14 Accountability, international business operations, and the law

The way forward

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14.1 Introduction

In an era of economic globalization, corporations have expanded their business operations internationally. This process could potentially be a win-win situation for corporations and home State consumers, as well as for host States and their citizens as it decreases production costs for corporations, allowing them to sell products to home State consumers at lower prices. Globalization may also benefit host States of foreign production and extraction activities, as it may create additional employment and bring in resources that could be used for the provision of public services. Unfortunately, these benefits do not always materialize. Autocrats may claim resources for themselves and spend lavishly on personal luxuries and prestige projects without being accountable to their citizens.[1] Multinational corporations, in their quest to maximize profits ("shareholder value"),[2] may have little or no concern for human rights and the environment in the host States where those profits are generated – typically weak governance States in the Global South that have limited enforcement capacity or corrupt regimes. These externalities of international business operations have informed calls for increased corporate accountability, not least by the UN through international soft law instruments like the UNGPs.[3]

Accountability – that is, requiring an actor to answer for his/her activities – is obviously a multifaceted notion, as evidenced by Larry Backer's efforts in this volume to "unpack" (and subsequently "repack") the concept.[4] This volume has mainly focused on the legal/liability dimension of accountability, both in the sense of prosecution and punishment under the first pillar of the UNGPs, and as an aspect of the right of access to remedy, which is addressed in the third pillar of the UNGPs.

The UNGPs' drafters have called on states to "protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises", to "take appropriate steps to prevent, investigate, punish and redress such abuse",[5] and, "[a]s part of their duty to protect against business-related human rights abuse", to "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".[6] However, they have refrained from fleshing out how states could and should hold corporations liable and what constitutes an effective legal remedy in this respect. In essence, they have considered these issues to be governed by domestic law and have called on States to "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."[7]

In other words, the UNGPs lay the groundwork for further legal and policy developments, but leave their actual implementation to States. It is the ambition of this volume to pick up where the UNGPs left off and to more clearly draw the boundaries of the legal/liability aspect of accountability, including the identification and/or reform of mechanisms that can contribute to realizing it. We have examined the conditions under which a corporation (or corporate officers) conducting international business operations can be held liable in law for the adverse effects of the operations on human rights, including labor rights (such as violations of health and safety standards, child or slave labor), and the environment (for example, pollution as a result of extractive activities)[8] in host States, and how procedural and substantive remedies could be shaped.[9]

A wide variety of legal accountability mechanisms have been discussed, ranging from private law (including contract and company law) to public law (including criminal law) to international law (including international arbitration and international criminal law) mechanisms. In addition, a number of tailor-made statutory instruments relating to corporate accountability in the business and human rights context have been passed in review. Some of these instruments, like the 2017 French *Loi relative au devoir de vigilance*[10] and the Swiss Responsible Business Initiative,[11] refer explicitly to the legal/liability aspect of accountability as they seek to impose – in different ways – legal liability for a corporation's failure to conduct adequate human rights (and/or environmental) due diligence.[12] Other instruments, notably those imposing reporting and disclosure requirements, primarily aim to create "market accountability" (that is, influencing consumers' and investors' economic choices) and may not explicitly mention legal liability. However, they could still inform a finding of liability, for instance under general principles of securities law,[13] criminal law, and/or tort law.[14]

Taken together, these examples show that corporate accountability mechanisms from different fields of law may be interrelated, complementary, and/or mutually reinforcing.[15] Ultimately, only a "smart mix" of such measures is likely bring about proper accountability and, by extension, the prospect of changes in corporate practices that are deemed desirable in order to enhance corporate accountability for human rights violations in global value chains.

14.2 Making the most of the existing law

The contributions to this volume demonstrate – perhaps surprisingly – that, to a large extent, legal accountability for corporate human rights abuse could be

established by means of **existing legal mechanisms, techniques, and doctrines**. This means that a more or less complete overhaul of the legal system does not need to be the first priority for governments and NGOs. Instead, better and more creative use of existing tools may go a long way toward a tighter (for some: better) liability regime. Obviously, this does not exclude the possibility that a more fundamental reform of the law, insofar as is politically and institutionally feasible, may deliver additional accountability dividends.[16]

This section offers a critical appreciation of the opportunities offered by existing private, criminal, and international law instruments to bring about corporate accountability for human rights abuses. It addresses both the procedural and substantive dimension of the remedies sought by the victims. Attention is paid to questions of *access* to remedy (in particular, access to an adequate jurisdictional mechanism), and to questions of *substantive law* (particularly concerning due diligence-based liability with respect to abuses committed in the corporate supply chain), bearing in mind that the harm done to the victim can only be adequately remedied if both dimensions are realized.[17]

