REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA

LISBON LAW REVIEW



REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA Periodicidade Semestral Vol. LXVI (2025) 1

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EDIÇÃO, EXECUÇÃO GRÁFICA E DISTRIBUIÇÃO LISBON LAW EDITIONS

Alameda da Universidade - Cidade Universitária - 1649-014 Lisboa - Portugal

ISSN 0870-3116

Depósito Legal n.º 75611/95

Data: Julho, 2025

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The United Nations Guiding Principles on Business and Human Rights and its Contours

Os princípios orientadores das Nações Unidas sobre empresas e direitos humanos e seus contornos

Jernej Letnar Černič*

Abstract: This article examines the contours of the UN Guiding Principles on Business and Human Rights. It critically discusses its content by deepening into state duty to protect, corporate responsibility and access to justice. It presents the current state of domestic and international law on state and corporate business and human rights obligations. As such, it presents the legal nature and scope of UNGPs and argues that since their adoption, they have evolved into the central binding instrument on business and human rights, which rights-holders and stakeholders employ in exercising their rights and leverage to prevent and punish business-related human rights abuses. Finally, it explores the potential need for reform of the text of the UNGPs to include changes in normative developments and practice in the last decade.

Resumo: Este artigo examina os Princípios Orientadores da ONU sobre Empresas e Direitos Humanos e os seus contornos: discute criticamente o seu conteúdo, incidindo com mais profundidade no dever do Estado de proteger, na responsabilidade corporativa e no acesso à justiça; apresenta o estado atual do direito interno e internacional sobre as obrigações estatais e empresariais em relação aos direitos humanos. Assim, o artigo expõe a natureza jurídica e o alcance dos Princípios Orientadores da ONU e argumenta que, desde sua adoção, eles evoluíram para se tornarem o principal instrumento vinculativo sobre empresas e direitos humanos, utilizado por titulares de direitos e partes interessadas no exercício dos seus direitos e na prevenção e punição de abusos empresariais contra os direitos humanos. Por fim, o artigo explora a potencial necessidade de reformar o texto dos Princípios Orientadores da ONU para incluir mudanças nos desenvolvimentos normativos e nas práticas da última década.

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Keywords: UNGPs, state obligations, corporate accountability, access to remedy, holistic approach.

Palavras-chave: Princípios Orientadores da ONU, obrigações estatais, responsabilidade corporativa, acesso a reparação, abordagem holística.

Summary: 1. Backdrop; 2. The legal nature and scope of the UNGPs on Business and Human Rights; 3. The structure and contents of the UNGPs on Business and Human Rights; 3.1 State duty to protect; 3.2 Corporate responsibility to respect human rights; 3.3 Access to Remedy; 4. The Impact of the UNGPs on Business and Human Rights Since Their Adoption; 5. Potential Review of the UNGPs and their Reform; 6. Conclusion.

1. Backdrop

Business and human rights is an interdisciplinary field which argues that businesses have human rights obligations. In the past decades, rightsholders have struggled to achieve justice for business-related human rights abuses. Stakeholders have struggled to develop domestic and international business and human rights standards. The international community created the primary document, the United Nations Guiding Principles on Business and Human Rights (UNGPs), which restate the existing international human rights law in business and human rights.²

Corporate accountability refers to holding businesses responsible for human rights violations through various mechanisms. However, accountability in business-

¹ FLORIAN WETTSTEIN, Business and Human Rights: Ethical, Legal, and Managerial Perspectives. Cambridge: Cambridge University Press, 2022; SURYA DEVA, DAVID BILCHITZ (eds.), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect, Cambridge, Cambridge University Press, 2013; NICOLA JÄGERS, Corporate Human Rights Obligations: In Search of Accountability, Antwerp, Intersentia, 2002; JERNEJ LETNAR ČERNIČ, 2010, Human Rights Law and Business, Groningen, Europa Law Publishing; JERNEJ LETNAR ČERNIČ, TARA VAN HO (eds.), Human Rights and Business: Direct Corporate Accountability for Human Rights, Wolf Publishing, 2015.

