHR disputes, namely that the impact of corporate Human Rights violations frequently affects a large number of persons, may often result in mass harm situations and, thus, may require mass actions in order to realise sufficient legal redress.[1420] As already mentioned above, this ought to be sufficiently taken into account in the context of creation of remedial mechanisms for BHR disputes and is superficially envisaged within the drafts for the future BHR treaty already.

Finally, the regulations on the allocation of procedural costs, Art. 53, 54 of the Hague Rules, provide for some relief for victims of corporate Human Rights abuses seeking to enforce their claims. The default-rule on the allocation of procedural costs is contained in Art. 53 Sec. 1 sent. 1 of the Hague Rules, placing the financial burden and risk on the unsuccessful party to a dispute. However, by virtue of Art. 53 Sec. 1 sent. 2, the tribunal might allocate the costs differently if it considers such an allocation appropriate in order to establish a fair and balanced procedural situation between the parties. This regulation has encountered some criticism.[1421] For although the basic possibility of a victim-friendly distribution of costs exists even in the event of a defeat, there is a lack of sufficient concretisation here that is actually able to counteract a financial deterrent for victims in practice. It is not specified under what circumstances tribunals should deviate from the default-rule of Art. 53 Sec. 1 sent. 1 of the Hague Rules. '*Loser pays all'* remains the starting point for all considerations of cost allocations lacking clear and explicit exceptions. Consequently, claimants must calculate with precisely this situation when considering the initiation of any proceedings, as they do not know in advance whether and how the tribunal will exercise its discretion regarding cost allocation.[1422] More detailed guidance on deviation in terms of Art. 53 Sec. 1 sent. 2, such as predetermined factors and conditions when a cost reallocation by the tribunal can and should

[1419] Commentary to Art. 32 of the Hague Rules, atCenter for International Legal Cooperation, *supra* note 1390, at 61.

[1420] Cf. the commentary at *ibid.*, at 39 f.

[1421] Gläßer and Kück, *supra* note 256, at 131.

[1422] *Ibid;* L. Sachs *et al.,* 'The Business and Human Rights Arbitration Rule Project: Falling short of its access to justice objectives' (2019), at 7.

take place would have been helpful and easy to integrate but are missing even in the commentary to the regulation.[1423]

Notwithstanding their aforementioned contributions to a fair and victim-friendly dispute settlement in relation with BHR issues, the Hague Rules heavily rely on the mere discretion of the arbitrators in order to create a balanced procedural situation in conflicts between individuals and businesses. This discretion ought to be designed and applied more purposefully. Strengthening the legal position of victims in BHR disputes depends largely on the performance and sensitivity of the individual arbitrator. There is no general rule or maxim that would require a decision in favour of a victim-friendly application in ambiguous cases. To balance the inequality of arms between businesses and individuals is not the exclusive objective of the Hague Rules. Rather, many provisions relate to the procedural situation of business-to-business with an underlying Human Rights issue, which might give rise to a lack of specificity in this regard.[1424] On their own, thus, the Hague Rules are not a *panacea*. Rather, they require substantive law on the basis of an application and interpretation in accordance with the protective purpose of BHR in the individual-to-business relationship ought to take place. This is where the future BHR treaty could complement the procedural law created by the Hague Rules. The complementarity between the future BHR treaty and the Hague Rules could therefore come to mutual effect in order to achieve the best possible results for the protection purposes of IHRL. The lack of focus on the individual identified within the Hague Rules, which might impede the rationaleffective remedies, could be filled by way of interpretation in the light of the future BHR treaty, which in turn has a more victim-oriented design and is designated to the protection of individuals only. Where the parties to a dispute under the Hague Rules are linked to State parties to the future BHR treaty, arbitrators would be *generally* required to exercise their discretion in favour of individuals on a default basis, e.g. within cost allocation according to Art. 53 Sec. 1 sent. 1 of the Hague Rules. For instance, the TRD provides for the elimination of financial barriers for victims seeking remediation of corporate-initiated harm. Application of Art. 53 Sec. 1 sent. 2 of the Hague Rules in light of the future BHR treaty should therefore contribute to the elimination of financial barriers and associated deterrent effects for victims. In light of the valuations of the future BHR treaty, thus, the starting point for the tribunal's deliberations could be the financial power imbalance between the parties rather than the mere outcome of arbitration. Within the limits of good faith and especially with regard to the abuse of rights (i.e. only if there was a

[1423] Cf. Center for International Legal Cooperation, *supra* note 1390, at 87.