Private law, which mainly consists of contract and tort law, is the bread and butter of many a domestic legal practitioner, who may never come across a business and human rights case. However, contributors to this volume have highlighted how, for instance, tort litigation and contractual arrangements may hold major promise to dispense corporate accountability for human rights abuses. With regard to contracts, Scheltema has pointed out that a large number of MEs *already* enhance compliance with human rights codes of conduct by enshrining human rights obligations in contracts concluded with suppliers.[18] The risk of losing contractual opportunities with major purchasers may force suppliers to improve their human rights record. However, the issue remains that contractual human rights clauses are not always effective. This is mainly because of a mismatch between lofty corporate human rights policy declarations and actual enforcement of contracts in case of non-compliance. Scheltema offers some useful prescriptions to close this gap between policy and practice.[19]

Bueno has discussed provisions of tort liability in specific legislative initiatives on business and human rights, such as the aforementioned French law on *devoir de vigilance* and, more specifically, the Swiss Responsible Business Initiative.[20] As recent judicial practice shows, "extraterritorial" tort cases are possible, but face significant barriers.[21] Home State courts may establish their jurisdiction over parent corporations under the domicile principle, possibly over foreign subsidiaries under the "connected claims" doctrine, and even potentially over any foreign corporation under the "forum of necessity" doctrine in case victims were to face a denial of justice in the host State.[22] However, one of the major challenges in these cases is establishing that the parent company was under a duty of care in respect of third parties, particularly host country workers, neighbors, and communities that are detrimentally affected by the activities of the local subsidiaries, suppliers, and/or business partners of those parent companies. At the time of writing, interesting developments are taking place in relation to this issue of parent company liability, as discussed by Dowling.[23]

Arguably, legal certainty regarding the requisite standard of care could be improved by reliance on broadly accepted international corporate due diligence guidance. This issue is addressed at greater length in the following analysis, but for now we emphasize that duty of care-based reasoning in transnational corporate tort cases can enhance victims' access to a remedy, because this creates an additional "defendant" and thus a forum to go to. However, victims do need to establish supervisory failures by controlling corporate entities to be successful and success will also strongly depend on the applicable law. Under the host State's provisions on non-contractual liability, which according to the rules of private international law will ordinarily be the law that is applicable, corporate duties of care may not be fully developed. This problem could be remedied by inserting a specific provision in new business and human rights legislation that considers home State tort law, particularly the duty of care as identified by the home State, as the applicable law. As Bueno shows, the Swiss Responsible Business Initiative provides an example of what such a provision may look like.[24]

An even more fundamental obstacle is that, to the extent that it cannot be established that a corporation closely supervised and/or controlled another entity, the former cannot be held liable in respect of the latter's violations, as the principles of separate legal personality and limited liability oppose holding one legal (corporate) person liable for the liabilities of another. Dowling has denounced this classic corporate-law-based limitation as a major accountability loophole, and has instead suggested a "profit risk" or "created risk" approach to liability (which he borrowed from some Latin American legal systems).[25] Pursuant to this approach, the liability for abuses could be engaged of "those who genuinely instigated, promoted or developed a dangerous activity through their actions or investment", and even those who just "profited from" production or extraction activities down the supply chain involving abuses. The separate legal personality of the various corporate persons participating in the supply chain would then no longer be an obstacle for this economically more realistic, enterprise-liability model.

With regard to the **criminal law**, the contributors to this volume have brought to the fore a panoply of provisions in domestic criminal codes that could be productively applied to hold corporations and corporate officers accountable for their involvement in foreign human rights abuses. Thus, the issue here does thus not seem to be a lack of legal rules. However, harnessing the power of the criminal law is crucially dependent on prosecutorial willingness and capacity, which may explain why, in the real world – at least in most places – very few criminal cases relating to irresponsible business conduct in global value chains have been prosecuted.

