Corporate Accountability in International Law: a “state shaming” Exercise

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When the United Nations system was founded, States were the dominant power and the main actors at the international stage. They were thus the only bearers of obligations in international law as they were perceived as the only ones capable of infringing international norms. Globalization has seen the emergence of new actors and corporations have gradually exercised some functions similar to that of states.

This change leads us to reconsider the allocation of responsibilities in international law. The growing recognition of the potential impact of corporations upon human rights has spurred the development

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of a number of regulatory initiatives in the last decades. The initiatives adopted have mostly taken the shape of soft law initiatives that do not impose direct binding obligations on corporations, as these initiatives rather focus on States’ obligations. Even at the regional level, States tend to be the only duty-bearers, even in cases involving corporations’ activities.

In this Article, the author discusses about the allocation of responsibilities in international law and criticizes the reluctance of international instruments to address the issue of corporate accountability, by only targeting States as the main wrongdoers and duty-bearers. The author also undertakes a comparative analysis of regional human rights systems and their rulings relating to corporate responsibility.

Introduction

In the last decades, a series of tragic events have revealed to the public abusive business practices used by several
transnational corporations (TNCs) having delocalized their production abroad. Recent examples of irresponsible corporate conduct in their supply chains include hazardous working conditions in the textile industry in Bangladesh (November 2012), the widespread use of forced labour in the fishing industry in Thailand (June 2014) and the environmental pollution and devastation of livelihoods caused by a dam collapse in Brazil (November 2015). Human


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rights violations committed by TNCs are in fact commonplace in developing countries.\(^6\)

With globalization, TNCs have become important players in the international arena,\(^7\) which benefits from transfers of


capitals between countries through the removal of trade barriers and the lowering of transactional costs. The economic wealth is sometimes equal or even superior to some countries. Indeed, it was estimated by an NGO in 2015 that among the 100 biggest economic entities of the world, 69 were corporations. Thus, corporations are increasing in power, leading to a new public order. This new public order justifies a shift in the repartition of rights and obligations. For the last decades, the growth of transnational corporations has been paralleled by concerns to find ways to regulate business activities, as their cross-national structures represent new challenges for the traditional territorial regulation of States.

Under international human rights law, the State is supposed to be the sole duty-bearer to ensure the respect of human rights. Yet, instruments such as the Universal Declaration on

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Human Rights (UDHR) (which mentions the responsibility of ‘every organ of society’¹¹) or the UN Covenant on Civil and Political Rights (ICCPR) (which provides that no ‘group or person’ shall be able to ‘engage in any activity (...) aimed at the destruction of any of the rights and freedoms recognized herein’¹²) tend to indicate a certain propensity to the regulation of private actors as well.

When the United Nations system was founded, States were the dominant power. They were deemed to be the only bearers of obligations in international law as they were perceived as the only ones capable of infringing international norms.¹³ Globalization has seen the emergence of new actors¹⁴ and corporations have gradually exercised some functions similar to that of states.¹⁵ Indeed, corporations exercise substantial influence over individuals, as they can for example determine their working conditions or have an

¹⁵ See Louise Amoore, ‘Making the Modern Multinational’ in Christopher May (ed), Global Corporate Power, (Lynne Rienner Publisher, 2006), 62.
impact on the pollution of the environment they live in.\textsuperscript{16} This new power leads to a necessity to better allocate responsibilities and hold corporations accountable. Given the serious detrimental impacts that TNCs’ operations can create, some multilateral treaties already impose direct obligations on companies, such as the Paris Convention on the Third Party Liability in the Field of Nuclear Energy,\textsuperscript{17} the International Convention on Civil Liability for Oil Pollution Damage,\textsuperscript{18} and the European Council Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.\textsuperscript{19} These treaties all place responsibilities on businesses.\textsuperscript{20} The growing recognition of the potential impact of corporations on human rights has spurred the development of a number of regulatory initiatives in the last decades. The initiatives adopted have mostly taken the shape of soft law initiatives that do not impose directly binding obligations on corporations, but rather focus on states. Even

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\item \textsuperscript{17} See Art. 6 of the Convention Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982.
\item \textsuperscript{18} See Arts. 3-4 of the International Convention on Civil Liability for Oil Pollution Damage, 1992.
\item \textsuperscript{19} See Art. 6 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous for the Environment, 1993.
\item \textsuperscript{20} Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the International Convention on Civil Liability for Oil Pollution Damage (CLC) and the International Convention for the Prevention of Pollution from Ships (MARPOL).
\end{itemize}
at the regional level, States tend to be the only duty-bearers, even in cases involving corporations’ activities. However, the imposition of hard law obligations on corporations is progressively discussed on the international stage. Indeed, following a proposal made by Ecuador and South Africa before the Human Rights Council in September 2013, the Human Rights Council adopted a resolution on the establishment of an Intergovernmental Working Group ‘to elaborate an international legally binding instrument’, aiming notably to ensure access to justice and redress to victims of corporate abuse. Discussions are currently held at the United Nations to find an agreement on the elaboration of this treaty. This new instrument represents the hope for a new era that would finally establish and recognise corporate accountability in international law. Throughout this Article, we shall hence discuss the allocation of responsibilities in international law and criticise this evident reluctance to address the issue of corporate direct accountability, as international instruments mostly target States as the main wrongdoers and duty-bearers. As we shall argue, soft law instruments should pave the way to build consensus to set the ground for the effective regulation of corporate actors. Yet, as we shall illustrate with the analysis of regional human rights systems, States remain the main duty-bearers before

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international jurisdiction, which allows evading the question of corporations’ liability.