² JOHN G. RUGGIE, Business and Human Rights: The Evolving Agenda, American Journal of International Law, 101; JOHN G. 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, A/HRC/8/5; JOHN G. RUGGIE, Just Business: Multinational Corporations and Human Rights, New York, W. W. Norton & Co. 2013; JOHN G. RUGGIE, Global Governance and "New Governance Theory": Lessons from Business and Human Rights, Global Governance, Vol. 20, Issue 1, 2014.

related human rights violations does not apply solely to businesses as corporations are made up of human beings. Corporations are artificial creatures – legal forms through which individuals perform business activities. Accountability for human rights abuses in the context of business and human rights includes different layers. The state is responsible for ensuring that businesses do not violate human rights. States must lead by example, particularly in contexts of their capital investments in the economy. In fully or partially state-owned companies, states have an even greater obligation to ensure that companies do not abuse human rights or violate environmental standards. They must lead by example, showing the private sector how to respect human rights and environmental standards. Even in the private sector, states have positive obligations or duties to ensure that businesses comply with their human rights obligations. In the context of business and human rights, individual responsibility should not be discarded. In some European countries, companies cannot be criminally prosecuted, while in others, companies can be criminally prosecuted under certain conditions. In jurisdictions where companies cannot be prosecuted, individuals within those companies, such as members of management boards or those tasked with specific duties, can be held responsible for violating human rights or environmental standards.

This article examines the UNGPs and their impact on broader field of business and human rights from adopting National Action Plans on Business and Human Rights to adopting national legislations. It is divided into six parts. After this introduction, Section 2 explores the legal nature and scope of the UNGPs on Business and Human Rights. Section 3 discusses and analyzes the three pillars of the UNGPs. Section 4 thereafter assesses the impact of the UNGPs on Business and Human Rights since their adoption, particularly on the adoption of national legislation on business and human rights. Section 5 on potential review of the UNGPs and their reform looks forward to how the UNGPs can be revised and further strengthened.

Since their adoption in 2011, the UNGPs have become the main authoritative document on business and human rights and have served as the basis for many other related legal documents.³ The UNGPs are divided into three pillars. Pillar I deals with the state's duty to protect and asserts that states have the primary duty to protect human rights in the business sector. Businesses are also responsible for respecting human rights, as outlined in the UNGP's business and human rights

³ RADU MARES, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress in RADU MARES (ed.), The UN Guiding Principles on Business and Human Rights – Foundations and Implementation (Martinus Nijhoff, 2012).

framework in Pillar II. Pillar III includes access to efficient, independent, and fair remedies, ensuring rights holders have access to remedies for alleged human rights or environmental abuses.

2. The legal nature and scope of the UNGPs on Business and Human Rights

The UNGPs are the key United Nations document on respect for human rights in the business sector.⁴ Since they were not adopted as an international treaty, they are not legally binding. Nevertheless, many theorists argue that they are at least indirectly legally binding because they contain legal principles and rules already found in other binding international human rights treaties. Based on the UNGPs, states must adopt (NAPs) to respect human rights in business. So far, thirty-nine countries have adopted NAPs to implement the UNGPs into their domestic legal systems.⁵

UNGPs on Business and Human rights are not a treaty or a convention, but as the late John Ruggie, the drafter of the UNGPs, always noted that they restate existing international human rights obligations of states, both in treaty and customary law.⁶ As such, they are a material source of international law, or even a formal source, which could make them a binding document. Over the last decade, they have become a definitive source of business and human rights standards. UNGPs were a trigger point for adopting domestic frameworks, like the German Human Rights Supply Chain Law or the French Duty of Vigilance Law. Debating whether UNGPs are legally binding instruments is not very helpful, and often, it is beside the point as the individual pillars of UNGPs restate the existing domestic

⁴ UN Human Rights Council, UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011.

⁵ UN Working Group on Business and Human Rights, National action plans on business and human rights, March 2025, https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights. Guiding Principles on Business and Human Rights: United Nations "Protect, Respect and Remedy" Framework, https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights.

⁶ JERNEJ LETNAR ČERNIČ, The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality, 10 Global Business Law Review of the Cleveland-Marshall College of Law of Cleveland State University 1 (2022); JERNEJ LETNAR ČERNIČ, The Reformed EU Human Rights Sanctions Regime: A Step Forward or an Empty Threat? (2021), Business and Human Rights Journal, 6(3), 559-566; JERNEJ LETNAR ČERNIČ, Institutional actors as international law-makers in Business and Human Rights: The United Nations Guiding Principles on Business and Human Rights and beyond (2021) Pravni Zapisi 12(2):594-617.

and international human rights law. Accordingly, state practice has shown that the UNGPs are indeed reflected in international human rights law. Additionally, international and regional human rights bodies have found their binding legal nature based in international law.