Despite its current underuse, domestic criminal law may constitute a particularly potent tool to create accountability for corporate abuses, as – to a greater degree than tort litigation, in which the state is largely a "recipient" of cases rather than a proactive enforcer – it expresses a society's indignation and moral condemnation of particular abusive activities and practices. For instance, Schaap shows how the domestic criminalization of modern slavery and child labor may also capture labor rights violations committed in global supply chains.[26] She

notably praises the Dutch model of criminalizing those who benefit domestically from slavery, labor exploitation, and human trafficking abroad, as a potential corporate accountability tool in respect of foreign human rights abuses.[27] Dutch law does not require that the predicate offense (the actual abuse) occurs in the Netherlands: it suffices that a Dutch corporation benefits from the abuse; for example, by purchasing a product assembled abroad in the (constructive) knowledge of an exploitative production process.[28] As under tort law, a company's failure to discharge its duty of care in relation to the impacts of its activities on human rights and/or the environment elsewhere may result in liability. Relatedly, a corporation's criminal liability may also be engaged by its failure to comply with mandatory due diligence provisions enshrined in domestic legislation that specifically addresses corporate human rights abuses in global supply chains, such as the recently adopted Dutch Child Labour Due Diligence Act.[29]

Cupido *et al.*, for their part, discuss the promises held by (Dutch) common criminal law provisions that were initially not designed or applied to create corporate accountability in respect of foreign abuses, but could be used to do just that.[30] They argue that, notably, money laundering and participation in a criminal organization – both criminalized by Dutch domestic law – lend themselves to prosecute Dutch(-based) corporations for their involvement in rights violations committed overseas. Just like profiting from labor exploitation, these crimes do not require that the predicate offense – the rights violation – occur on Dutch territory. It suffices that the illegal proceeds of the crime were laundered in the Netherlands, or that a corporation participated from the Netherlands in criminal schemes.

To successfully prosecute corporations for these offenses, as in tort litigation, jurisdiction may not be the main obstacle. Instead, prosecutors will have to establish sufficient causal and motivational proximity of the corporation to the foreign crime, including a failure to discharge the duty of care (that is, a failure to take adequate due diligence measures). The Swiss *Argor-Heraeus* case – discussed by Dam-de Jong in her contribution to this volume[31] – shows that this is a tall order indeed. A Swiss prosecutor discontinued money-laundering and pillage-based criminal proceedings against this Swiss gold refiner on the grounds that the company apparently did not know that the gold was sourced from an area in the Democratic Republic of the Congo (DRC) that was rife with conflict and rights violations committed by armed groups.[32] Still, it is not impossible for a corporation or a businessperson to be sufficiently proximate to the foreign crime for its/his liability to be engaged.[33] Even then, as Cupido *et al.* point out, one may wonder whether reliance on the rather technical domestic criminalization of money laundering or participation in a criminal organization adequately expresses a society's condemnation of the predicate human rights abuses.

Next to these domestic legal instruments, **international law** criminalizes the most shocking rights violations (war crimes, crimes against humanity, genocide), including complicity in such violations. In this respect, it is well known that the ICC has no jurisdiction over corporations.[34] Somewhat paradoxically perhaps, this does not mean that the ICC cannot prosecute corporate abuses. After all, it

has jurisdiction over corporate officers. In fact, in a 2016 policy paper, the ICC Office of the Prosecutor announced that it would henceforth "give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia* . . . the illegal exploitation of natural resources",[35] crimes that may well involve (multinational) corporations. In addition, in States that know the concept of corporate criminal liability, domestic courts may well hold corporations as such accountable for violations of international criminal law. In particular, Dam-de Jong has highlighted the potential of prosecuting corporations for the war crime of pillage with regard to their irresponsible sourcing of various metals and minerals in conflict-affected areas.[36]

Accountability solutions under international law do not only need to have a criminal law dimension. As Yiannibas suggests in her contribution, the traditional dispute settlement mechanism of international arbitration could be relied on to settle disputes between corporations and victims of human rights abuses resulting from corporate activity (abroad), provided that several reforms to the classic principles governing arbitration are implemented to comply with the UNGPs.[37] This proposal again shows that making smart use of existing accountability mechanisms, and reforming them only to the extent needed, may be the way forward.[38] Zerk seems to have reached a similar conclusion in her contribution on models of cross-border legal cooperation in complex corporate cases.[39] She points out that better operational-level cooperation and communication between States is likely to be much more effective in addressing cases of business-related human rights abuse than the pursuit of fundamental reforms of an international legal system that is necessarily flawed when it comes to the regulation of transnational business actors and activities.

