1 Introduction

Human rights violations by corporations that operate in more than one state have attracted the attention of legal scholars over the past four decades.[1] The field of business and human rights has, however, been largely silent on private transnational corporations *from* so-called developing and emerging countries (TNC-DECs).[2] If corporations from developing and emerging states are included in the literature, then they are mostly studied in supply chain relations, as subsidiaries of corporations *from* European Union (EU) Member States and other economically developed states.[3] In other words, while human rights research has focused on issues relating to power diffusion, i.e. the growing influence of corporate non-state actors, issues relating to power transfusion, i.e. the rising influence of new – and currently particularly Asian – corporate non-state actors on the global stage, have been largely overlooked.[4]

[1] Some parts of Chapters 1 and 8 of this book have been published in Aleydis Nissen, 'Beyond the Western "Business and Human Rights" Tunnel Vision' (2020) 32 *European Review of Public Law* 1427–59 (subject to editorial changes), and are published herein with the permission of European Public Law Organization.

[2] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2nd edn, Oxford University Press 2013) 199; Florian Wettstein, Elisa Giuliani, Grazia Santangelo et al., 'International Business and Human Rights: A Research Agenda' (2019) 54 *Journal of World Business* 59–60.

[3] There are some exceptions. As discussed later, the return of China to the centre of the international system has attracted attention. The research on civil judicial remediation under the Alien Tort Statute 1789 (US) – discussed further in Chapter 2 (Section 2.3.3) – also needs to be mentioned here.

[4] Cf. Joseph Nye, *The Future of Power* (Public Affairs 2011) 204.

This research gap is surprising for two reasons. First, the continuing context of globalisation makes it necessary to look beyond the Western bias in legal research. Developing and emerging states have significantly fewer capabilities to install business and human rights requirements than economically developed states but TNC-DECs' impact can be powerful. TNC-DECs deploy economic activities on a global scale influenced by the rapid pace of technological change and introduce new products and services in direct competition with products and services that are produced by corporations from economically developed states. Some TNC-DECs even build their businesses through the acquisition of older Western firms. To be clear, TNC-DECs are not just copying the strategies of their Western competitors. TNC-DECs often possess unique competitive traits, such as frugal innovation capabilities and the strength to cope with more evolving government and legal systems.[5] Second, studying TNC-DECs can shed new light on the extensively documented poor track record of economically developed states to hold 'their' corporations accountable for their involvement in human rights violations in developing and emerging states. States often align themselves with the perceived short-term interests of corporations.[6] Globalisation has created a collective action problem: if some states regulate 'their' corporate nationals and invest in serious efforts to protect people impacted by them in third states, then competitors that do not have to respect the same standards (and bear the related costs) might undercut these responsible corporations. While all states are encouraged to hold 'their' corporations – or corporations in their value chains – accountable for human rights violations, their current track record in this matter is rather limited.

This book aims to investigate the conditions under which the EU and its Member States are attempting to overcome this collective action problem by creating an artificial level playing field in which private TNC-DECs can be held accountable for human rights violations abroad.

[5] Ravi Ramamurti, 'Competing with Emerging Market Multinationals' (2012) 55 *Business Horizons* 245; Richard Dobbs, Tim Koller and Sree Ramaswamy, 'The Future and How to Survive It' (2015) 93 *Harvard Business Review* 55.

[6] HRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises John Ruggie – Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) UN Doc A/HRC/8/5 para 22.

Any legal study of a level playing field requires the study of mandatory measures as a matter of regulatory compliance. Voluntary requirements or positive incentives do not impose immediate costs, and therefore do not necessarily create a competitive disadvantage for EU-based corporations. They do not contribute to a collective action problem. Olivier De Schutter and his co-authors carried out extensive and global stakeholder consultations to identify two types of mandatory measure.[7] First, there are direct obligations formulated in a rule. This book studies regulation in laws and trade agreements. Second, there are indirect obligations that offer corporations the opportunity to defend themselves against administrative, civil and criminal violations. This book focuses specifically on civil judicial remediation. By analysing how both types of requirement – preventive and remedial – function in relation to TNC-DECs in our globalised world, this book researches interactions in a multi-layered and multi-spatial order. Three perspectives will be examined: the international perspective (Part I; Chapter 2); the perspectives of the EU and a number of EU Member States (Part II; Chapters 3–5); and the perspectives of selected developing and emerging states (that have established trade relations with the EU) (Part III; Chapters 6 and 7).