[1424] See S. Haythornthwaite, *The Hague Rules on Business and Human Rights Arbitration*: *Noteworthy or Not Worthy for Victims of Human Rights Violations?* (2020), available online at http://arbitrationblog.kluwerarbitration.com/2020/05/05/the-hague-rules-on-business-and-human-rights-arbitration-noteworthy-or-not-worthy-for-victims-of-human-rights-violations/.

tangible reason for initiating the proceedings), a fixed quota to be borne by the business is at least conceivable, where their claimant is an individual.[1425] Thus, the '*loser pay all'* default-rule could come into full effect in business-to-business disputes, but only in disputes involving an individual if it is in accordance with the object and purpose of the future BHR treaty. Moreover, it has been criticised that a proposed fund for victims of corporate Human Rights violations has ultimately not been integrated into the Hague Rules, costing the instrument some of its potential effectiveness.[1426] Contrarywise, the TRD envisages the establishment of precisely such a fund in its Art. 15 Sec. 7. The envisaged fund, the details of the functioning of which are still to be designed by the State parties, could be applied to disputes that are arbitrated on the basis of the Hague Rules. Non-governmental participants to the sixth OEIGWG negotiation session proposed a mandatory contribution to the fund by certain businesses.[1427] States could for instance be required to impose such mandatory contributions applicable to specific businesses, based on the model, size or turnover of a corporation.[1428] Financing of BHR arbitration from such a fund could respond to the problem of high upfront costs, which usually exceed the costs of constitutional remedies and, thus, might discourage victims even more from seeking remediation and thus lead to the Hague Rules having precisely the opposite to the intended effect.

However, a major general flaw of arbitration remains, namely its dependence on consent.[1429] Arbitration can only take place if both parties to the dispute agree to settle it by means of arbitration, for which the Hague Rules provide no exception.[1430] Why should businesses willingly and freely agree to arbitrate a BHR-related dispute? This appears particularly unlikely given all the aforementioned reliefs and victim-friendly regulations of the Hague Rules, diminishing businesses' favourable procedural pole positions.

[1425] Such a fixed participation of the "stronger" party in the total costs of the settlement of the dispute is similarly provided for in the context of mediation, for example, in Art. 12(4) Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, 11 July 2019; P2B-Regulation.

[1426] Gläßer and Kück, *supra* note 256, at 131.

[1427] United Nations Human Rights Council, *supra* note 277, at 8.

[1428] For instance, there is a comparable fund for tour operators in Germany, who have to pay compulsory contributions into the fund in order to ensure insolvency protection and thus avert the risk of insolvency from their customers. See Bundesministerium der Justiz, *Neuregelung zur Insolvenzsicherung bei Pauschalreisen tritt zum 1. Juli 2021 in Kraft* (2021), available online at https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2021/0630_RSFV.html#:~:text=Voraussetzung%20ist%20wie%20nach%20geltendem,eine%20R%C3%BCckbef%C3%B6rderung%20des%20Reisenden%20umfasst.

[1429] Gläßer and Kück, *supra* note 256, at 126; Haythornthwaite, *supra* note 1424.

[1430] Art. 1 Sec. 1 of the Hague Rules.