14.3 Finding new ways to operate: due diligence

What unites the various contributions on the domestic private law, domestic criminal law, and international law mechanisms for business and human rights accountability is that, from a substantive liability perspective, they all seem to underline, to some extent, the salience of mandatory due diligence. The consequence of a legal obligation to conduct human rights due diligence could be that a corporate actor could be held liable if, on the basis of a reasonable due diligence inquiry into its supply chain, it could have known that it contributed to human rights abuses and could have reasonably been expected to do more to prevent such abuses. As Bjorn Fasterling explains, this notion of human rights due diligence is already to be found in the UNGPs, where it grounds the responsibility of transnational corporations to respect human rights, albeit without any legal liability consequences having been attached by the UNGPs' drafters to non-compliance.[40]

However, we are currently witnessing a "legalization" of the concept, in the sense of an increase in its binding force, as failures to live up to "soft" due diligence standards may increasingly provide grounds for "hard" corporate liability in civil, criminal, or international law. One of the ways in which this development is taking place is through the use of open-ended criminal or tort law duties of

care, the specification of which is informed by international and transnational soft-law due diligence guidance. For instance, Dam-de Jong argues that the *mens rea* of the classic war crime of pillage could be triggered if a corporate officer deliberately chose to "remain ignorant with respect to the origin of their natural resources procurements", in violation of, for example, the (in itself non-binding) OECD Due Diligence Guidance on responsible sourcing of conflict minerals, thus inducing liability of the corporate officer involved.[41] Alternatively, issue-specific legislation may enshrine due diligence as a standard for corporate liability in respect of human rights abuses, as is the case with the aforementioned French law on *devoir de vigilance* and the Swiss Responsible Business Initiative, or as a standard regarding disclosure about or importation of goods produced abroad.

The migration of the concept of due diligence, first from the field of business law to the business and human rights field and then to the field of legal liability, is a concrete manifestation of normative regime interaction that enhances corporate accountability. However, it is not without problems. Fasterling, for one, argues – taking the French law on *devoir de vigilance* as an example – that States may tend to impose due diligence obligations only on parent corporations rather than on the entire enterprise.[42] Inspired by the UNGPs' requirement to integrate due diligence findings, he instead draws attention to the responsibility of persons throughout the organization and down the supply chain to report and address human rights risks. Bueno, for another, while supporting first movers such as Switzerland, notes that due-diligence-based liability should not be introduced unilaterally, but should instead be broadly adopted internationally, to level the playing field for internationally active corporations.[43]

Even more fundamentally, despite specific sectoral international guidance instruments developed by the industry, States, or international organizations like the OECD,[44] the practical meaning of due diligence may remain elusive. In light of the principle of legal certainty, clarity about when a corporation discharges its due diligence obligations (allowing it to escape liability) and when it does not (leading to liability) is essential. In this respect, one may also ask whether corporate due diligence failures (should) *ipso facto* lead to liability, whether liability should only result from more serious failures, or whether liability should be limited to larger corporations that have the resources to conduct elaborate due diligence throughout the supply chain.[45]

Furthermore, an actual finding of liability for due diligence failures will crucially depend on *who* has to establish the failure. If, as is the case under the French law, it is incumbent on the victim/plaintiff to discharge that burden of proof, in line with what the "normal" rules on burden of proof would ask in most systems, the informational deficit from which he or she normally suffers, may let the corporation off the hook.[46] One must add to that the similar evidential difficulties that the victim/plaintiff is likely to experience in proving a causal link between the absence of a proper due diligence plan and the loss that he or she actually suffered. By contrast, if the corporation itself must prove compliance with due diligence requirements, as would be the case under the Swiss Responsible Business Initiative, the threat of liability may be much more serious.[47]

The latter model, which is based on a presumption of a corporate due care violation, is attractive from an accountability perspective in that it may unmask corporate window-dressing and blue-washing strategies. Nevertheless, casting the liability net too wide could have negative repercussions not only for corporations acting in good faith – which, hopefully, is the majority of them – but also for producers and suppliers abroad. Widespread corporate divestment from certain sectors, locations, or activities out of fear for liability could have serious welfare effects in the Global South. Perversely, then, relatively strict liability rules may actually aggravate the human rights risks that they were supposed to address.[48] For instance, commentators have warned that the US Dodd–Frank Act's imposition of stringent due diligence requirements regarding the sourcing of minerals in the DRC may lead corporations to no longer source from the DRC, which would plunge the DRC into even more abject poverty and entrench violations of economic and social rights.[49]

14.4 Practical challenges

Even if, in due course, (due diligence-based) liability standards with respect to corporate human rights violations in global value chains were to be enacted and/or clarified, there is still no guarantee that victims of corporate abuses would have access to a remedy. As highlighted previously, some of these problems of access may be jurisdictional or evidentiary in nature. Still, recent developments in extraterritorial tort cases in this context before English and Dutch courts suggest that existing jurisdictional doctrines under public and private international law may go some way toward accommodating victims' quest for a forum that is competent to hear complaints regarding "extraterritorial" abuses. However, practical challenges regarding access may be less easily surmountable. Various authors have identified such challenges and have suggested ways to overcome them. For instance, Jennifer Zerk points out that lawsuits and prosecutions regarding corporate abuses tend to be complex given the transnational character of corporate activities, especially as far as the taking of geographically dispersed evidence is concerned. For cases against corporations to be successful, cross-border legal cooperation will be required.[50]