3. The structure and contents of the UNGPs on Business and Human Rights

3.1 State duty to protect

The Pillar I includes the state's duty to protect. Foundational Principles 1 and 2 of the UNGPs provide that states have a duty to protect the human rights of rights-holders against the adverse conduct of businesses.⁷ State authorities have both negative and positive obligations to protect human rights. They should not harm but also take active measures to safeguard rights-holders. State duty to protect is a foundational duty deriving from customary and treaty international law. The state's obligation to protect human rights is the foundation of the UNGPs, as it stems from existing customary and treaty international human rights law. Principle 1 of the UNGPs states, "States must ensure, on their territory and/or within their jurisdiction, that third parties, including businesses, do not violate human rights. States must prevent, investigate, and punish such violations and provide compensation for them through effective strategies, legislation, regulations, and judicial proceedings."8 While Principle 1 establishes only territorial human rights obligations, it is increasingly recognized in the practices of states and businesses that states have positive obligations to oversee the activities of companies based on their territory, even when these companies operate in foreign markets. Principle 2 requires states

⁷ MARKUS KRAJEWSKI, The state duty to protect against human rights violations through transnational business activities, Deakin Law Review, Vol. 23, Aug 2018: [13]-14; JAMES GOMEZ, ROBIN RAMCHARAN (eds.), Business and Human Rights in Asia: Duty of the State to Protect, London, New York and Shanghai: Palgrave Macmillan Singapore, 2021.

⁸ UNGPs on Business and Human Rights, Principle 1.

⁹ DANIEL AUGENSTEIN, DAVID KINLEY, Beyond the 100 acre wood: In which international human rights law finds new ways to tame global corporate power, (2015) The International Journal of Human Rights. 19, 6, p. 828-848; DANIEL AUGENSTEIN, DAVID KINLEY, When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations in DAVID BILCHITZ, SURYA DEVA, Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect, Cambridge: Cambridge University Press, 2013, pp. 271–94. See also ESCR Committee, General Comment No. 24, 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 (23 June 2017).

to »clearly express their expectation that all businesses operating within their territory and/or under their jurisdiction will respect human rights throughout their operations. α^{10}

State authorities should also clarify their expectations for businesses in order to respect human rights. What is important is that states should, through NAPs or through regulatory environment, also provide a framework for respecting and protecting business and human rights standards. Principle 4 of the UNGPs pertains to the state's obligations to oversee state-owned enterprises. It states: »States must take additional measures to protect against human rights violations by businesses that are owned or controlled by the state or that receive substantial support or services from state agencies such as export credit agencies, investment insurance agencies, and investment guarantee agencies. Such measures may include requiring human rights due diligence where necessary.«11 The state must lead by example for the private sector. As a result, states are the primary duty bearers of human rights obligations and must lead by example. In terms of respecting business and human rights standards, it must be a role model for the private sector. Respect for human rights in businesses with full or partial state ownership is also hampered by constant political interference in their operations. The state must ensure that companies do not violate human rights protection standards in business. Effective monitoring and measuring of the implementation of human rights protection standards in business and taking appropriate measures are crucial.

A state leads by an example by first requesting its state-owned enterprises, where the state has a capital investment to meet business and human rights standards. One of the better examples of good practice here is a Norwegian state pension fund, which emphasises respect for business and human rights. Also, when choosing a capital investment, states have to provide state oversight over businesses. Indeed, this is the obligation of conduct that ensures that companies respect human rights in their operations.

Principle 7 of the UNGPs provides that states should guide companies to operate in conflict-affected areas, ensuring heightened due diligence, which is

¹⁰ UNGPs on Business and Human Rights, Principle 2.

¹¹ UNGPs on Business and Human Rights, Principle 4.

¹² MIHAELA BARNES, The United Nations Guiding Principles on Business and Human Rights, the State Duty to Protect Human Rights and the State-Business Nexus, 15 Braz. J. Int'l L. 42 (2018).

¹³ For more detail, see Heidi R. Nilsen, Beate Sjåfjell, and Benjamin J. Richardson, The Norwegian Government Pension Fund Global: Risk-Based versus Ethical Investments. Vierteljahrshefte Zur Wirtschaftsforschung, 2019 88 (1): 65–78.

critical for businesses operating in Russia, Ukraine, Israel or occupied Palestinian territories. ¹⁴ It is also crucial that state institutions function coherently in engineering and propelling business and human rights standards and that all departments in the executive, legislative and judicial branches are on board with these business and human rights standards because often, in many countries, one can observe discrepancies in positions between one ministry and another. ¹⁵ A textbook example is now, for example, a disagreement in 2024 between the German Ministry of Finance and the German Ministry of Foreign Affairs, which had contrary positions on the new European directive on corporate sustainability and due diligence. ¹⁶ It is also essential to ensure policy coherence in relations with foreign investments and policy coherence when states act within international organisations. Additionally, there is much debate about whether those obligations of states apply only territorially or also extraterritorially.