As a legal analysis, this research does not attempt to engage in international relations debates. Various scholars have noted that legal researchers should 'avoid rearguing intellectual debates' that have been 'all but settled' in international relations theory.[8] The tools provided by these debates are, nevertheless, useful to trace political dynamics at play in transnational law-making in general and human rights in particular.[9] This research relies on the following models: realism; institutionalism; and constructivism. It has long been established that each model has its explanatory strengths and weaknesses.[10]

[7] Olivier De Schutter, Anita Ramasastry, Mark Taylor et al., 'Human Rights Due Diligence: The Role of States' (2012) www.cidse.org 4–5. See also Sigrun Skogly and Philippa Osim, 'Jurisdiction – A Barrier to Compliance with Extraterritorial Obligations to Protect against Human Rights Abuses by Non-State Actors?' (2020) *Human Rights & International Legal Discourse* 5.

[8] Tomer Broude, 'Behavioral International Law' (2015) 163 *University of Pennsylvania Law Review* 1107–8. See also Stefan Oeter, 'Towards a Richer Institutionalism for International Law and Policy' (2008) 62 *University of Illinois Law Review* 62.

[9] Broude (n8) 1107–8.

[10] Georg Sørensen, Jørgen Møller and Richard Jackson, *Introduction to International Relations: Theories and Approaches* (8th edn, Oxford University Press 2021) 62.

This research will also use the models critically, rather than as objective theories that create objective and universal knowledge.

Realism attends to the constant struggle for power. Where the classic realist approach explains state behaviour by the greedy forces inherent in human nature, which pursue self-interest,[11] the neorealist approach has been devoted to analysing and predicting conditioned state behaviour that is dictated by the anarchic structure of the international system.[12] States act to maximise power and increase their security and second-order interests, including upholding the population's socio-economic wealth.[13] States with the most military power and economic clout can exert defining influence[14] Accordingly, international law is a flexible tool for powerful states to pursue their material power and exercise control over the international agenda.[15]

Like realism, institutionalism perceives international relations in an instrumental manner. But states are sometimes willing to compromise their short-term self-interest in order to achieve bigger, longer-term goals that are also in their interest.[16] Accordingly, states cooperate when the perceived interests of doing so outweigh the costs. The perception of interests is contextual and dynamic. They depend on history, development and learning. Effective regulation and remediation might be considered to be either wise or unwise depending on their potential for maximising payoffs. Andrew Guzman emphasised the importance of reputation.[17] All other things being equal, it is generally, but not always, in a state's interest to protect its reputation by signalling that it is an appealing, cooperative partner. Again, states can object if they do not 'anticipate' getting returns from investments in their reputations or if the payoff of not cooperating is considered to be large enough.

[11] Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (5th edn, Alfred Knopf 1973).
[12] Kenneth Waltz, *Theory of International Politics* (McGraw-Hill 1979); John Mearsheimer, *The Tragedy of Great Power Politics* (W. W. Norton & Company 2001) 46.
[13] Mearsheimer (n12) 55.
[14] Sørensen (n10) 8.
[15] Morgenthau (n11) 271–2; Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press 2005).
[16] Robert Keohane, *After Hegemony* (Princeton University Press 2005).
[17] Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) 35.

Social constructivism argues that the international system is constituted by ideas.[18] There is a focus on identities, beliefs, in-groups and out-groups. Material power and state interests are relevant but only because they have been given certain meanings in social interactions. These interactions are not limited to states. It is often added that non-state actors, including private corporations, non-governmental organisations (NGOs) and international organisations, also participate in transnational networks.[19] They can decide to act as 'norm entrepreneurs' who 'attempt to convince a critical mass of states to embrace new norms'.[20] Through repeated engagement, the network actors can reconfigure the very nature of their identities in such a way that their identities reflect their status of being a party to the network. Accordingly, actors acquire identities by interacting in a multi-layered and multi-spatial order to 'make, interpret, internalize, and enforce rules of transnational law'.[21] The late United Nations (UN) Special Representative for Business and Human Rights John Ruggie explained in this regard that we give international law its normative shape over time through our collective participation in this process.[22]

Before explaining the contribution and methodology of each chapter, it is necessary to draw attention to two conceptual issues. First, there is currently no international agreement that determines when a corporation can be deemed a 'national' of a state. The criteria to define 'corporate nationality' are set by each sovereign state individually and the criteria of one state can overlap with the criteria of another state. These criteria include the place of incorporation, the place where the day-to-day decisions are made and the nationality of the owners. Corporations can also consist of separate legal persons with different nationalities connected through relationships of control. Second, the concept

[18] Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press 2000).
[19] Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stanford Journal of International Law* 283–327; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.
[20] Finnemore (n19) 895.
[21] Harold Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2626.
[22] John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar 2020) 63–86.

of 'transnational corporations' is unclear. In this book, this concept is used to refer to companies that undertake 'transnational' activities. According to the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Intergovernmental Working Group), a business activity is 'transnational' if it

> (a.) is undertaken in more than one jurisdiction or State; or (b.) it is undertaken in one State but a significant part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another state or jurisdiction; or (c.) it is undertaken in one State but has significant effect in another State or jurisdiction.[23]