Lawyers and law-enforcement agencies dealing with business and human rights abuses need not reinvent the wheel. Instead, as Zerk suggests, they could build on international cooperation arrangements that are already in place, such as joint investigative teams (JITs), a tool developed in the EU to boost cooperation between national investigative agencies addressing cross-border crime.[51] Such JITs could allow prosecutions for transnational corporate abuses to be more successfully mounted. Still, it will also be key to involve the State on whose territory the abuse has actually occurred, typically a non-EU Member State, even if such a State may well lack the resources to be a full partner in these investigations.

More generally, whereas it is often stated that host States lack the capacity to legally address corporate abuses in the business and human rights context – often due to poor judicial infrastructure – home States may also face major capacity

problems. Home State police officers and prosecutors may not have the knowledge, time, or resources at their disposal to seriously investigate transnational corporate crime, even more so if and when their superiors decide to prioritize domestic crime for national political reasons.[52] In addition, victims may be reluctant to file tort claims for financial reasons. This situation can only be remedied by expanding victims' entitlements to financial assistance, or by law firms and NGOs taking up the case on a *pro bono* basis.

Suppliers, for their part, may face practical and financial difficulties to comply with strict human rights standards required by buyers, a problem that Scheltema argues can only be remedied if the buyer provides training and/or dialogue to enable the supplier to actually comply with contractual human rights clauses.[53] Also, buyers themselves, especially if they are small or medium-sized, may face problems in complying with statutory due diligence obligations. This challenge may be addressed by excluding such corporations from the scope of application of the law, by easing due diligence and/or burden of proof requirements, or by encouraging them to participate in multi-stakeholder initiatives that may be better able to monitor compliance. That it is not a pipedream to hope for increased capacity and resources is demonstrated by Buhmann's example of the Dutch OECD National Contact Point (NCP). That institution received substantial funds enabling it to travel and meet complainants in the DRC, and was able to bring about a form of accountability for extraterritorial corporate abuses.[54]

14.5 An integrated approach

The contributions in this volume also point to the inherent interconnectedness of many of the issues that exist when it comes to providing justice for corporate human rights violations in global value chains, and what this says about corporate accountability for human rights abuses as a field of study, and, by extension, business and human rights as a field of law. This interconnectedness can be observed, for instance, in the way in which particular legal concepts manifest themselves across legal domains. They migrate between different fields of law and transcend the boundaries between the domestic and the international, remaining only marginally connected to their doctrinal roots. Human rights due diligence, which is now rapidly evolving from an international soft-law guideline to a standard of conduct that informs enforceable obligations from both domestic and international law, is just one such concept.[55] Another example is the much-discussed "corporate veil", which is addressed in detail by Dowling,[56] but also plays a role in one way or another in most other contributions. While it is, at its core, a company law concept meant to encourage investment, it is now at the heart of the societal and legal debate relating to the governance and accountability of transnational corporate groups when it comes to preventing human rights abuses in their global value chains.

As the contributions to this book have highlighted, this migration and uprooting means that neither the study of accountability, international business operations and the law, nor the search for effective measures in this context, can take

place from the within the confines of separate legal fields, domains, or disciplines. It cannot be conducted without paying regard to the fading divisions between the international and the domestic, between the public and the private, and between the substantive and the procedural. In this respect, business and human rights are at the forefront of a change in how we look at the study and reform of international law. Together with the role of the law in combating climate change or the role of the law in the digital era, business and human rights demonstrates a turn toward a more functionalist approach to law,[57] in the sense of a growing tendency to assess the law on its ability to perform particular societal functions. As the contributions to this book have shown, the law is currently not optimally shaped and/or utilized to adequately fulfill its function of ensuring accountability of transnational corporations in the business and human rights context.

Therefore, what is needed is an integrated approach that connects different fields of law to engage with the broader question of accountability – a holistic view of accountability, if you will. Rather than looking at corporate accountability from the perspective of changes within each legal field individually, we should take a broader view of how mechanisms that are present in different fields of law, and also those from outside the legal domain, may complement one another, if we are to promote accountability for corporate human rights violations in global value chains. That requires an increased and deepened collaboration across the boundaries between doctrines and disciplines: it requires a broader research and policy horizon. Hopefully, this book and its constituent contributions have provided a glimpse of that horizon, and what lies beyond.