First, there are strategical considerations, which, from the perspective of the businesses, may argue in favour of consenting to an arbitration process initiated by a potential victim. The major argument here is the business' image and reputation. Compliance with BHR regulation and voluntary participation in respective dispute resolution can constitute a competitive advantage and figurehead for certain corporations.[1431] As has already been outlined above, consumers in today's wealthy and well-educated information society tend to condemn and boycott businesses for any negative Human Rights management and are even willing to spend more money on products and services that are demonstrably produced or provided within a high standard of CSR.[1432] As for now, this development appears to increase further or at least not to stop in the near future. But even if businesses do not rely on CSR as a marketing measure, no corporation will have an interest in being associated with Human Rights violations. The respective damage to a business' image may well have lasting economic consequences. Lawsuits for Human Rights violations are a very effective means of changing public perception and any affected business will be careful to end them as quickly as possible and to present itself as cooperative, insightful and as courteous as possible towards the victims.[1433] It is one thing to have caused a human rights violation and its associated harm and another to escape its consequences and reparations. In many cases, businesses will therefore be well advised to accept and not to reject every attempt at arbitration. This is particularly true, as, in general, decisions issued by arbitration tribunals have less systematic value and precedential meaning than judgements issues by courts in regular state-based judicial proceedings.[1434] Similar considerations based on the societal perception and reputational risks may have prompted a number of multinational businesses to join the international agreement called the *Bangladesh Accord* after the fire at Rana Plaza in Bangladesh in 2013 (putting a whole branch under massive criticism), and thus to voluntarily agree to dispute settlement through arbitration in BHR-related disputes.[1435] Voluntary submission to BHR arbitration by businesses is, thus, not beyond realistic probability.

In addition, the future BHR treaty itself could address consent as a barrier to law enforcement by way of arbitration. The future BHR treaty could oblige States to subject corporations, e.g. above a certain size or in case of a certain level of severity of Human Rights impact (which businesses will be required to assess anyway in the course of due

[1431] Cf. Börzel and Deitelhoff, *supra* note 1, at 256. regarding the competitive incentive for businesses to engage in BHR issues see also below at Sect. Xx.

[1432] *Ibid.*

[1433] Cf. Gläßer and Kück, *supra* note 256, at 127.

[1434] Sachs *et al., supra* note 1422, at footnote 18.

[1435] Gläßer and Kück, *supra* note 256, at 126.

diligence) to arbitration in accordance with the Hague Rules in case a treaty-related dispute with an individual occurs.[1436] Such a particularly severe impact might exist where important Human Rights of *ius cogens* character are regularly affected by the business' activities, if the likely Human Rights violations at risk are irremediable or if the businesses operate in the utility sector, crucial infrastructure or essential services.[1437] The Hague Rules, at any rate, do not contain any specifics on the modalities to obtain an effective declaration of consent to arbitration, nor are there any corresponding provisions in the model UNCITRAL Arbitration Rules.[1438] Thus, there is room for a solution based on mandatory consent. The European P2B-Regulation, for example, contains a similar obligation for platform operators with regard to mediation.[1439] Admittedly, it can be objected to this example that compelled consent to mediation is easier to justify due to the consensual nature of the mediation procedure itself in contrast to arbitration - even if one party is compelled to mediate, the result cannot usually be enforced against that party's will. On the other hand, the P2B-regulation only concerns business-to-business disputes and thus less unbalanced procedural situations than BHR. In view of the protection of individuals and the goal of establishing procedural equality of arms, a legislatively compelled consent linked to foreseeable preconditions in the specific BHR context therefore appears to be justifiable and does not constitute a general and unreasonable marginalisation to the requirement of consent in arbitration.

In order to operationalise the Hague Rules on a more frequent basis, the infrastructure established in connection with the OECD Guidelines and NAPs introduced by States could be supplementarily utilised. It is certainly inefficient and not in the interest of the victims to have to convene an entirely new tribunal and establish necessary procedural resources for every case of legal dispute. National contact points could support and inform victims in the preparations for such an arbitration and initiate the establishment of an arbitration tribunal, and take over the forwarding to respective entities. At present, national contact points serve two functions. They serve as signposts for businesses regarding their efforts to meet the standards of '*responsible business'* and, second, as independent mediation centres for disputes between individuals and businesses.[1440] This twofold mandate would have to be supplemented accordingly, so that in the event of failed mediation processes, they

[1436] Cf. Cassell and Ramasastry, *supra* note 311, at 34.