II. The repetitive adoption of international soft law instruments relating to corporate accountability

International organisations have started to realise the importance of the problem relating to corporate accountability quite early on. In fact, a first effort to regulate international business practice had been started in 1948 with the inclusion of investment and social responsibility provisions in the Havana Charter for an International Trade Organization. However, the Charter was never adopted.\textsuperscript{22}

A second attempt was then made in 1974 by the United Nations Centre on Transnational Corporations (UNCTC)\textsuperscript{23} with the negotiation of a Code of Conduct on Transnational Corporations. Indeed, in the 1970s, several scholars had started warning that transnational corporations (TNCs) were acquiring a certain importance on national economies.\textsuperscript{24} The main concern was that TNCs operated beyond the reach of

\textsuperscript{22} The Charter was adopted in the final act of the United Nations Conference on Trade and Employment held at Havana, Cuba, from 21 November 1947 to 24 March 1948.
\textsuperscript{23} The Centre was established in 1974 and abolished in 1992.
states’ national sovereignty. Therefore, in November 1974, the UN General Assembly mandated the UNCTC to elaborate a normative framework for TNCs. The long-term objective was the adoption of an international treaty to monitor TNCs, which would require extended discussion.25

For 20 years, the United Nations Commission on Transnational Corporations negotiated for the adoption of a United Nations (UN) Draft Code of Conduct of Transnational Corporations26 but no agreement could be found between developing and developed countries to decide whether the rules of conduct should be ‘detailed and mandatory’ or more ‘general and voluntary’.27 The UN Draft Code raised so much controversy that it was finally abandoned since the idea of imposing direct obligations on companies met strong opposition.28 As a result, only soft law instruments have been

adopted to this day at the international level to regulate corporate activities in the field of human rights. In this first section, we shall study the different ‘soft law’ instruments that have been adopted at the international level relating to business and human rights.

II A) The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

The International Labour Organisation (ILO) is a specialized United Nations agency in charge of the drafting of international labour standards as well as of their enforcement by Member States. The ILO is one of the first international organizations that has started measuring the importance of the question of corporate social responsibility. Indeed, in the 1960s, it started drafting the Tripartite Declaration of Principles concerning multinational enterprises and social policy. The declaration was drawn up to define and regulate the conduct of multinationals with their host countries.29 The declaration was intended as a set of guidelines to help TNCs, governments, and workers’ organizations in their activities and their interactions.30 These guidelines are based on principles contained in international labour conventions and

recommendations and cover a broad range of areas such as conditions of work and life. The original declaration was amended three times and last revised in 2017 to better adapt it to the role of TNCs in today’s globalization.\textsuperscript{31}

The declaration is meant to ‘guide governments, employers’ and workers’ organisations of home and host countries and multinational enterprises in taking measures and actions and adopting social measures (…) to further social progress and decent work’.\textsuperscript{32} The declaration also allows governments and unions to conduct surveys to gather information from TNCs in order to draw conclusions on policies and suggest possible changes.\textsuperscript{33} In 2016, the Declaration has notably led to the conclusion of an agreement with the construction sector in the Arab states (in the context of the preparation of the 2020 World Expo in Dubai and the 2022 Football World Cup in Qatar in which many migrant workers from Asia and Africa

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\textsuperscript{32} Updated version of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (March 2017), para. 4.
\end{flushleft}
are involved).\textsuperscript{34} However, the declaration has only moral authority.\textsuperscript{35} In case of breach, a complaint cannot be filed against a State for not complying with the objectives of the declaration.\textsuperscript{36} Therefore, one of the main triggers for change and compliance under the Tripartite Declaration lies with the public pressure.\textsuperscript{37}

\textit{II B) The OECD Guidelines}

The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental economic organisation founded in 1960 to foster economic progress and


compare policy experiences among its 35 member countries. The OECD started considering the question of business and human rights in the 1970s by issuing guidelines (known as the OECD Guidelines), a set-up of recommendations addressed by governments to transnational corporations.

These Guidelines contain recommendations on human rights, employment, industrial relations and environment among others. They apply to all corporations which have a parent company or operate in any of the signatory states, even if the enterprises also operate in non-signatory states. National Contact Points (NCPs) were created with the adoption of the Guidelines. They are responsible for promoting observance of the Guidelines in the national context and for ensuring that the Guidelines are known and understood by enterprises.\(^{38}\) Governments that have adhered to the Guidelines are obliged to set up National Contact Points which can be either a government department or independent structures comprising government officials, trade unions, employers’ unions, and sometimes non-governmental organizations. NCPs can report regularly to the OECD Investment Committee, which can then issue clarifications on how the Guidelines should apply and be interpreted.\(^ {39}\)

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\(^{38}\) OECD, General Policies I.1, OECD Guidelines for Multinational Enterprises.