14.6 Summing up: an agenda for future research

Some questions regarding accountability and liability for corporate human rights abuses in global value chains could only be addressed superficially in this volume. Other researchers are invited to discuss these issues in more depth, as we will do so ourselves in our continuous efforts to realize true justice for all involved in the field of international business and human rights. Most notably, mention could be made of the *effectiveness* and *legitimacy* of accountability initiatives. Productive scholarly inquiries could be made regarding the impact of enhanced liability "on the ground", in the corporate supply chain and for potential victims of abuse. Buhmann, for instance, suggests a future research agenda on the impact of the process of OECD National Contact points in ensuring substantive remedies for victims, and in generating longer-term change in corporate conduct.[58]

In any event, the impact of corporate accountability mechanisms in this context should not be taken for granted. For instance, Scheltema cautions, with respect to human rights clauses in buyer–supplier contracts, that termination of contracts on grounds of human rights abuses may "force a supplier to contract other buyers who might be more lenient on these issues", thereby worsening rather than improving matters.[59] However, even the underlying assumption that buyers are serious about providing accountability in the supply chain should by no means be seen as self-evident. There is, more generally, no guarantee that

public or private actors supervising corporate compliance with human rights will adequately discharge their supervisory duties. Even worse, a supervisory agency, even if required by statute or regulation, may not even materialize.[60] Surely, unlike what Glaucon, one of Socrates' interlocutors in the *Republic*, stated, "it would [not] be absurd that a guardian should need a guard."[61] Analyzing how supervisory agencies can and should monitor corporate compliance, and how they themselves can be held to account, is another productive field of future inquiry in this context.

Ultimately, analyzing what works and what does not seems more important than legalistic hairsplitting in the heaven of legal concepts.[62] However, the fact that something "works" from an empirical perspective cannot and should not be the end of the scholarly enquiry.[63] Otherwise, one risks lapsing into reductionist scientism, pursuant to which only what can be measured is real and justified.[64] Put differently, what is effective is not necessarily fair and legitimate. The effectiveness of corporate accountability mechanisms may well be increased in the near future, but one may be left to wonder whether due diligence standards may not become too strict (see Section 14.3). Also, these mechanisms are in large part Western constructs, which elicits the question of whether they are sufficiently responsive to the expectations and interests of the envisaged beneficiaries: the individuals, workers, and communities in the Global South who tend to be the victims of corporate human rights abuse in global value chains. Future research could empirically examine the extent to which Western corporate accountability mechanisms are considered as invasive, imperialistic, or culturally inappropriate in and by non-Western host States. A distinction will then have to be made between elites, which tend to benefit from foreign corporate activity, and the masses that are at risk of human rights abuses and are most in need of true (access to) justice.

Notes

1 Leif Wenar, *Blood Oil: Tyrants, Violence and the Rules that Run the World* (Oxford University Press 2016).
2 As Dowling points out in this volume (Chapter 11), it is the underlying legal imperative of all corporations to act in the service of its shareholders, as a result of which CSR may even be "illegal".
3 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy", Annex to UNHRC, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie (21 March 2011) UN Doc A/HRC/17/31.
4 See Chapter 4. See also, for instance: Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', (2010) 33 *West European Politics* 946; Deirdre Curtin and André Nollkaemper, 'Conceptualising Accountability in International and European Law', (2006) *Netherlands Yearbook of International Law* 3.
5 UNGPs (n 3) Guiding Principle 1.
6 Ibid. 25.
7 Ibid. 26.

8 Just like the UNGPs, this volume has not specifically focused on the environment as such, unlike, for instance, Chapter VI of the OECD Guidelines for Multinational Enterprises, see OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011). However, environmental abuses may have a human rights dimension, and may therefore be captured by corporate human rights obligations. This is not to deny that transnational corporate activities could have adverse impacts on local or global environmental goods without these impacts being reducible to human rights abuses.

9 The centrality of remedies explains why the volume features a contribution on OECD National Contact Points (NCP). Admittedly, the NCPs may not hold corporations liable in law. Thus, they are not a strictly legal mechanism. Nevertheless, as Buhmann points out in this volume (Chapter 3), they can hold corporations accountable via final statements on whether or not they have complied with OECD Guidelines, and thereby "facilitate agreements between parties, which may include reparations", thus contributing to the provision of a substantive remedy.

10 Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (FR). For more on the Swiss initiative, see the contribution by Bueno in this volume.

11 The official text of the initiative can be found in French, German, and Italian <www.bk.admin.ch/ch/f/pore/vi/vis462t.html> accessed 22 August 2019; the English translation is available on the website of the Swiss Coalition for Corporate Justice <https://corporatejustice.ch> accessed 22 August 2019. For more on this initiative, see Bueno (Chapter 12 in this volume).

