

Investigating the Use of Private International Law Tools in Preventing Human Rights Impact of Environmental Harm in Global Value Chains of the Extractive Sector

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In today's world, corporations structure their businesses in corporate groups or supply/value chains. Such structure allows the companies to spread their business operations around the world and allow access to cheaper workforce, raw materials, or other products. Although this is advantageous for companies, it threatens human rights and the environment. Thus, my research seeks to uncover the possible contribution of private international law in preventing the human rights impact of environmental harm caused by the cross-border operations of multinational enterprises. In this light, in the first part of this short paper, I will briefly overview the issue at hand and how my project aims to tackle it.

1. The Problem

The human rights violations companies commit through their activities have increased rapidly over the last few decades. According to the 2020 Corporate Human Rights Benchmark survey, which surveyed 229 global corporations, nearly half had at least one allegation of a serious human rights issue, and only four percent of the companies effectively remedied the situation.² Especially in the extractive sector (mining, oil, and gas), the extent of the corporate disasters is quite far-reaching due to the sector-specific qualities. Natural resource exploration and extraction are inherently exploitative and environmentally and socially damaging.³ For instance, in April 2012, the oil rig Deepwater Horizon, operated by British Petrol in the Gulf of Mexico, exploded and sank, causing the death of 11 employees and the largest man-made environmental disaster in history.⁴ More recently, Repsol, a Spanish energy company, was sued over a huge oil spill causing severe ecological disaster in Peru.⁵ Furthermore, as a result of its ongoing endeavors for a long time, Shell has been degrading the environment in Nigeria through oil spills in its extraction operations.⁶

Naturally, such corporate disasters/endeavors significantly impact human rights, the environment, and the climate. The important thing to realize about this type of harm is that human rights/environment/climate damage is very likely to be irreparable. In this regard, if a child loses his arm while working for such a company or a pristine area or a type of species is

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² Radmilla Suleymanova, 'Corporate Giants are Falling Down on Human Rights, Says Study', (Aljazeera, 19 Nov 2020) accessed on 9 June 2023, can be accessed via <https://www.aljazeera.com/economy/2020/11/19/big-global-firms-falling-short-on-human-rights-despite-pressure> .

³ Darren McCauley & Lauren Downes & Oscar M. Ramirez Rodriguez & Raphael J. Heffron, 'The Emergence of the 'Social Licence to Operate' in the Extractive Industries? [2021] 74, Resources Policy 101272.

⁴ 'Deepwater Horizon-- BP Gulf of Mexico Oil Spill' (United States Environmental Protection Agency, 31 August 2022) accessed on 9 June 2023, can be accessed via <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill> .

⁵ Beth Timmins, 'Peru to Sue Repsol for \$4.5 bn over Oil Spill' (BBC News, 24 August 2022) accessed on 9 June 2023, can be accessed via <https://www.bbc.com/news/business-62659241> .

⁶ 'Nigeria: Shell Must Clean up Devastating Oil Spills in the Niger Delta' (Amnesty International 2 February 2023) accessed on 9 June 2023, can be accessed via <https://www.amnesty.org/en/latest/news/2023/02/nigeria-shell-oil-spill-trial/> .

lost, they are lost forever.⁷ Therefore, although it is also vital to facilitate access to remedies for the victims of such corporate harm (which has been the aspect that the literature has been focusing on so far), maybe the perspective should be changed. Ways to prevent such harm from happening in the first place must be searched.

2. The Solution

In 2011, after the rigorous efforts of Professor John Ruggie, the United Nations Guiding Principles on Business & Human Rights were endorsed by the United Nations.⁸ The UNGPs were the beginning of an era where gradually, coming up to today, corporations would have to carry the burden of protecting human rights and the environment from their own impact. When the UNGPs were endorsed, it was an outstanding achievement because it was a novel idea to put certain responsibilities on the corporations regarding human rights, as for decades, they were seen as entirely immune from any human rights responsibility.

The UNGPs provide a non-binding yet authoritative framework that sits on three pillars: the State's duty to protect, the business responsibility to respect, and facilitating access to remedy.⁹ These three pillars provided the framework for considering how human rights can be genuinely and effectively protected. As it is well-known, States are the primary duty-bearers regarding human rights protection. This privileged position of the State makes sense because the State is an entity that has the authority to make laws/regulations; it has the means to implement them and monitor their implementation. Furthermore, the State also has the power to bring the ones who do not (effectively) follow the rules before justice.

On the other hand, the UNGPs framed what the businesses must do as a responsibility rather than a duty. Although such framing weakened the already voluntary obligations of the UNGPs, for the companies that wanted to follow the framework, it still brought quite some actions onto businesses. The primary responsibility in this regard is the need for businesses to conduct human rights due diligence to identify, address and remedy their (possible) adverse impacts.