The NCPs include a ‘specific instance’ procedure in charge of handling complaints against companies operating within their national jurisdiction and suspected of having failed to comply with the Guidelines’ standards. This instance oversees the resolution of disputes, through mediation and conciliation. The dispute resolution procedure can be used by anyone who can prove an interest in the alleged violation. However, the effectiveness of this mechanism has been debated and some civil society actors have criticized NCP procedures as uneven and often ineffective. Indeed, if no conciliation is reached, the NCP does not offer any other recourse to the victims.

Although this ‘specific instance’ claim review mechanism does not have the power to impose sanctions, the NCP can publish information on non-compliance. This provides some force to the Guidelines, as this information can notably

40 The Implementation Procedure of the OECD Guidelines for Multinational Enterprises is included in Part II of the OECD Guidelines, Section II.
42 OECD Watch, Calling for Corporate Accountability <http://oecdwatch.org/publications-en/Publication_3962>.
be used in civil or criminal litigation. Thus, this can put pressure on TNCs since they might fear the related negative impact on their reputation towards the public. Nevertheless, the efficiency of such a system is still criticized. The non-binding nature of the Guidelines has been criticized as a ‘gentlemen’s agreement’ without a real bite. Indeed, according to the Guidelines, TNCs do not assume legal liability for non-compliance.

Another critique relates to the fact that complaints are considered by the NCPs are usually established within governmental institutions which promote international trade and investment rather than human rights. This might

46 For example, the German NCP is part of the Federal Ministry of Economics and Technology entrusted with the promotion of foreign trade and investment. The Italian NCP is within the Ministry of Economic Development, and the Korean NCP is located in the Ministry of Commerce, Industry and Energy.
47 According to a report produced by Rights and Accountability in Development (RAID) and the Centre for Research on Multinational Corporations (SOMO), NCPs generally favour business and even seem to be “designed to discourage complaints” by responding too slowly and interpreting the Guidelines in a restrictive manner. See OECD Watch, Review
indicate a sign of bias or ineptitude of these authorities. Therefore, the OECD Guidelines show some limitations in being able to foster a real compliance with human rights standards by corporations.

II C) The UN Global Compact

The UN Global Compact,\(^{48}\) which was launched in 2000, consists of a ‘practical framework for the development, implementation, and disclosure of sustainability policies and practices’.\(^{49}\) It is a policy initiative addressed to public sector bodies, corporations, NGOs, and labour organisations in order for them to sign up to a set of ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption, derived from various international legal instruments. The ten principles of the Global Compact are issued from four of the most widely ratified international legal instruments, namely: The Universal Declaration of Human Rights; the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work; the Rio Declaration on Environment and Development; and the United Nations Convention Against Corruption.

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Thus, the UN Global Compact breaks with the traditional modes of standard-setting generally used by the UN.\(^50\) It is the largest voluntary corporate social responsibility initiative in the world, as it groups 12,000 signatories, among which 9,000 corporations and more than 4,000 non-business.\(^51\)

Therefore, this initiative was described as a fundamental shift by the previous UN Secretary-General Kofi Annan: ‘The United Nations once dealt only with governments. By now we know that peace and prosperity cannot be achieved without partnerships involving governments, international organizations, the business community and civil society’.\(^52\)

Once an enterprise has signed onto the Global Compact, it commits to apply the Global Compact principles by including them in its business practice in a complete and long-term


\(^{51}\) UN Global Compact, Our Participants, <https://www.unglobalcompact.org/what-is-gc/participants>.


manner.\textsuperscript{54} The company is also required to conduct risk-assessments of its activities and to issue strategies to tackle these risks.\textsuperscript{55} Therefore, under the Global Compact system, businesses are expected to ‘support and respect the protection of internationally proclaimed human rights’.\textsuperscript{56}

On the other hand, we shall note that the terms used to describe the responsibilities of corporations are quite elusive. In fact, it is not completely clear what behaviour is expected from participating businesses. The Global Compact is criticised for its lack of enforcement mechanisms.\textsuperscript{57} A too-

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\textsuperscript{56} UN Global Compact, Principles 1 and 2.

wide margin of appreciation is left to businesses regarding the interpretation and application of the Compact’s principles.\textsuperscript{58} Thus, it is even affirmed that the Global Compact hinder development ‘by disguising profit-making aspirations under a veil of social conscience’.\textsuperscript{59} Others invoke the fact that the Global Compact represents a perfect opportunity for corporations to green wash their image, using the image of a UN flag to indicate to the public that they are respectful of UN principles, while breaching at the same time human rights that they are supposed to comply with. This results in allowing them to benefit from a good reputation despite their non-compliance with the initiative.\textsuperscript{60}

One of the weaknesses of the Global Compact is the fact that it does not provide any compliance or control mechanism through which victims of adverse impacts caused by TNC’s activities can obtain redress. In fact, corporations can decide by themselves how to implement the Global Compact Agenda. The Global Compact mostly relies on the idea that good practices should be rewarded by being publicised on