[1437] These considerations correspond to the basic idea of a risk-based approach, which can also be found in Principle no. 14 of the UNGP and the accompanying commentary.

[1438] Winarsky Green and McKenzie, *supra* note 897.

[1439] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, *supra* note 1425, Art. 12. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, *supra* note 1425, Art. 12.

[1440] Cf. Cassell and Ramasastry, *supra* note 311, at 32.

accompany claimants of BHR disputes beyond this stage where it is found reasonable. In addition thereto, national contact points could support victims in initiating international arbitration if a conflict resolution at state-based judicial level or within a mediation process fails. According to Art. 6 of the Hague Rules, it is possible to draw on the resources of the Permanent Court of Arbitration (***'PCA'***) as default-authority under application of the special BHR-specific framework of the Hague Rules.[1441] The assigned arbitrators of the PCA are experienced experts in general PIL, and thus also in IHRL, and provide all prerequisites to render a qualified decision in BHR disputes.

All of the illustrated victim-oriented provisions of the Hague Rules have in common one major deviation from the general rules on arbitration, they restrict the flexibility of the superior party to the dispute - the businesses - granting unilateral facilitations and procedural advantages to victims in order to outweigh the factual inferiority of the latter on the procedural law level. Usually, the parties to an arbitration would be granted equal powers to design the procedure and, to a certain extent, the outcome of the arbitration, which is precluded in BHR disputes based on the Hague Rules. The Hague Rules address the essential factors of procedural equality of arms to which the States' special attention ought to be drawn by virtue of pillar 3 of the UNGP and which the drafts for the future BHR treaty address as well. The Hague Rules constitute a suitable procedural counterpart for the future BHR treaty, especially as a means of fallback alternative mechanism where state-based judicial redress is either entirely inaccessible or where it cannot realistically be expected that it will respond to the special procedural situation in BHR disputes. Conversely, the Hague Rules cannot and are not intended to replace state-based judicial remedies altogether. Rather, the UNGP's approach to provide diverse mechanisms in parallel is maintained, which the Hague Rules intend to respond to in one out of many conceivable ways. It has been noted that international arbitration as a remedial mechanism is no *panacea* and has its own inherent weaknesses, which might have adverse impact on victims. These include the requirement of consent, the low precedent effect of arbitral decisions as well as limited possibilities of appeal and review.[1442] A blanket reliance on the Hague Rules for the implementation of the substantive provisions of the future BHR treaty is, thus, out of question, as its might only satisfy very specific purposes of individual law enforcement. If non-judicial mechanisms such as arbitration are used to deal with Human Rights violations, it must be ensured that, where criminal offences are involved, state law enforcement mechanisms and, in particular, criminal sanctions still apply.[1443] The injustice generated by criminal offences cannot be compensated

[1441] Gläßer and Kück, *supra* note 256, at 128.

[1442] Born, *supra* note 1400, at 10.

[1443] McGregor, *supra* note 1313..

by way of arbitration and any such attempt would constitute a violation of the states' own obligations under IHRL.

In principle, however, the Hague Rules might appear as a relatively face-saving and sovereignty-preserving solution for contracting state parties, in order to balance the identified 'technical barriers' to individual law enforcement, relating to the dysfunctionality of the judicial infrastructure and the rule of law in certain host as well as home states. The focus of law enforcement should be on national, public state mechanisms and institutions. To refer individuals to a non-judicial arbitration mechanism may by no means be made a prerequisite for formal court proceedings, and recourse to the ordinary courts of a state cannot be denied by reference to any available means of arbitration – in itself this would constitute a violation of the Human Right of access to court.[1444] The obligation of states imposed by general IHRL as well as the future BHR treaty itself, to establish accessible and adequate judicial procedures in accordance with the rule of law will remain, regardless of any alternative remedial instruments granted to potential victims on a non-judicial or international level.[1445] However, where these fail, the application of international remedies, such as international arbitration must be considered. The Hague Rules ought to be regarded as a possible middle path, preventing both intervention by a foreign sovereign power exercising jurisdiction and unreasonable disadvantages for victims.