What is the nature of state obligations in business and human rights, and do the states also have obligations to protect and fulfil? States undoubtedly carry both negative and positive obligations in business and human rights. It is also essential to ensure that states measure and supervise when those standards are adopted and implemented. Measuring is critical to ensure that the state complies with obligations under UNGPs. After states adopt those commitments in the form of national action plans (NAPs), they have to adopt national legislation to implement their obligations.¹⁷ However, since 2011, developments have been quite varied across the globe. Countries which have already adopted an NAP to implement business and human rights are found mainly in Europe. Beyond Europe, some good examples exist from Southeast Asia and Latin America.¹⁸

 $^{^{\}rm 14}$ UNGPs on Business and Human Rights, Principle 7.

¹⁵ MARCUS JUNG, Die Firmen ächzen unter dem Lieferkettengesetz, Frankfurter Allgemeine Zeitung, 27 October 2024, https://www.faz.net/aktuell/wirtschaft/unternehmen/unternehmen-aechzen-unter-lieferkettengesetz-woran-es-fehlt-110072957.html.

¹⁶ Zeit Online, FDP strebt zügigen Stopp des Lieferkettengesetzes an. 29 November 2024, https://www.zeit.de/politik/deutschland/2024-11/fdp-lieferkettengesetz-stopp-bundestag-johannes-vogel.

¹⁷ HUMBERTO CANTU RIVERA, National Action Plans on Business and Human Rights: Progress or Mirage?"Business and Human Rights Journal 4, no. 2 (2019): 213–37.

¹⁸ See, for instance, BONNY LING, National Action Plans on Business and Human Rights and Protecting Displaced Populations through Human Rights Due Diligence: Recommendations for Taiwan. Innovation in the Social Sciences, 2023 2(1), 53-69; FEDERICO CHUNGA FIESTAS, The Experience of Multistakeholder Dialogue in the Process of Elaboration of the National Action Plan on Business and Human Rights in Peru, Business and Human Rights Journal 9, no. 2 (2024): 328–33; LUIS CHINCILLA, A Critique of Latin American National Action Plans on Business and Human Rights, McGill Centre for Human Rights & Legal Pluralism, 2 May 2023, https://www.mcgill.

NAPs are soft law documents where the state explains what it will do in the next five to ten years.

Nonetheless, the NAPs can have quite a few positive impacts.¹⁹ They can create incentives for adopting domestic legislation and clarify state and corporate obligations. They set out states' priorities in business and human rights. They can also build capacity in state institutions. Indeed, some good examples of NAPs are those from countries like France, Germany, Norway and the UK. NAPs have often led to the adoption of domestic legislation, due diligence guides in some countries, and national strategies.²⁰ Some include measurable indicators to monitor whether the state has implemented what it promised in the plan, such as Luxembourg, Slovenia, Switzerland and other countries.

All in all, drafting NAPs has been very useful as it engages stakeholders from businesses, government, and civil society, defining actions and expected results. They also ensure the responsibility of different actors. When a country takes a new path, adopts an NAP, and sets promises and objectives, it must not do that just for window shopping. NAP should also introduce a set of measurable indicators where government, business and civil society institutions can go back and, after a few years, measure what has been done. There exists a lot of pressure from both within the countries and from regional and global arenas that the states should adopt NAPs on business and human rights. There are some areas for improvement, from commitment issues to accountability issues. However, NAPs are the first steps in strengthening the state's compliance with and record on business and human rights. Therefore, the state's duty to protect is the first step under the UNGPs for any state committed to making steps forward in business and human rights.

ca/humanrights/article/critique-latin-american-national-action-plans-business-and-human-rights; Asia Centre, Business and Human Rights in Southeast Asia Developing National Action Plans, 21 December 2021, https://asiacentre.org/business-and-human-rights-developing-national-action-plans/.

¹⁹ See, for instance, United Nations Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, 2016, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

²⁰ Markus Krajewski, Kristel Tonstad, Franziska Wohltmann, Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?; Business and Human Rights Journal 2021, 6, no. 3: 550–558.