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  \item \textsuperscript{58} Justine Nolan, 'The United Nations’ Compact with Business: Hindering or Helping the Protection of Human Rights?' (2005) 24:2 University of Queensland Law Journal 445, 460
  \item \textsuperscript{60} David Bigge, 'Bring on the Bluewash: a social constructivist argument against using Nike v. Kasky to attack the UN Global Compact' (2004) 14(1) International Legal Perspectives 6, 12.
\end{itemize}
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the official website of the initiative. Therefore, just like the OECD Guidelines or the ILO Tripartite Declaration, the Global Compact fails to create binding obligations for corporations. It has even been underlined that many corporate members of the Global Compact have been criticized for violations of the compact’s principles.61

Under the Global Compact system, a written complaint can be submitted by any individual, organisation or state to the Global Compact Office, which will require the relevant company to provide written comments and keep it informed of action undertaken to address the situation brought to its attention. The Office will not assess the situation but simply provide guidance and assistance to the company to remedy the situation. The Office can also refer the matter to the relevant UN specialized entity for advice, assistance or action, but it cannot take enforcing measures against the corporation to make it comply with the protected principles.

To tackle this criticism of inefficiency, a Communication on Progress (COP) mechanism was introduced in 2005 to create a public reporting requirement. A communication must thus be sent annually by signatories to communicate on their application of the Global Compact’s principles. The COP

must be published on the UN Global Compact website and shared with the company’s stakeholders. Failure to submit an annual COP results in a change in the participant’s status from ‘Active’ to ‘Non-Communicating’. Participants who do not communicate progress for two years in a row are then delisted. In November 2015, 2,063 companies were ranked under the ‘Delisted’ status on the Global Compact website, which shows that a substantial number of companies do not take proper care to communicate on their efforts to comply with the Global Compact’s principles.

Another measure taken in 2005 introduced strict rules on the use of UN and Global Compact logos. Moreover, a new complaint mechanism was set up: Section 4 of the 2005 Public Sector Integrity Measures introduced a dialogue process to settle ‘credible allegations of (...) abuse of the Global Compact’s (...) principles by a participating organization’. The purpose of the dialogue is to ‘assist participants in aligning their actions with the commitments they have undertaken with regards to the Global Compact principles’. Yet, these initiatives are insufficient to cure the initial failure of the UN Guiding Principles relating to the lack of efficient

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sanctions. Fostering dialogue does not constitute a strong enough measure to answer the critiques raised by several relevant actors, who perceive the instrument as a greenwashing tool for companies. Surely aware of the shortcomings of the UN Global Compact, the UN tried to conduct other initiatives in order to impact business practices more deeply.

II D) The UN Guiding Principles

The 2011 UN Guiding Principles on Business and Human Rights (UNGPs, also referred to as the Ruggie’s Principles, by the name of the Harvard Professor in charge of their drafting) represent one of the most recent soft law attempts at regulating corporations in international public law. The UNGPs have gathered an unprecedented consensus among states, corporations and human rights defenders.


Guiding Principles aim to clarify the implications of relevant international human rights provisions for both states and businesses. Similarly to the UN Global Compact, the Principles do not create new obligations but explain how existing human rights principles should be enforced by states and corporate actors. The UNGPs rest on a three pillars framework, often summarised as the ‘Protect, Respect and Remedy’ formula:

i) States have a duty to protect against human rights abuses through their legislation and their policies to ensure an effective enforcement (Principles 1 to 10);

ii) Enterprises have a responsibility to respect human rights: they must avoid breaching human rights and must address harms that they have caused (Principles 11 to 24);

iii) When individuals are victims of human rights breaches caused by business activities, they should be able to seek redress. States and corporations both share a responsibility to

and Anna-Louise Chané, 'Multinational Corporations in International Law, in Non-State Actors in International Law' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds), Non-State Actors in International Law (Bloomsbury, 2015) 241–242.

provide such an access to effective remedy.68 This pillar encompasses both judicial and non-judicial mechanisms69 (Principles 25 to 31).

The first pillar corresponds to the traditional understanding of human rights obligations of states. The first pillar confirms that States are still the primary actors in securing compliance with human rights. The UN Guiding Principles emphasise that States have a critical role to play and can use a ‘smart mix of measures – national and international, mandatory and voluntary- to foster business respect by for human rights.’70

68 Surya Deva claims that the right to a remedy is encompassed in human rights themselves. Therefore, he claims that businesses’ responsibility to respect human rights comprises the right for victims to obtain redress, as the three pillars of the UNGPs should be seen as a whole. See Surya Deva, Access to Effective Remedy: Taking Human Rights and Rights Holders Seriously, Cambridge Core Blog, (November 2017) <http://blog.journals.cambridge.org/2017/11/14/access-to-effective-remedy-taking-human-rights-and-rights-holders-seriously>.


The key role of States rather than corporations is confirmed by the terminology used for the second pillar, which refers to the ‘responsibility’ of corporations. The use of the term ‘responsibility’ rather than ‘duty’ implies that respecting human rights is not an obligation which is imposed on companies.

Nevertheless, companies do have a role to play in the implementation of Pillar 3, as they can establish ‘non-state-based grievance mechanisms’ (Principles 28, 29 and 30). According to the Commentary on the UN Guiding Principles, remedies can be:

- apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.\(^{71}\)

The Ruggie principles insist much more on the issue of remedies in comparison to the UN Global Compact. States have a responsibility to provide both judicial and non-judicial remedies, while businesses have a responsibility to provide non-judicial remedies for violations in which they are involved.\(^{72}\) For the remedies to be effective, the UNGPs insist

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\(^{71}\) ibid, Principle 25.

on the fact that the ‘remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.’