[1444] *Ibid;* United Nations Economic and Social Council, *supra* note 289, at para. 39 ff.

[1445] Given this background, it would also be conceivable to create an abstract mechanism for individual complaints against the State on the basis of the incorrect implementation of the future BHR treaty, in particular the violation of its own duty to create an effective remedial mechanism. The individual complaints mechanisms of the Human Rights, first and foremost of the First Optional Protocol of the ICCPR, are not comparable to a 'normal' or ordinary remedial procedure. The decisions and assessments of the bodies involved, e.g. the Human Rights Committee or the Inter-American Court, are not legally binding for the states and are more like 'observations' than enforceable legal titles against the states concerned. Nevertheless, the added value of such instruments should not be underestimated; they are suitable for pillorying misbehaving states, for generating pressure on them to change their behaviour, but also for persuading other allied states to reconsider their cooperation with states in breach of treaties in other areas of international relations as well. The latter, in turn, can be a sensitive means of persuading treaty-breaching parties to relent. In addition, these complaints processes also serve to refine and shape the Human Rights protection regime created by the relevant treaties: a body of case law is created that can serve as a precedent for subsequent proceedings and create legal certainty for those affected. The mere fact that there is an institutional complaints mechanism that is accessible to the Human Rights concerns of those affected and that, where applicable, comparable cases have already been brought forward can have a positive effect on Human Rights protection. Cf. in this regard also Cassell and Ramasastry, *supra* note 311, at 31 ff.

D. Summary and Outlook – Endless Plea for a Realistic Utopia in IHRL

„An invasion of armies can be resisted, but not an idea whose time has come."[1446]

This finding from *Victor Hugo* is characteristic of the legal field of PIL as a whole, but of particular relevance for the subdiscipline of IHRL. Many developments in IHRL and effects it had on other fields, and PIL as a whole, were unpredicted and unimaginable at the time PIL emerged, just as the actual events that gave rise to said legal developments were imposible to foresee.[1447] IHRL is the response of human interests to actual events. In response to globalisation, a societal perception emerged, considering businesses as actors responsible for the common good and not only subject to economic interest and profit maximisation.[1448] The future BHR treaty constitutes an attempt to legally codify such a perception of corporate responsibility for Human Rights and redefine the role of businesses in society. It most certainly may be qualified as an idea whose time has come. This work has intended to outline how the legislation of such an idea ought to look within a future BHR treaty to satisfy its normative dimension. In particular, it focused on the question of the personal and material scope that such a legal source ought to provide, as well as its means of individual law enforcement.

Thereby, it was argued that in addition to the mere protection of substantive provisions of individual Human Rights, IHRL pursues another more abstract regulatory concern, which is to counterbalance any abusive power relations that exist to the detriment of the individuals protected by IHRL. A normatively coherent future BHR treaty ought to serve this purpose. This is crucial for the question of the personal scope of application of a future BHR treaty. In order to determine what kind of businesses are to be regulated by a future BHR treaty, their relationship to individuals and whether it is defined by subordination should be decisive. Factors such as the transnationality, turnover, sector, or number of employees of a corporation are indications for the identification of respective power relationships, but they are not in themselves constitutive for the purposes of IHRL in general and BHR in particular.

Political feasibility has been a factor that has dominated the debate on international BHR regulation since its inception. It is a determining and non-derogable factor in the creation of law. However, within the finding of legislative decisions, it needs to be brought into balance with normative necessities. Such a balance cannot be reached on a one-way-road. Rather,

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[1446] A quote by Victor Hugo from its piece HISTOIRE D'UN CRIME (1852), part II, § 10, quoted by Bassiouni, 'The Discipline of International Criminal Law', *supra* note 140, at 36.

[1447] *Ibid.*, at 33.