3.2 Corporate responsibility to respect human rights

Apart from states, corporations are duty-holders of human rights obligations in domestic and international human rights law. UNGPs provide in Principle 12 that »Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.«²¹ Businesses must respect and implement the eight existing United Nations human rights conventions. Many discussions, including those under negotiation for the new EU legislation, have been held about which companies should be subject to those obligations. Regional and domestic legislation usually applies to the largest corporations. For instance, the German Supply Chain law applies to companies with at least 1000 employees.²²

There is a difference between corporate and state human rights obligations in business. Indeed, states have primary obligations to ensure that human rights are respected. The UNGPs distinguish between state duty to protect and corporate responsibilities to respect human rights based on societal expectations. Several scholars have criticised such distinctions, arguing that corporations have human rights obligations and should be accountable for their violations.²³

An ordinary tenant in human rights law is that states have negative and positive obligations. However, corporate obligations are complementary and not secondary. There is a move from negative nature of corporate obligations to their positive dimensions. It is not enough anymore that companies do not commit harm. Moreover, they must also show that they respect human rights by conducting due diligence policies and introducing these quality assurance systems in their operations.

Principle 15 of UNGPs requests companies to introduce human rights processes and policies in their business operations.²⁴ These are tools for companies to introduce

RFDUL-LLR, LXVI (2025) 1, 341-357

²¹ UNGPs on Business and Human Rights, Principle 12.

²² Federal Republic of Germany, Act on Corporate Due Diligence Obligations in Supply Chains of 16 July 2021. See also MARKUS KRAJEWSKI, KRISTEL TONSTAD, FRANZISKA WOHLTMANN, Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction? (2021) 6 Business and Human Rights Journal 550.

²³ Surya Deva, Regulating Corporate Human Rights Violations: Humanising Business (Routledge, 2014); Jernej Letnar Černič, Corporate accountability under socio-economic rights, (Transnational Law and Governance). Oxon; New York: Routledge, cop. 2020; Jernej Letnar Černič, Human rights law and business: corporate responsibility for fundamental human rights, Europa Law Publishing, Amsterdam, 2010; Elisa Morgera, Corporate Accountability in International Environmental Law, Oxford, Oxford University Press, 2009.

²⁴ UNGPs on Business and Human Rights, Principle 15.

human rights in their business processes. Principle 17 of UNGPs constitutes the concept of due diligence, which identifies and responds to human rights risks in a company's global supply chains. ²⁵ It is a quality assurance system that ensures that the company does not violate human rights and environmental standards. Due diligence requires companies to integrate data into business policies, supervise the impact, and then act on it to adopt measures to ensure that human rights risks are minimized and introduced. It requests companies to introduce due diligence processes in their business operations. It requires companies to identify the risks in their business operations and adopt policies to reduce them. After that, companies obtain data from different stakeholders within the company and external stakeholders and, after that, draft policies.

The due diligence process has six phases. ²⁶ The first step is to embed responsible business conduct into operations and supply chains. The second step requires companies to establish indicators and identify and assess the impact of adverse human rights conduct. Thirdly, companies include measures that they can take to minimize the risk to prevent or mitigate impacts. The fourth step involves tracking human rights-related risks based on different indicators. Fifthly, they must communicate with external stakeholders and adopt relevant measures to mitigate human rights and environmental hazards. For instance, the Norwegian Transparency Law requests that any company with more than 50 employees share information about how they conduct the due diligence process with the public, NGOs, and civil society.²⁷ Surely, it will take a lot of effort for businesses to adapt to this requirement. Sixth, a part of the human rights due diligence obligation is also the remediation of the adverse effects of human rights violations. Principle 18 of the UNGPs states: »When businesses identify that they have caused or contributed to adverse impacts, they must provide for or cooperate in the remediation of those impacts through legitimate processes. «28 The sixth step also includes providing access to internal remedies.

The aim is to ensure that business and human rights standards are embedded, implemented and internalized in the company culture and practices through its supply chains. Either the company provides for internal grievances procedures so that the

²⁵ UNGPs on Business and Human Rights, Principle 17.

²⁶ See, for example, OECD, OECD Due Diligence Guidance for Responsible Business Conduct. 30 May 2018, Https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

²⁷ Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act) ((LOV-2021-06-18-99 om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)), 1 July 2022.