On the other hand, the UNGPs are also the object of many critiques. The lack of a monitoring and enforcement mechanism to provide efficient compliance creates problems which the recurring theme with the previous initiatives mentioned above. The NGO Amnesty International notably explained: ‘The draft guiding principles enjoy broad support from business, precisely because they require little meaningful business. The fundamental challenge was how to address these problems. His draft guiding principles fail to meet this challenge’. Moreover, social expectations formulated in soft law instruments do not have a clear

73 ibid, 22.
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normative basis\textsuperscript{76}, as soft law approaches are ineffective when it comes to protecting human rights.\textsuperscript{77} According to the critiques, the UNGPs were not ambitious enough as they have only established negative responsibilities towards corporations (not to infringe human rights)\textsuperscript{78} and have ignored important questions such as extraterritorial jurisdiction of tribunals to ensure access to justice.\textsuperscript{79}


Despite the effort made in the UNGPs to underline the importance of access to remedies, commentators have raised the fact that the UNGPs failed to provide adequate remedies to victims. A representative from Amnesty International observed that not enough was being done for victims and that business enterprises continued to evade accountability for their human rights violations. In fact, the succession of international instruments has failed to foster proper remedies that victims of corporate abuses can rely on, but has also failed to lead to the overall recognition of corporations as duty bearers in international law. In the next section of the Article, we shall analyse how regional human rights instruments regulate corporations and see if more obligations are expected from corporations at this level.

**III. Regional regulations**

At the regional level, the question of corporate accountability has also been raised. In this second part, we shall discuss regional human rights systems with a focus on the European, American, and African systems.

**a) In Europe**

**i) Instruments adopted by the European Union**

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The European Union (EU) has taken significant initiatives in the field of business and human rights, including access to remedy. The EU has repeatedly underlined its commitment to the implementation of the UNGPs. In 2016, the European Parliament discussed a report drafted on its own initiative on ‘corporate liability for serious human rights abuses in third countries’. The ensuing resolution, adopted on 25 October 2016, ‘calls on the Commission and Member States to guarantee policy coherence on business and human rights at all levels: within different EU institutions, between the institutions, and between the EU and its Member States’.

**ii) Instruments adopted by the Council of Europe**

The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), which entered into force in 1953, established the first international complaints procedure and international court where claims could be presented against States for the violation of human rights enshrined in the Convention.

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However, in 2012, a report of the Steering Committee for Human Rights (CDDH) indicated that there were no remedies at the level of the Council of Europe to address civil claims against corporations for human rights violations. Following this report, the Committee of Ministers of the Council of Europe issued a declaration reaffirming its commitment to the UNGPs and establishing that corporations had a responsibility to respect human rights.

Yet, this declaration was not the occasion to propose solutions, nor an attempt to lay out operative remedies.

Therefore, the Council of Europe calls for States to adopt national measures to implement business and human rights principles. The Council of Europe also disposes of a judicial mechanism to enforce business and human rights principles.

As mentioned, the European Court of Human Rights (ECtHR) can hear individuals’ complaints against States alleging a breach of one of the human rights protected by the European Convention on Human Rights. One limitation to the ECtHR is that it does not allow claims against private actors according to Article 35 para. 3a ECHR. In fact, claims of ECHR violations can only be made against States as stated in Article 34 ECHR.

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83 Declaration by the Committee of Ministers of the Council of Europe on the UN Guiding Principles on Human Rights and Business of 16 April 2014.
84 EU Steering Committee for Human Rights, Draft preliminary study on corporate social responsibility in the field of human rights, R76, Addendum VII, p. 10; Olufemi Amao, Corporate
The ECHR only provides an indirect means by holding the State responsible for the human rights violations that took place in their territory and jurisdiction to sanction abuses committed by corporations in the course of their activities. As the Court stated in *Hatton and Others v. United Kingdom*:

‘Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether the State responsibility arises from the failure to regulate private industry properly.’

Therefore, a State can be held responsible under the ECHR when it fails to appropriately regulate the conduct of private actors within its jurisdiction, but human rights obligations are not imposed on private actors.

The ECtHR has also held that the State is responsible for the protection of individuals from the adverse impact on human rights by businesses. In *Cyprus v. Turkey*, the Court explained that a State’s responsibility may be engaged for violations of the Convention rights committed by private social responsibility, human rights and the law: multinational corporations in developing countries (Routledge, 2011) 27. See notably the case of the European Court of Human Rights: *Lopez Ostra v Spain*, no. 16798/90, (1994), where the Spanish government was held accountable for failing to prevent the inconvenience caused by the pollution emanating from a waste treatment plant, which was held to be against Article 8 of the European Convention on Human Rights.

individuals in its jurisdiction. Moreover, in Soering v. United Kingdom, the ECtHR held that a State could be held responsible for extraterritorial effects of its domestic acts. In addition, the ECtHR has ruled that States are also responsible for the breaches of human rights protected under the European Convention on Human Rights committed by their agents.