[1448] Peters, *Beyond Human Rights, supra* note 868, at 107.

there is a need for convergence on the part of both poles. Normative necessities are not equally important in every legal field – in IHRL, however, they should be accorded the necessary degree of relevance. Normativity, ethical and moral considerations are essential for IHRL. The natural gravity of normative necessities in the context of IHRL must be reflected in legislative decisions. Furthermore, a contemporary approach to political feasibility ought to be applied. In order to determine at what point a balance between normative necessities and political feasibility is reached and what legislative decisions actually ought to be regarded as politically feasible, it should be taken into account that political feasibility itself is a flexible and partly malleable factor, whereas normative necessities, in contrast, cannot be influenced in this way. It may therefore be necessary in individual cases not to tinker with normative necessity but rather with political feasibility in an attempt to bring both factors closer together and into balance. Moreover, it seems that the debate around BHR in terms of political feasibility does not do justice to the fact that political feasibility is quite different now than it was, say, when a first attempt to regulate BHR took place. A more differentiated definition of political feasibility might provide an opportunity to reassess the pros and cons of direct corporate Human Rights obligations, which are objected mainly on the basis of lacking political feasibility.

Regardless of whether the intermediary approach of IHRL is retained in the field of BHR or whether direct Human Rights obligations of businesses are created – the concretisation of its material scope of application will be essential for the effectiveness of a future BHR treaty. This has been largely neglected within the drafts published by the OEIGWG and challenged only sporadically by stakeholders. Within such a concretisation, it must be taken into account that businesses are actors that are fundamentally different from states, and whose direct or indirect obligations in the field of IHRL arise from different rationales and must also provide for a difference in scope. Furthermore, the determination of obligations that should exist in relation to businesses requires a balancing of interests that would not be necessary in relation to the state as the obliged party. This is because businesses themselves have interests and rights that are worthy of protection, which a state must take into account, and which eventually must be weighed against the rights and interests of individuals in particular cases.

Finally, a future BHR treaty, regardless of its concrete material content, should provide for a practice-oriented and victim-friendly enforcement mechanism, at the core of which should be individual law enforcement and in particular, the imposition of civil liability against business actors involved in the occurrence of Human Rights harm. In this context, it is conceivable to follow up on the approach taken by the Hague Rules on Business and Human Rights Arbitration and to introduce an international non-state grievance mechanism allowing victims

of corporate Human Rights obligations to seek justice, even if the domestic legal order or judicial infrastructure does not provide for sufficient possibilities to do so.

The contributions to IHRL that are going to be introduced by virtue of a future BHR treaty ought to be understood as a supplementation of existing legal standards, not a substitution. There is neither an intention nor the necessity to challenge the notion that it is a core responsibility and task of the state to comprehensively protect and promote Human Rights, or that states still carry an immanent risk of seriously and widely endangering Human Rights.[1449]

IHRL is understood a core pillar of PIL. However, normatively appropriate legislation requires the realisation that the concept of international Human Rights protection has never completely matched many funding approaches of PIL and, thus, naturally cannot always take the same course and velocity of development. The emergence of IHRL in itself meant a great '*paradigm shift'* for PIL.[1450] The regulation of BHR issues attempted by virtue of the OEIGWG negotiations, regardless of whether the intermediary approach is maintained or whether those responsible surprisingly choose the direct approach after all, provides further proof of such Human Rights-initiated paradigm shifts in PIL. From a dogmatic and teleological perspective, IHRL to some extent might be regarded as a category of international legislation *sui generis*. In terms of its subject-matter, it regularly appears as a third independent pillar alongside Private International Law and PIL, giving rise to autonomous means of realisation and reform. Unlike the classical understanding of PIL, IHRL does not apply to the coordination of sovereign powers with equal authority. Rather, it applies precisely when it comes to power asymmetries that are susceptible to abuse. To balance the latter is a distinctive feature of IHRL, which in the authors view is not highlighted enough. Therefore, as a field of law, it naturally falls outside the framework of sovereignty, subjectivity, and many other pillars of PIL as such. This finding explains the various necessary exceptions international Human Rights protection requires from some traditional PIL dogmas, such as sovereignty and reciprocity, and it would also allow to justify a more flexible approach to IHRL.