²⁸ UNGPs on Business and Human Rights, Principle 18.

rights holders, in the case of alleged human rights violation, can turn first to the company, or they can go to ombudsman mechanism, or they can go to any other governmental mechanism or they can go to any other mechanisms established in the private sector. Many industries, such as the diamond industry, have private mechanisms where victims can bring their complaints.²⁹ There are different ways that rights holders and victims can voice their concerns. In the framework of human rights due diligence, businesses must, therefore, prepare and integrate human rights protection policies and documentation into their operations; monitor the risks of human rights violations; take measures to reduce and eliminate the risks of human rights violations; measure human rights protection in business operations; act based on feedback; and ensure legal protection for rights holders. Businesses must take active measures to ensure respect for human rights throughout their global supply chains to ensure adequate human rights protection. Businesses, therefore, have an obligation to respect, protect, and fulfill human rights throughout their entire operations.

3.3 Access to Remedy

Where can victims of alleged business-related human rights violations turn to? What are the most appropriate judicial and non-judicial mechanisms for victims of business-related human rights abuses? Where and how can rights holders enforce accountability for business-related human rights abuses? This is a challenging and umbrella question with many layers. Rights-holders should be able to achieve full justice for business-related human rights abuses.³⁰ State obligations are negative and positive, meaning that states must ensure that the business sector does not violate human rights and fundamental freedoms. Complaints can also be filed against the state for failing to comply with its negative and positive obligations. These are some of the main features of access to remedy in business and human rights. Pillar III focuses on access to remedy, particularly those found in Principles 25, 26, 27, 28, 29, and 30.³¹ Pillar III addresses state-based judicial, non-judicial, and non-state-based non-judicial mechanisms.

Pillar III of the UNGPs pertains to the rights-holders' access to legal protection, which must be effective and straightforward to achieve corporate accountability for business-related human rights abuses. Ensuring the right to access accountability

²⁹ The Kimberley Process, https://www.kimberleyprocess.com/

³⁰ JOANNA KYRIAKAKIS, Corporations, Accountability and International Criminal Law: Industry and Atrocity, Cheltenham: Edward Elgar Publishing, 2021.

³¹ UNGPs on Business and Human Rights, Principles 25-30.

for human rights violations in business is among the most complex challenges in domestic, regional, and international order.³² The UNGPs note in foundational principle 25 that »As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.«³³

Principle 26 of the UNGPs states that »States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.«³⁴ States must establish civil, criminal, labor, and administrative legal accountability in business-related human rights violations. Judicial protection for business-related human rights violations must be fair, independent, and impartial. Access to justice refers to both judicial and non-judicial forms of accountability. It is submitted that judicial accountability is perhaps the only route to bring full justice to victims by awarding compensation or punishing the perpetrators. However, other ways of achieving justice exist, such as through quasi-judicial or non-judicial forums. Domestic judicial mechanisms play an essential role, particularly in enforcing constitutional rights. Domestic judicial mechanisms are the primary means of enforcing socio-economic rights and civil and political rights.

There are many cases from different jurisdictions – such as Colombia and India – where public interest litigation has been used to address corporate accountability.³⁵ In recent years, several cases have been brought against large companies in Europe for failing to comply with their obligations to conduct due diligence.³⁶

³² OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, Report to the UN Human Rights Council, UN Doc. A/HRC/32/19, 10 May 2016.

³³ UNGPs on Business and Human Rights, Principle 25.

³⁴ UNGPs on Business and Human Rights, Principle 26.

³⁵ Charan Lal Sahu v. Union of India, 1990 (1) SCC, 613 (Supreme Court of India); Kishen Pattnayak & Another v. State of Orissa, A.I.R. 1989 S.C. 677 (Supreme Court of India); Hernán Galeano Díaz c/ Empresas Públicas de Medellín ESP,y Marco Gómez Otero y Otros c/Hidropacífico SA ESP y Otros, T-616/10, 5 August 2010.G v. An Bord Uchtála, 1980, IR 32 (Constitutional Court of Colombia); Judgment T-732/16 (Constitutional Court of Colombia), 19 December 2016; Judgment T-254/93 (Constitutional Court of Colombia), 30 June 1993; Judgment T-202/12 (Constitutional Court of Colombia), 14 March 2012.

³⁶ See, for example, Philipp Wesche and Miriam Saage-Maaß, Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK (2016) 16 Human Rights Law Review 370.