Furthermore, the European Committee of Social Rights has adopted a very similar approach to the one of the ECtHR. The European Committee of Social Rights examines reports submitted by individuals and judges if contracting states to the European Social Charter have failed to comply with their obligations from the Charter. A key difference between the European Court of Human Rights and the collective complaints before the European Committee of Social Rights is that all the State parties to the Council of Europe are committed to the ECHR whereas the Additional Protocol to the Social Charter relating to Collective Complaints has been ratified by only less than half of the Council of Europe’s Member States. Moreover, the European Committee of Social Rights has dealt with some complaints involving corporations. In the case Marangopoulos Foundation for Human Rights v. Greece, the European Social Committee stated the following: the State is responsible for enforcing the rights

embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the claimant’s allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator.90

As a result, if an enterprise is registered in a State’s territory or has business in its territory, the State has the competence and duty to regulate its behaviour. However, the answer to the question of knowing if a State is responsible for extraterritorial wrongs committed by private persons domiciled on their territory is uncertain under the European Committee of Social Rights’ case law.91 In any case, both mechanisms by the ECHR and the European Committee on Social Rights only focus on States’ responsibilities, leaving corporate accountability aside. Public international law tools, including at the European regional level, thus mostly focus on the obligations of States, without tackling the issue of corporate stakeholders’ accountability.

III b) The Inter-American Court of Human Rights

The first regional human rights declaration was the American Declaration of the Rights and Duties of Man adopted under the auspices of the Organisation of American States (OAS) in 1948. Article 26 of the Convention particularly insists on economic and social rights. Article 25 of the American Convention on Human Rights underlines the importance for State Parties to provide access to judicial remedies for victims of human rights violations. The Commission on Human Rights hears complaints of human rights violations against State parties.92 Both individuals and NGOs are recognized the capacity to submit complaints.

Since the adoption of the American Convention on Human Rights, the Commission was confronted with questions relating to business and human rights. In the case of *Mayas indigenous peoples v. Belize*, the Commission recommended that the State should ‘abstain from all acts that could encourage public agents or third parties that could act with its acquiescence or tolerance that affects the existence, value, use and enjoyment of the property of the Maya indigenous peoples’93. Decisions adopted from 1985 to 2004 mainly focused on the State duty to protect or States’ due diligence regarding business activities that threatened or violated indigenous peoples’ right to land.94

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92 Article 44 of the American Convention on Human Rights.
94 Cecilia Anicama, ‘State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American
In 1979, the Organization of American States established the Inter-American Court of Human Rights to enforce and interpret the provisions contained in the American Convention on Human Rights. Following Article 1 of the Statute of the Inter-American Court of Human Rights, the Court can only hear claims directed against Member States. The Inter-American Court provides the widest range of reparations among regional courts’ systems, including restitution (when feasible) and money damages for material and moral injuries.\textsuperscript{95} The aim of the Court is to follow the principle of restitution in integrum, according to which the Court will do everything it can restore the victims back to their previous position in which they were before the violation occurred.\textsuperscript{96}

Conversely, the Inter-American Court is more limited than the Commission. Indeed, it can only decide on cases brought by OAS Member States against other Member States that


\textsuperscript{96} Almonacid Arellano et al. v. Chile, IACHR, no. 154, (2006), para. 136.
have accepted the Court’s jurisdiction\textsuperscript{97} or cases brought by the Commission on Human Rights against OAS Member States.\textsuperscript{98} The Inter-American Court was confronted with the question of oil\textsuperscript{99}, logging\textsuperscript{100}, mining\textsuperscript{101}, and other exploitation\textsuperscript{102} of territories by non-state actors. Notably, case law on indigenous and tribal peoples’ rights contains express references to corporate actions endangering human rights.\textsuperscript{103} On these occasions, the Court has emphasized on States’ obligations and seemed to indicate that corporations could not be held accountable. In the case of \textit{Awas Tigni},\textsuperscript{104} a concession had been granted to a Korean company by

\begin{footnotesize}
\textsuperscript{97} Article 61(1) of the American Convention on Human Rights. \\
\textsuperscript{98} Article 51 of the American Convention on Human Rights. \\
\textsuperscript{99} Kichwa Indigenous People of Sarayaku v Ecuador, IACHR, no. 245, (2012). \\
\textsuperscript{100} Mayagna (Sumo) Awas Tingi Community v Nicaragua, IACHR, no. 79, (2001), para. 104. \\
\textsuperscript{101} Kaliña and Lokono Peoples v. Suriname, IACHR, no. 198/07, (2007). \\
\textsuperscript{103} Mayagna (Sumo) Awas Tingi Community v Nicaragua, IACHR, no. 79, (2001); Saramaka People v Suriname; Kichwa Indigenous People of Sarayaku v. Ecuador, IACHR, no. 245, (2012); Kaliña and Lokono Peoples v. Suriname, IACHR, no. 198/07, (2007). For further analysis of this case law, see Thomas M. Antkowiak, Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court (2013) 35 University of Pennsylvania Journal of International Law 113. \\
\textsuperscript{104} Mayagna (Sumo) Awas Tingi Community v. Nicaragua, IACHR, no. 79/01, (2001).
\end{footnotesize}
Nicaragua to exploit timber in the zone where the Mayagna indigenous community lived. The Court held that Nicaragua:

‘must abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the Members of the Mayagna (...) community live.’\textsuperscript{105}

The Court did not refer to any obligation of the corporation to abide to the principles enshrined in the American Convention.