Over the years, moving forward from the UNGPs, with the inadequateness of voluntary frameworks to effectively and efficiently decrease human rights violations and to increase access to remedies when they happened, pushed academia, politicians, governments, and civil society to look for alternative methods. As such, to force companies to do better, some States started enacting hard laws on the matter. Starting with [France](#) in 2017, followed by [Germany](#) in 2021, and the ongoing discussions in the European Union for a [Corporate Sustainability Due Diligence Directive](#), the new momentum is behind abandoning voluntary frameworks and having robust legislation.¹⁰ The common tools to tackle corporate harm in all these voluntary and mandatory initiatives are corporate codes of conduct, contractual clauses, and reporting mechanisms. As such, moving on from the common (private international law) tools, my research looks into how we can use these three tools to prevent the human rights impact of environmental harm in the global value chains of the extractive sector.

⁷ Karin Buhmann, Blogging on Business & Human Rights: Towards an EU Directive on Corporate Sustainability Due Diligence (16.01.2023, held in Lisbon, NOVA Center on Business, Human Rights and the Environment)

⁸ United Nations Human Rights Office of the High Commissioner, United Nations Guiding Principles on Business and Human Rights (2011), can be accessed via <https://digitallibrary.un.org/record/720245?ln=en> .

⁹ See as an excellent commentary on the UNGPs, Choudhury, B. (Eds.). (2023). *The UN Guiding Principles on Business and Human Rights*. Cheltenham, UK: Edward Elgar Publishing.

¹⁰ See also the last documents, the [Council position](#) and [the Parliament position.](#)

3. The Method

I will use different legal research methodologies for different steps in my research. I will use the legal doctrinal methodology to identify and describe these three tools in the selected jurisdictions. In this step, I will examine the selected jurisdictions' laws, legislations and case law. Then, I will use two sets of empirical research to contextualize the use of these tools. Firstly, I will use desk-based empirical research to examine corporate codes of conduct, general terms & conditions, and reports of the top 10 extractive companies. Later, I will conduct qualitative empirical research to find how the companies operate on the ground. I will conduct interviews with persons from business organizations, non-governmental organizations, and civil society organizations who have more access to information on how the companies act on the ground.

As a result of this data gathering and contextualization, I will compare the use of these tools in the selected jurisdictions and give evidence-based normative recommendations on how we can use these tools to prevent harm.

In this light, I have selected the following jurisdictions to compare: European Union (France & Germany, England, and South Africa). The reasons for the selection of these jurisdictions are manifold:

- I have chosen to focus on the European Union due to the significant momentum behind adopting hard laws to regulate behavior. As aforementioned, the European Union adopted the Corporate Sustainability Reporting Directive in 2022. In June 2023, the European Parliament recently adopted its position on the Corporate Sustainability Due Diligence Directive. Consequently, the trialogues have begun in the adoption of the Directive.
- Secondly, European Union is a significant player in the international political and economic spheres. Adopting the directives mentioned above will significantly impact all countries, considering that these laws will have extraterritorial effects, and one way or another, all countries are involved in the global value chains of extraction.
- I have chosen to focus on Germany and France within the Union due to their progressive nature of adopting hard laws on business and human rights. The two laws from these countries carry some critical differences. Naturally, if the Corporate Sustainability Due Diligence Directive is adopted, these laws will meet at a common baseline. However, still keeping this baseline, either law may exceed the expectations of the Directive.
- I have also chosen to focus on England due to the progressive decisions from the English courts. The decisions from the English courts provide an excellent benchmark to discuss how these private international law tools can be used to prevent harm. By comparison, we can see what the legislators and the courts can contribute to preventing harm.
- The first four jurisdictions are Global North countries with strong links to the colonial past. Due to their colonial past and the continued endeavors of today, the Global North countries still have strong ties to current human rights abuses or environmental degradation happening in the Global South. Furthermore, Global North countries are

essential investors in the Global South area, financing many projects linked to human rights abuses.

- I also chose South Africa as a jurisdiction because I wanted to include a recipient country of damage. South Africa is a very vibrant country regarding investments, and the other selected countries are major investors in the South African economy.
- South Africa presents a great case study for my research as my research focuses on the extractive sector. South Africa is home to many minerals and has been subject to colonial and extractive endeavors. Many extractive sector companies are operating in South Africa, and thus it is an integral part of many value chains. Consequently, it is a home country to various types of human rights abuses and environmental degradation.
- Overall, the selected jurisdictions bring examples from common law, civil law, and mixed jurisdictions, showing the extent of prevention that can be achieved through various means. The selected countries also provide an excellent comparison to see how Home and Host countries tackle the issue of regulating corporate behavior and preventing human rights and environmental impact.

It is also important to stress that my research does not aim to measure the efficiency of the new hard laws adopted. My research aims to determine the initial impact of such laws and whether they have or can induce change in the corporate stance. Furthermore, my research is also monodisciplinary in nature, trying to uncover how law, specifically private international law, can contribute to preventing harm as a consequence of corporate activities.

4. Concluding Remarks

My research concerns a very socially relevant topic that is hotly debated in the international area today. Today's big problems, such as environmental degradation, climate change, and human rights violations, are quite pressing and need to be urgently addressed. The issues at hand are transnational and multi-faceted, making them even harder to effectively and efficiently resolve. Therefore, not only legal researchers but we also need researchers from various fields (political science, international relations, economics etc.) working on this matter to end corporate harm.