Recent cases include litigation against Shell in the Netherlands and England concerning the company's failure to fulfil its duty of care in Nigeria. In the Netherlands, the Hague District Court found that Shell had violated its duty of care.³⁷ These cases illustrate the effectiveness of domestic judicial mechanisms in enforcing corporate accountability and, in some cases, individual responsibility for human rights violations. However, there is a risk of judicial neocolonialism in bringing cases for human rights violations that happened in the Global South in front of courts in the Global North.³⁸

While accountability for business-related human rights abuses is more straightforward to ensure in theory than in practice, as the judiciary is weak in many countries, states must also ensure that rights holders have access to quasijudicial and non-judicial mechanisms for enforcing human rights accountability. Principle 27 thus provides: »In addition to judicial proceedings, states must provide effective and appropriate non-judicial grievance mechanisms as part of a comprehensive state system for providing remedies for business-related human rights abuses.«³⁹ Quasi-judicial and non-judicial mechanisms must also function fairly and independently of all branches of government.⁴⁰ National human rights institutions are crucial in investigating and addressing business-related human rights violations.⁴¹ Businesses must also establish internal grievance mechanisms in cooperation with various stakeholders, from trade unions to civil society. Principle 29 of the UNGPs provides: »To make it possible for grievances to be addressed early and remediated directly, corporations should establish or participate in effective operational-level grievance mechanisms for individuals and communities

³⁷ Four Nigerian Farmers v Shell, The Hague Court of Appeal, 29 January 2021, ECLI:NL:GHDHA: 2021. See also Okpabi and Others v. Royal Dutch Shell plc and Another [2021] UKSC 3.

³⁸ CAROLINE OMARI LICHUMA, (Laws) Made in the "First World": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains [2021] Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 81.

³⁹ UNGPs on Business and Human Rights, Principle 27.

⁴⁰ KINNARI BHATT, GAMZE ERDEM TÜRKELLÍ, OECD National Contact Points as Sites of Effective Remedy: New Expressions of the Role and Rule of Law within Market Globalization? (2021) 6 Business and Human Rights Journal 423, 429.

⁴¹ Jernej Letnar Černič, The role of human rights Ombudsman Institutions in business and human rights. in: AXEL MARX, GEERT VAN CALSTER, JAN WOUTERS (eds.). Research handbook on global governance, business and human rights. Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing Limited, 2022, pp. 274-290; Jernej Letnar Černič, The role and nature of financial ombudsman institutions in business-related human rights. in PIOTR TERESZKIEWICZ, MARIUSZ JERZY GOLECKI (eds.). Protecting financial consumers in Europe: comparative perspectives and policy choices. Leiden; Boston: Brill Nijhoff, 2023, pp. 367-390.

who may be adversely impacted.«⁴² Both state and non-state non-judicial mechanisms must under Principle 31 (g) of the UNGPs operate credibly, accessibly, predictably, fairly, transparently, in accordance with rights, and must serve as "a source of continuous learning." Grievance mechanisms within businesses must operate inclusively, based on dialogue with stakeholders.

The state's duty to ensure access to remedy includes traditional judicial mechanisms, such as civil litigation labour mechanisms, and quasi-judicial and non-judicial mechanisms. Labour disputes are typical examples of judicial disputes to which individuals and groups can resort. Alternative dispute resolution mechanisms are also viable. States are to ensure coherence and consistency across judicial state and non-state judicial mechanisms. NAPs on UNGPs have often failed to provide access to justice for rights-holders. There has been some peer sharing but a lack of consistency and coherence among different countries' approaches. ⁴³ States need to ensure the capacity of rights-holders and communities to develop different venues for access to remedies. State and non-state mechanisms should create trust among rights holders to lodge effective remedies for business-related human rights abuses.

4. The Impact of the UNGPs on Business and Human Rights Since Their Adoption

What has been the impact of the UNGPs on the strengthening of local and transnational frameworks on business and human rights? Since their adoption, the UNGPs have revolutionised the business and human rights normative framework. Their effects have been multi-layered in the fields of normative regulation, state practice, civil society practice, business practice, and elsewhere. On a normative level, the UNGPs have propelled the existing documents and have led to the development of new regulations at regional and domestic levels. NAPs have triggered the development of domestic legislation on environmental and human rights due to diligence, sustainability reporting, and modern slavery, among others. Regarding

⁴² UNGPs on Business and Human Rights, Principle 29.

⁴³ HUMBERTO CANTU RIVERA, National Action Plans on Business and Human Rights: Progress or Mirage?, Business and Human Rights Journal 4, no. 2 (2019): 213–37.