Several other cases have been instructed on the issue of the adverse impacts on indigenous people caused by extraction companies’ activities.\textsuperscript{106} Nevertheless, in these cases, the accountability retained was always that of the State and not that of corporations.\textsuperscript{107} In fact, corporations are not held to have any obligation to pay reparations to affected

\textsuperscript{105} ibid para 173.
\textsuperscript{107} For example, IACHR, Report on the Situation of Human Rights in Ecuador, Doc. OEA/Ser.L/V/II.96, Doc.10 rev.1, April 24, 1997, Chapter IX.
communities.\textsuperscript{108} For example, in the case of \textit{Kichwa Indigenous People of Sarayaku v. Ecuador}, the Court held that ‘there is no environmental liability’\textsuperscript{109} for corporations. However, in the case \textit{Kaliña and Lokono Peoples v. Suriname}, a step was made as for the first time, the Court placed an obligation on the state ‘in conjunction with the company’.\textsuperscript{110} Despite this statement, the Court required the State of Suriname to establish ‘the necessary mechanisms to monitor and supervise the execution of the rehabilitation of the company’.\textsuperscript{111} Therefore, even though the Court recognized that the corporation had played a role in the infringement and had a responsibility for it, the duty to repair and make amends was imposed solely on the government of Suriname. This state-centric conception of the Inter-American system on Human Rights was recently confirmed in a recent report of the Inter-American Commission on Human Rights relating to human rights protection in the context of extraction, exploitation, and development activities.\textsuperscript{112} Indeed, this report solely focuses on the responsibility of States and does not mention

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\textsuperscript{108} Mayagna (Sumo) Awas Tingi Community v Nicaragua, IACHR, no.79, (2001), paras 104ff.
\textsuperscript{109} Kichwa Indigenous People of Sarayaku v. Ecuador, IACHR, no. 245, (2012), para 123.
\textsuperscript{110} Case of the Kalina and Lokono Peoples v. Suriname, IACHR, no. 309, (2015), para 224.
\textsuperscript{111} Kichwa Indigenous People of Sarayaku v. Ecuador, IACHR, no. 245, (2012), para 290.
\end{flushright}
the responsibility of corporations or private actors. Therefore, just as the European human rights regime, the Inter-American system applies a state-centric conception to designate responsible entities of human rights breaches.

**III c) The African Commission on Human Rights and People’s Rights**

Africa has also adopted a regional human rights instrument intended to promote fundamental human rights in the continent. The African Charter on Human and People’s Rights came into effect on October 21st 1985 under the auspices of the Organization of African Unity. The Preamble to the African Charter underlines the importance of the right to development: it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

The Charter established at the same time of its adoption a quasi-judicial body, the African Commission on Human and

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113 ibid., pp.25-75.
People’s Rights in charge of interpreting and enforcing the rights enshrined in the Charter.\(^{114}\) According to Article 45 of the Charter, the Commission is ‘in charge of the promotion of human and peoples’ rights and ensures the protection of these rights.’ Article 46 states that the Commission can benefit from ‘any appropriate method of investigation’. Individuals and NGOs’ complaints are admissible before the Commission, despite the ambiguity of the wording of the African Charter in this regard.\(^{115}\)

Since its creation, the Commission has had to deal with cases relating to business and human rights. In the case of *Socio-Economic Rights Action Centre v. Nigeria*\(^{116}\), a complaint concerning the environmental damage caused by the wrongful practices of oil companies in the Ogoni region in Nigeria, which caused serious damage to the health of the local population. The Commission ruled that the Ogoni people had suffered violations of their rights to health\(^{117}\) and to a satisfactory environment favourable to development\(^{118}\), due to the government’s failure to prevent pollution and

\(^{114}\) See Article 30 of the African Charter.


\(^{117}\) See Article 16 of the African Charter on Human and Peoples Rights.

\(^{118}\) See Article 24 of the African Charter on Human and Peoples Rights.
ecological degradation. It held that the State’s failure to monitor oil activities and to involve local communities in decisions violated the right of the Ogoni people to dispose freely of their wealth and natural resources.\textsuperscript{119} The Commission thus found that the Nigerian State had a duty to protect its citizens against violations of their rights by private parties.\textsuperscript{120} Nevertheless, the Commission did not recognize that corporations were themselves bound by the human rights contained in the African Charter. In fact, the Commission chose to omit the question of their responsibility, even though the complainants explicitly accused the oil exploiting companies.

This case highlights once again the problem of holding corporations accountable. As long as corporations are not bound by international human rights instruments, it will be impossible for victims to obtain redress from them directly before supranational bodies. Access to a remedy is a fundamental right in international law\textsuperscript{121} but without any prior legal obligations or recognition of private actors as bearers of these obligations, corporations shall keep benefiting from this impunity. To deal with this situation, an

\textsuperscript{119} See Article 21 of the African Charter on Human and Peoples Rights.