12 For a discussion and comparison of both initiatives, see Bueno (Chapter 12 in this volume).

13 Under US securities law, fraudulent misstatements or omissions in reporting to the US Securities and Exchange Commission (SEC) could lead to liability (Securities Act, Section 12(a)(1)). This means that misstatements or omissions in reports submitted by corporations to the SEC under Section 1502 of the US Dodd–Frank Act (2010) could lead to liability. This section requires corporations (US issuers) to report whether or not their products contain "conflict minerals", by conducting due diligence.

14 For example, Robert Chambers and Anil Yilmaz-Vastardis, 'The New EU Rules on Non-Financial Reporting: Potential Impacts on Access to Remedy?', (2016) 10 *Human Rights and International Legal Discourse* 1, 18–40 (arguing that, by requiring parent companies to report on human rights impacts, Directive 2014/95/EU 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 [2014] OJ L 330/1 "could be mandating companies to acquire knowledge of and involvement in the business of their subsidiaries and show this in their annual reports, which may result in them assuming a duty of care to employees (and others) affected by the actions of their subsidiaries").

15 See also supply chain contracts on human rights compliance, as discussed in this volume by Scheltema (Chapter 13), which may feature an arbitral clause providing for arbitration in case internal corporate grievance mechanisms fail to deliver results.

16 Such reform may possibly be addressed by the new business and human rights treaty that is being prepared by the Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights, established by the UN. A first draft was released in July 2018, a revised draft in July 2019. For more information and further references, see <www.business-human-rights.org/en/about-us/blog/debate-the-treaty> accessed 22 August 2019.

17 See also Buhmann's observation in this volume that (merely) having access to remedy is no guarantee that harm done will be cured (Chapter 3).

18 See Chapter 13.
19 Scheltema advocates the following measures: "clearer description of the human rights the buyer is referring to; enhancing measurement of supplier performance, including improved audits; building dialogue with suppliers; implementing effective grievance mechanisms with feedback loops to the buyer; enhancing supplier obligations to provide information; and increasing enforcement of contractual provisions, including arbitration as an escalation mechanism" (Chapter 13).
20 See Chapter 12.
21 See, for example, Juan José Alvarez Rubio and Katerina Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017).
22 See, for example, Liesbeth Enneking, 'Transnational Human Rights and Environmental Litigation: A Study of Case Law Relating to Shell in Nigeria', in Isabel Feichtner et al. (eds.), *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Springer 2019) 511–51; Lucas Roorda and Cedric Ryngaert, 'Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction', (2016) 80(4) *Rabels Zeitschrift für internationales und ausländisches Privatrecht* 783.
23 See Chapter 11. See also Enneking (n 22).
24 See, e.g., para. 2(d) of the text of the Swiss Initiative ("[t]he provisions based on the principles of paragraphs a–c apply irrespective of the law applicable under private international law"), as discussed by Bueno in Chapter 12.
25 See Chapter 11.
26 See Chapter 10.
27 Dutch Penal Code, Article 273f.
28 Schaap also discusses the UK Modern Slavery Act 2015, s 54(4)(a), which requires, *inter alia*, that commercial organizations prepare a slavery and human trafficking statement that must include information about parts of the organization's business and supply chains that contain a risk of slavery and human trafficking, and the steps it has taken to address that risk. However, she also notes that this Act, unlike the Dutch provision, does not criminalize domestic profiting from extraterritorial abuses, which means it is no real substitute for the Dutch provision as a working model.
29 Voorstel van wet van het lid Van Laar houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid), *Kamerstukken I*, 2016/17, 34 506 <zoek.officielebekendmakingen.nl/kst-34506-A.html> accessed 22 August 2019. Article 9 provides for criminal sanctions on (officers of) companies that repeatedly fail to comply with the due diligence and reporting obligations set out in the Act.
30 See Chapter 9.
31 See Chapter 7.
32 Schweizerisches Bundesanwaltschaft, Dismissal of proceedings against Argor-Heraeus, Case Number SV.13-MUA, Bern, 10 March 2015.
33 This is evidenced by the Dutch convictions of individual businessmen Van Anraat and Kouwenhoven, discussed in this volume by Cupido et al.: both were held liable, on the basis of accomplice liability, for facilitating war crimes committed in Iraq and Liberia in the context of their delivering chemicals and arms to a party to the armed conflict.
34 Article 25 of the Rome Statute of the International Criminal Court limits its jurisdiction to natural persons.
35 ICC, Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation', 15 September 2016, para. 41.
36 See Chapter 7.