The first part of this book (Chapter 2) considers the international perspective. This part uses the doctrinal approach to introduce ideas and controversies that surround the legal scholarship on business and human rights. The UN Guiding Principles on Business and Human Rights ('UN Guiding Principles') – endorsed by the UN Human Rights Council (HRC) in 2011 – remain the most comprehensive template to deal with such issues.[24] These principles integrate existing standards and practices under international law and are organised around a three-pillar framework introduced by Ruggie in 2008: the state's duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy for those whose rights have been violated.[25] While the UN Guiding Principles have been extremely influential in putting ideas forward, they have also been criticised as not being comprehensive (or far-reaching) enough. In particular, various UN treaty bodies, Special Procedures and legal scholars have argued that there is an emerging consensus that there exist 'extraterritorial obligations' relating 'to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human

[23] Art 1(4) Intergovernmental Working Group, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises – Third Revised Draft' (2021) www.ohchr.org/

[24] HRC, 'John Ruggie Report – Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework' (2011) UN Doc A/HRC/17/31 Annex (endorsed by UN General Assembly, Res 17/4 (2011) UN Doc A/HRC/RES/17/4).

[25] A/HRC/8/5 (n6).

rights outside of that State's territory'.[26] Chapter 2 then answers the separate question of whether there are legal limitations on the EU and its Member States when regulating and remedying corporate human rights violations committed by TNC-DECs. Import-restrictive measures may appear an attractive solution for states that are increasingly expected (or obliged) to rein in their corporate nationals when they violate human rights in third states. Such measures allow a state to create an artificial level playing field that enforces the same standards across both national and foreign corporations that operate in its market. The issue of a social clause is, however, contested. The separate development of international labour standards in the International Labour Organization (ILO) and trade regulation in the World Trade Organization (WTO) is symptomatic of this debate. The chapter explains that EU Member States are all Parties to the 1994 General Agreement on Tariffs and Trade (GATT) and have limited ability under this treaty to impose import restrictions.[27] The attitude–behaviour gap, the behavioural phenomenon of people's actions not correlating with their attitudes, is used as a theoretical lens in the analysis of the GATT regime to add nuance to the existing debates. Finally, it is explained that each state has acted unilaterally in developing the rules governing the use of civil adjudicative jurisdiction, as their use has not been regulated by international law to any great extent. The two ways in which extraterritorial states can strengthen access to judicial remedies over TNC-DECs are introduced. First, it is explained that the extraterritorial state can support capacity building in the developing or emerging state where corporate human rights violations occur. This analysis is inspired by the constructivist perspective in the Commentary to UN Guiding Principle 10. Second, extraterritorial litigation in business and human rights is discussed. Two lines of research need to be re-assessed in this discussion. The most expansive line of research considers litigation as a key component of a truly global human rights regime. The other line focuses on cost-benefit critiques of extraterritorial remediation for the forum state.

[26] Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 8 ('Commentary to Maastricht Principles').

[27] General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (GATT).

The second part of this book (Chapters 3–5) considers the supranational perspective of the EU and the national perspectives of selected EU Member States. Only regulations that have been adopted with specific reference to the UN Guiding Principles since 2011 are analysed. The existing business and human rights regimes vary greatly in terms of the legal obligations imposed, the sectors and duty-bearers covered, the human rights targeted and the way in which the obligations are monitored and enforced. These regimes can be split into two categories.

The first category of initiatives requires corporations only to 'show' information about the impact of their operations and value chains on human rights. After Ruggie created the 'protect, respect, remedy' framework, such legislation was adopted in South Africa (2009).[28] Section 1504 of the United States (US) Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) also introduced transparency rules in the extractive industries in 2010.[29] After the HRC endorsed the UN Guiding Principles, the EU adopted country-by-country reporting rules that mirror section 1504 for the extractive and logging industries.[30] Furthermore, 'show' regulations relating to human rights have been adopted in Australia, California, India, the Philippines and the United Kingdom (UK).[31] In various EU Member States, transparency laws were also adopted (which may or may not cover a corporation's policies and activities relating to human rights) in response to growing public sensitivity to Corporate Social Responsibility (CSR). In 2014, these led to a regulatory initiative in the EU which exercises the

[28] King III Code of Corporate Governance 2009 (SA).

[29] There is discussion whether Section 1504 Dodd-Frank Act is or should be understood to be 'know and show' regulation. See Aleydis Nissen, 'Stag Hunt: Anti-Corruption Disclosures Concerning Natural Resources' (2021) 1 *Chicago Journal of International Law Online* 1–20.

[30] Art 42(1) European Parliament and Council of the EU, Directive Nr 2013/34/EU on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings [2013] OJ L182/19; Art 6 European Parliament and Council of the EU, Directive Nr 2004/109/EC on the Harmonisation of Transparency Requirements in Relation to Information about Issuers whose Securities are Admitted to Trading on a Regulated Market [2004] OJ L390/38 (amended by Art 1 Directive Nr 2013/50/EU [2013] OJ L294/13).