\textsuperscript{121} Article 2 of the International Covenant on Civil and Political Rights.
African Court on Human and People’s Rights has been created.\textsuperscript{122} The introduction of the African Court on Human and People’s Rights was due to the lack of enforcement powers of the African Commission, whose decisions were not binding on States. The African Human Rights Court was granted the mission to ‘complement the protective mandate’ of the African Commission.\textsuperscript{123} The Court has both contentious and advisory jurisdiction.\textsuperscript{124}

However, the Court is only competent to hear complaints against Member States of the African Union, not against individuals that have breached human rights provided in the African Charter. Therefore, the African Court’s functioning, similarly to its European and American counterparts, illustrates one more time, the lack of mechanisms to hold corporate actors liable under international law. In a recent publication, the African Commission has confirmed its position, stating that African States are ‘the primary duty

\textsuperscript{122} See Article 1 of the Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights.

\textsuperscript{123} Article 2 of the Protocol to the African Charter on Human Rights and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights.

\textsuperscript{124} Under Article 28 of the Protocol on the Statute of the African Court of Justice and Human Rights, the African Court has jurisdiction over a wide range of treaties of a general nature, including all treaties of the African Union. Article 17(2) of this same Protocol provides that the Human Rights Section of the Court “shall be competent to hear all cases relating to human and/or people’s rights”.

bearers\textsuperscript{125} that have to comply with human rights, while making reference to the ‘responsibility of the private sector’\textsuperscript{126}, without evoking corporations’ liability in case of non-compliance. All regional human rights systems thus seem to leave aside the question of direct corporate accountability.

IV Conclusion

The various attempts to hold corporations accountable for their human rights breaches in international law have been insufficient so far. Until recently, the prevailing view of international organizations such as the UN\textsuperscript{127}, the ILO\textsuperscript{128}, the OECD\textsuperscript{129} and the EU\textsuperscript{130} was that corporate social

\begin{itemize}
\item \textsuperscript{126} ibid 134.
\item \textsuperscript{127} UN Global Compact, 2000.
\item \textsuperscript{128} ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 1977.
\item \textsuperscript{129} OECD Declaration on International Investment and Multinational Enterprises, 1976.
\end{itemize}
responsibility is a matter that can best be left to self-regulation by the industry. In setting up soft law mechanisms which are not legally binding and therefore incapable of enforcement, public international law has failed so far to provide a satisfactory remedy for victims of wrongful business activities. Regional human rights instruments have also failed to address the question of corporate accountability correctly, by choosing to focus solely on the responsibility of States, as the question of application of human rights to private actors is still unresolved.

Yet, the numerous soft law instruments consecutively adopted do have a relevance and could contribute to the establishment of binding human rights obligations on corporations. The fact that soft law rules lack enforcement mechanisms does not mean that they do not have any normative character. In fact, these rules do have a normative significance as they can provide evidence of *opinio juris* of the international community over certain principles and participate in the elaboration of future norms. As George Abi-Saab described, soft law allows the international community to reflect on the need to adopt new legal rules to tackle emerging issues. Therefore, it allows us to articulate common values and defines guidelines that States are

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131 Patrizio Merciai, Les entreprises multinationales en droit international (Bruylant, 1993) 241.
encouraged to develop through binding normative standards.\textsuperscript{132}

As a consequence, soft law should be acknowledged as a way to create consensus among States and other parties to progressively amount to legal reforms and changes. In fact, soft law consolidates political opinion around the need for action on a new issue and can provide guidance or a model for hard law provisions. This might actually be the main function of soft law instruments in the context of corporate responsibility: foster discussion among the different stakeholders to progressively amount to a mutual agreement. As Günther Handl rightly explained: ‘soft law will capture emerging notions of international public order and thus help extend the realm of legitimate international concern to matters to previously exclusive national jurisdiction’. Therefore, soft law represents an opportunity for States to reflect upon solutions to current challenges.

\textsuperscript{132} See George Abi-Saab, Cours général de droit international public, 207 Collected Courses of the Hague Academy of International Law, (Brill, 1987) 210. See also Dinah Shelton, ‘Comments on the normative challenge of environmental “soft law’, in Société française pour le droit international, Le droit international face aux enjeux environnementaux, (Pedone, 2010), 111 ; Christian Huglo, L’influence du droit international sur le développement de la responsabilité civile des personnes privées pour les dommages environnementaux in Société Française pour le Droit International, Le droit international face aux enjeux environnementaux, (Pedone, 2010), 165.
Soft law should thus be considered as a preliminary step, an initial phase of consolidation for the necessary consensus to establish binding norms. In fact, the current developments intervening, notably the discussions at the UN regarding the adoption of a binding instrument relating to transnational corporations, or the enactment in several countries of corporate due diligence duties, can be seen as the result of the progressive reflection that was fostered through the adoption of the soft law instruments described above.\textsuperscript{133} The outcome of the current negotiations for the adoption of this treaty will be key to finally establish the direct accountability of corporations in international law.

\textsuperscript{133} For more discussion on the role of soft law, see René-Jean Dupuy, L’humanité dans l’imaginaire des nations, (Julliard, 1991) 243; Adefolake O. Adeyeye, Corporate Social Responsibility of Multinational Corporations in Developing Countries, (Cambridge University Press, 2012), 20.
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