⁴⁴ SURYA DEVA, The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface, Business and Human Rights Journal 6, no. 2 (2021): 336–51. See also PETER MUCHLINSKI, The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights. Business and Human Rights Journal 6, no. 2 (2021): 212–26.

state practices, thirty-nine states have adopted NAPs, and some of them have adopted a more detailed national legislation. On a civil society level, these have culminated in unprecedented social movements requiring active measures and actions from the bottom up. 46 Civil society organisations have become more potent and effective business and human rights stakeholders. As a result, the UNGPs have propelled negotiations for the potential United Nations Treaty on Business and Human Rights. On a business level, an unprecedented number of businesses have introduced their business operations due diligence processes, rules and best practices, strengthening the position of rightsholders and other stakeholders.⁴⁷ Moreover, businesses have started measuring their performance review to negative impacts, highlighting more positive ones, and thereafter adopting measures to minimise the risk of their operations for human rights and environmental protection. The UNGPs have, therefore, been at least a partial success story. Nonetheless, several different interests are present on moving forward with normative developments in business and human rights, including stakeholders who often find themselves in conflict. The question is whether the push forward will be achieved by the traditional approach in human rights, where states remain the primary duty holders of human rights obligations. The UN has done a lot by setting standards, organising forums, and pushing to strengthen the adoption of NAPs; however, businesses need to enhance responsible business standards further by applying them in practice and internalizing them in their business operations.

On the other hand, states are obliged to protect individuals against business conduct that negatively affects human rights and environmental standards. State institutions should set high expectations for state-owned enterprises to comply with domestic and international human rights standards to provide an example of good practice for privately owned corporations. Only strong state institutions based on the rule of law can tame corporate power and avoid actual and perceived conflicts of interest.

⁴⁵ French Law No. 2017-399 of 27 March 2017 on the Duty of Care of Parent Companies and Ordering Companies (French Vigilance Act); California Transparency in Supply Chains Act 2010, Senate Bill 657, s. 2(j).

⁴⁶ United Nations Development Programme, The Status of the Implementation of the UNGPs on Business and Human Rights in Eastern Europe and Central Asia (Istanbul: United Nations Development Programme, 2023).

⁴⁷ RENÉ WOLFSTELLER, YINGRU LI, Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness. Human Rights Review 23, 1–17 (2022).

5. Potential Review of the UNGPs and their Reform

The UNGPs are now in the second decade of their existence. Since their adoption, the field of business and human rights has progressed substantially. Many binding and non-binding sources of law in the area of business and human rights have been adopted since 2011. Many of those legal documents have gone beyond the content of the UNGPs and have established novel obligations for state institutions and corporate obligations. As a result, it is necessary to update the UNGPs text to reflect the current state of international law. Even though the revision of the UNGPs may not be likely shortly, it is critical to debate what such revisions would include. The following changes are necessary. First, revisions should unequivocally reflect that the state's duty in Pillar 1 of the UNGPs to protect applies extraterritorially and imposes obligations on states to regulate companies when doing business abroad. Second, the revision of Pillar II should make clear that human rights and environmental due diligence are an obligation of conduct that applies to all companies. Third, Pillar III on access to remedy should make clear that efficient access to remedy rests on strong institutions, clear rules and processes. The level of rule of law conditions the access to independent, impartial and fair access to justice. Improving access to justice for victims of business-related human rights abuses requires a multifaceted approach. It is not enough to rely solely on judicial mechanisms; one must also consider non-judicial mechanisms, social movements, grassroots initiatives, and symbolic forms of justice. This holistic approach is essential to ensuring that victims have the opportunity to seek redress and that perpetrators are held accountable for their actions.

6. Conclusion

Undoubtedly, the UNGPs have brought about positive business and human rights reforms. It is now widely recognized that states have obligations to protect human rights against adverse corporate conduct, companies have an obligation to respect human rights, and states have obligations to provide effective access to remedies. They have engineered responsible business conduct in companies of different sizes. Companies now accept the responsibility to respect human rights. Nonetheless, much work remains to internalize business and human rights standards. Only a few states have so far adopted national plans on business and human rights. UNGPs still remain only partly implemented in the business sector. In this way, states and companies must find a reasonable, balanced approach to protect human rights and the environment and not overburden companies with unnecessary and

costly compliance. Such a balanced approach is essential in tense times of societal division and the current ideological battles between extremes. Therefore, implementing UNGPs should subscribe to a multi-faceted holistic approach that includes various stakeholders and fosters open and respectful dialogues. As a result of a holistic approach, the access to remedies for business-related human rights abuses could be improved. Even though the UNGPs were adopted in soft law form, their content is binding through other international human rights law sources. Moreover, since their adoption, different sub-areas of business and human rights have become directly binding. Nowadays, UNGPs form the undebatable foundation for developing all business and human rights sources at the domestic and international levels.