37 See Chapter 5. Yiannibas reviews the mechanism of international arbitration in light of the requirements with which mechanisms offering a remedy should comply, according to General Principle 31 of the UNGPs, and makes a number of recommendations in order to make the mechanism of international arbitration more compatible with/effective in the business and human rights context.
38 See also Scheltema's emphasis on incremental reform, where, regarding contractual clauses on business and human rights compliance, he points out that "smaller changes are preferably first implemented in the supply chains and in relation to the types of risk that pose the largest treat to human rights" (Chapter 13).
39 See Chapter 6.
40 See Chapter 2. See also UNGPs (n 3) General Principles 17–21. General Principle 17 defines due diligence as the process through which enterprises can identify, prevent, mitigate, and account for how they address their actual and potential adverse impacts.
41 See Chapter 7.
42 See Chapter 2.
43 See Chapter 12.
44 See generally, regarding the OECD and due diligence: OECD (n 8) ch II, commentary para. 14 and ch IV, commentary para. 15. Under OECD auspices, various sectoral due diligence guidances have been developed, e.g., OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector.
45 Cf. Section 2b of the Swiss Initiative, which instructs the legislator to take into account the needs of small and medium-sized companies.
46 Regarding the French law, Fasterling observes: "As long as the parent company draws up a state-of-the-art risk map and due diligence plan, and is able to show that it implements and regularly follows up on the plan, the defendant is on the safe side".
47 The presumption of liability was already mooted by Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) 111 *The Yale Law Journal* 443, 520.
48 The assumption here would be that a decrease in welfare will lead to more human rights abuses, proof of which is not easy to obtain. However, this assumption can also be seen as the inverse of the much reported effect that an increase in welfare has on human rights compliance.
49 See, for instance, Christiana Ochoa and Patrick Keenan, 'Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation', (2011) 3(1) *Goettingen Journal of International Law* 129, 148. See also Annika van Baar, 'Conflict, Minerals and Reporting Obligations for Multinational Business Operations (what Did Dodd-Frank 1502 Do?)', Conference Paper UCALL Conference 2017 Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights, Labor and Environmental Standards (Utrecht, the Netherlands), on file with the editors.
50 See Chapter 6.
51 Council Resolution on a Model Agreement for setting up a Joint Investigation Team (JIT) [2017] OJ C 18/1.
52 This issue is also highlighted by Schaap in respect of prosecutions for modern slavery involving corporate actors (Chapter 10).
53 See Chapter 13. Scheltema notes that Western buyers' behaviour may sometimes impede their suppliers' compliance with human rights, and suggests setting up mechanisms for suppliers to complain about this.
54 See Chapter 3. Nevertheless, Buhmann harbors doubts about the availability of resources for proactive instead of reactive accountability efforts by NCPs.

55 Compare how the normative force of due diligence can inform not just duties of care, but also standards of international criminal law, as discussed by Dam-de Jong (Chapter 7). It is a substantive concept that can fill the gaps in open norms with regard to corporate behavior.
56 See Chapter 11.
57 As noted by Michaels, "functionalism" in law, especially in comparative law, has a plethora of meanings that are often confused, but the interpretation here is that of instrumentalism as a functionalist approach. See Ralph Michaels, 'The Functional Method of Comparative Law', in Mathias Reimann and Reinhard Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2007), 351–2.
58 See Chapter 3.
59 See Chapter 13.
60 At the time of writing, it was still unclear what Dutch agency would supervise compliance with the EU Conflict Minerals Regulation (Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 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 L 130/1), which requires that EU importers of a number of minerals comply with due diligence obligations.
61 Plato, 'The Republic', in Paul Shorey (ed. and trans.), *Plato: The Republic: Books I–V* (Loeb Classical Library Putnam 1930) Book III, XII, 403E, 265. The Roman author Juvenal is credited with posing the question 'who is guarding the guardians?' for the first time. Juvenal, *Satire* 6: 346–8 ('quis custodiet ipsos custodes?').
62 Cf. Rudolf von Jhering, 'Im Juristische Begriffshimmel', in *Scherz und Ernst in der Jurisprudenz* (Breitkopf und Härtel 1912) 245; translated in English as 'In the Heaven for Legal Concepts: A Fantasy', (1985) 58 *Temple Law Quarterly* 799.
63 Cf. Ivo Giesen, 'The Use and Incorporation of Extralegal Insights in Legal Reasoning', (2015) 11(1) *Utrecht Law Review* 1, 15–6.
64 Cf. Thomas Sorell, *Scientism: Philosophy and the Infatuation with Science* (Routledge 1994).

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