The traditional concepts of state-centrism as well as subjectivity in PIL as a means to determine the extent to which certain actors may be subject to legal obligations, can only claim validity as far as they refer to a regulatory subject matter which might be subsumed under the classical function of PIL, which is the law of coordination between sovereign and equal states. To the extent that a regulatory subject matter exceeds this function, e.g. because the protection of individual rights, private investors or the relationship between

[1449] Ratner, *supra* note 45, at 469.

[1450] Appea Busia, *supra* note 91, at 44.

private actors is intended, both concepts reach their limits and are unsuitable in order to provide for a reasonable regulatory solution. In these cases, it makes sense and is legally and politically feasible, as the examples of ICL or Trade and Investment Law prove, to apply a greater degree of flexibility than usual and to modify the dogmas that supposedly hinder respective regulation. To argue that a corresponding modifiability should not apply in relation to BHR cannot be convincingly defended.

Ultimately, with regard to BHR as a regulatory concern of IHRL, it must be found that the Human Rights objectives of the International Bill of Rights, the UNCh as well as customary PIL cannot be reached without sufficient integration of businesses into the regime of IHRL. Whether such sufficient integration is possible while maintaining the intermediary approach to BHR has been challenged in this work. While most certainly many proponents of a particularly ambitious future BHR treaty can be legitimately accused of oftentimes losing the necessary sense of reality and effectiveness, and even to get lost in *'utopian-idealistic'* experiments of thought,[1451] even advocates of a strict pragmatic-realistic approach to BHR must concede that the regulatory goals pursued with BHR cannot be achieved on the path pursued so far; at least if one assumes that the rhythm of the past sets the pace for the future. To date, only very lengthy staged successes have resulted from such a regulatory course. Credible realism also includes the observation that eventually pragmatism might have been based on assumptions that were not supported in reality. Moreover, a treaty's anticipated broader formal recognition does not necessarily make it more valuable in practice, as the considerations on *'ritualism'* in this paper illustrated. Just as states can sign an ambitious treaty without the will or means of actual implementation, they can also do so with a less ambitious treaty. The risk of non-compliance is simply an inherent and inevitable part of contracting. However, the pressure to implement and the risk of being exposed by a breach of law is higher with the first variant, as ritualistic commitments become more easily identifiable with a clear and ambitious treaty. And to put it in very simple terms: Which appears more helpful to victims of a corporate Human Rights violation: if 50% of an ambitious treaty is implemented or 50% of a weak treaty? For the state, there is the same legal risk of not having complied with half of the agreement in both cases. The ambitious treaty, however, creates the basis for more innovation from its outset, without requiring another lengthy process for reform.

In this regard, one might refer to a perception of the UNGP expressed by the African Coalition for Corporate Accountability, stating that *'the UNGPs, as currently framed and*

[1451] Ford and Methven O'Brien, *supra* note 558, at 1235.

understood (...) are currently failing to change lived realities."[1452] Thus, one might doubt whether the pragmatic approach provided by means of the UNGP actually serves the desired and predicted '*real effects on real people*'[1453] more effectively than a comprehensive binding treaty could.

Whatever form a future BHR treaty will take in terms of its specific provisions, it is desired that it will stand out from the approaches that have been carried into legislation to date and pursue the demands of various norm entrepreneurs to the greatest possible extent, thereby fully exploiting the opportunities of the current '*high tide'* for a future BHR treaty.[1454] In sum, the plea for an ambitious future BHR treaty, which has been repeatedly upheld within this work, intends to equal and fill with content the '*plea for a realistic utopia'* in future IHRL, as is expected of legal scholars wishing to aspire to a realistic utopia as a scholarly endeavour.[1455]

[1452] Deva, 'Multinationals, Human Rights and International Law', *supra* note 43, at 33; African Coalition for Corporate Accountability (ACCA), *supra* note 559

[1453] J. Ruggie, 'International Legalization in Business and Human Rights' (2014), at 4.

[1454] Cf. Deva, 'Conclusion - Connecting the Dots', *supra* note 363, at 474.

[1455] Fasciglione, *supra* note 36, at 31; see Cassese, 'Introduction', *supra* note 435; Peters, *Realizing Utopia as a Scholarly Endeavour, supra* note 10.