[31] California Transparency in Supply Chains Act 2010; Section 135 Companies Act 2013 (IN); Modern Slavery Act 2015 (UK); Modern Slavery Act 2018 (AU); Philippines (Securities and Exchange Commission), 'Sustainability Guidelines for Publicly-Listed Companies' (2019) Memorandum Circular Nr 4.

powers conferred by its Member States.[32] The Non-Financial Reporting Directive requires certain corporations to disclose non-financial information concerning respect for human rights and a limited number of related matters.[33] Like many 'show' regulatory frameworks, this Directive has been criticised for its limited impact and relevance. As a result, this Directive will soon be amended and renamed the Corporate Sustainability Reporting Directive.

The second category of regulations requires corporations to engage in human rights 'due diligence'. Due diligence enables a reasonable and prudent company to 'know' what human rights it is impacting and to 'show' what it is doing about this in light of its circumstances.[34] It is thus not possible for corporations to comply with due diligence regimes merely by reporting on the steps that they did or did not take. While the use of the concept of 'due diligence' in the UN Guiding Principles is not consistent, the UN High Commissioner for Human Rights (OHCHR) has defined it as 'an on-going management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights'.[35] The 2011 update of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises indicated that through this process, corporations can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems.[36]

Section 1502 of the US Dodd-Frank Act introduced 'know and show' rules in the extractive industries in 2010.[37] These inspired the EU to

[32] Daniel Kinderman, 'The Struggle over the EU Non-Financial Disclosure Directive' (2015) 6 *WSI-Mitteilungen*.
[33] European Parliament and Council of the EU, Directive Nr 2014/95/EU As Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups [2014] OJ L330/1 (Non-Financial Reporting Directive).
[34] Commentary to UN Guiding Principle 15 referring to UN Guiding Principles 16–24.
[35] OHCHR, 'The Corporate Responsibility to Respect Human Rights' (2012) HR/PUB/12/02 6.
[36] OECD, *OECD Guidelines for Multinational Enterprises* (2nd edn, OECD Publishing 2011) para 14.
[37] There is discussion whether Section 1502 Dodd-Frank Act is or should be understood to be 'show' regulation (see Nissen (n29) 19). Section 307 Tariff Act 1930 (US) is older. It targets forced, indentured and/or convict labour. See Chapter 3 (Section 3.3.2.3).

adopt the Conflict Minerals Regulation in 2017.[38] France was the first state in the world to adopt sector-wide 'know and show' legislation covering all human rights risks when it adopted the Law on Parent Corporations' Vigilance in 2017.[39] Afterwards, the Dutch Child Labour Duty of Care Law, the German Law on Corporate Due Diligence in Supply Chains and the Norwegian Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions were adopted.[40] 'Know and show' requirements were also adopted in India in 2021.[41] At the time of writing, Switzerland, Mexico, Finland, the Netherlands and Belgium are also planning to adopt due diligence legislation or considering doing so. For some EU Member States, such laws are planned because the European Commission has delayed acting upon its 2020 promise to propose an EU-wide sustainable corporate governance initiative. The Commission proposal has been postponed for the fourth time at the time of finishing this book.

Chapter 3 analyses the factors that lead the EU to cooperate in a collective action problem. This chapter needs to deal with two issues. First, this chapter investigates whether competition from TNC-DECs has been taken into account, and whether – and to what extent – they have been regulated by the EU to minimise any negative impact on EU-based corporations. All unilateral regulatory initiatives that have been taken in the EU to implement the UN Guiding Principles (2011) to date will be studied. Various documents of the relevant EU bodies and national actors have been examined. The discourse employed in the European Commission's impact assessments lends itself particularly well to in-depth analysis of framing processes and strategies, as policy coordination is the prevalent interpretation

[38] European Parliament and Council of the EU, Regulation Nr 2017/821 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas [2017] OJ L130/1.

[39] Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre 2017 (FR).

[40] Wet houdende de Invoering van een Zorgplicht ter Voorkoming van de Levering van Goederen en Diensten die met Behulp van Kinderarbeid tot Stand zijn Gekomen 2019 (NL); Gesetz über die Unternehmerischen Sorgfaltspflichten in Lieferketten 2021 (DE); Lov om Virksomheters Åpenhet og Arbeid med Grunnleggende Menneskerettigheter og Anstendige Arbeidsforhold (Åpenhetsloven) 2021 (NO).

[41] India (Securities and Exchange Board), 'Business Responsibility and Sustainability Reporting by Listed Entities' (2021) Circular SEBI/HO/CFD/CMD-2/P/CIR/2021/562.