ISSN 2421-5414
Settembre 2022

DE IUSTITIA
RIVISTA GIURIDICA

Transnational Enterprises' due diligence: International Custom?

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SOMMARIO: 1. Abstract. **2.** Introduction. **3.** Towards a clear definition: Transnational Enterprise. **4.** National law approach: a comparative analysis. **5.** Critical analysis and assessment of the identification of a customary international law. **6.** Conclusion. The new "frontier" for mandatory due diligence: UN Treaty on Business and Human rights.

1. Abstract.

The growing importance and influence of companies involved in transnational businesses has contributed to rising interest in finding homogenous legislations. However, uniformity needs a bigger step to be achieved, that is a source of international law, such as treaty, or an international custom. Only through such sources different countries will equally develop legislations on business and human rights. For this reason, the present research will firstly delimitate the type of business activity to be regulated. Secondly, National Action Plans and national legislations will be compared and analysed. Based on such comparative approach, it follows the evaluation of recognition of an international custom on mandatory due diligence law. Lastly, new developments will be discussed.

2. Introduction.

The purpose of this research is not to understand if the identification of international custom can be ascertained by the content of NAPs, together with national legislative trends. Therefore, the scope of the current research is to acknowledge whether there is a general practice, and, secondly, if such practice is accepted as law. To do so it is firstly important to delimitate the subjects of this study. In fact, the specific use of words has a crucial role, especially in a developing legal matter. It is not just a mere definition but the delineation of the

matter to be regulated. The effects of internationalised businesses can be found in different countries. This field is covered by a developing spectrum of legal regulation, so-called transnational law[1]. Yet, it needs to be clearly delineated, and the consequences are the uncertainties related to the possible ways to guide internationalised enterprises' activities and to prevent, as well as judge, wrongdoings. All the laws "which regulates actions or events that transcend national frontiers" are included in the classification of transnational law[2]. The laws have "spilt out" beyond national borders, and many scholars agreed that seemed necessary to detect a new legal realm indicating new legal relations, influences, controls, regimes, and doctrines. A different system from the municipal one but, equally, not wholly, comprehended within the scope of international law[3]. The presence of new hybrid inhabitants in the legal universe evokes new *modi* of legal thinking. Transnational law does not lay "into the dichotomy of municipal and international law"[4], rather it fits into another area not yet covered by traditional views.

The first basic "systematisation" was the nation-state perspective[5]. Such an approach is unable to regulate events both beyond the national boundaries and among states. Therefore, the intervention of a new branch was necessary: international law. By its two public and private branches, international law administers relationships between "nation-states and their legal orders"[6]. Nevertheless, a crossed view of the legal orders around the globe was missing. This legal hybridisation is a consequence of globalisation or denationalisation[7]. Globalisation is a compression of time and space[8], and the restricted space of a state-sovereignty approach is inadequate to manage this new reality. The state society is moving towards a global society comprising different sub-systems[9]. The non-extraterritoriality of domestic regulations and the necessity for entities to

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[1] P. C. JESSUP, Transnational Law (Extracts), in Christian TIETJE, Alan BROUDER, Karsten NOWROT, Philip C. Jessup's Transnational Law Revisited, 2006, 45-55.

[2] *ibid.*

[3] R. COTTERRELL, What Is Transnational Law?, in Law & Social Inquiry, 37(2), 2012, pp. 500-524.

[4] K. TUORI, Transnational law, in M. MADURO, K. TUORI, S. SANKARI, Transnational Law: Rethinking European Law and Legal Thinking, Cambridge University Press, 2014.

[5] *ibid.*

[6] *ibid.*

[7] D. HARVEY, *The Conditions of Postmodernity: An Inquiry into the Origins of Cultural Change*, Cambridge, Blackwell, 1989.

[8] *ibid*. For instance, an investor can purchase a share wherever and whenever.

[9] R. STICHWEH, *Die Weltgesellschaft: Soziologische Analysen*, Frankfurt, Suhrkamp Verlag,2000.

comply concomitantly with different rules has generated "forms of synergy and integration"[10].

Nowadays, different actors (such as companies, associations, universities, churches) are empowered with the right to create legal norms [11]: laws characterised by "publicness", and enforceable by courts[12]. Historically, until the first half of the 20th-century states were the only players in the world. After World War II, and with the start of globalisation, international organizations and Non-State Actors (NSAs) began to develop. Two events helped the change of the course of international law history: in 1949 the International Court of Justice recognised the international legal personality of International Organisations[13]; and, in 1947, Nuremberg[14] and Tokyo Military Tribunals' decisions, granted the international legal personality to individuals under certain circumstances. More specifically, rights and obligations directly under international law had been recognised, so that individuals could be held responsible for the "international crimes" committed[15]. On the other hand, multinational/transnational business activities, as non-state actors, even having a globally important role, do not have a full international legal personality[16]. For this reason, using a 'transnational law approach'[17], and comparing domestic legislation concerning such matters, will show the due international importance to global enterprises.

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[10] *ibid*. Cf. D. F. VAGTS, *Extraterritoriality and the Corporate Governance Law*, in *American Journal of International Law*, 97, 2003, pp. 289-94.

[11] J. RAZ, *Between Authority and Interpretation - On the Theory of Law and Practical Reason*, Oxford, 2009, 193-194. In his <<incorporation doctrine>>, Raz affirmed that: <<UK and USA statutes give legal effect to company regulations, to university statutes, and to many other standards without making them part of the law of the United Kingdom or the United States>>. Following Raz, McCornick considers companies and corporations as <<institutional agencies>>, as <<legislatures, courts, cabinets and government departments, police forces and other enforcement agencies>>, because they have juristic personality <<by virtue of being incorporated under appropriate statute law>>.

[12] C. MICHELON, The Public Nature of Private Law?, in C. Michelon et al. (eds.), The Public in Law Representations of the Political in Legal Discourse, Farnham, Ashgate, 2012, p. 195.

[13] International Court of Justice, Reports of Judgments, Advisory Opinions and Orders. Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of April 11th, 1949.

[14] Cf. B. KRZAN, International Criminal Court Facing the Peace vs. Justice Dilemma, in International Comparative Jurisprudence, 2, 2, 2016, pp. 81-88.

[15] Cf. ICC International justice - First generation tribunals, Nuremberg and Tokyo, International Bar Association (IBA).

[16] M. SAVIĆ, *Contemporary issues of legal personality in international law. Factual and normative problems*, *European Journal of Law and Political Sciences*, 2016.

[17] Transnational law includes a greater variety of legal sources than the categories "international" and "foreign" law. It also includes rules or agreements that transcend domestic boundaries but might not have been formally adopted by states, such as customs. Another example are NAPS on business and human rights since it includes aspects of national and international law.

The analysis conducted in the present paper will consider each national legislation on companies' responsibility as well as each National Action Plan on Business and Human Rights. It represents the intents of states to adapt to a new international order, but at the same time, it includes a directive element for companies. The National Action Plan is an example of a document incorporating international and transnational approach: it is the result of mutual international consensus, and it includes monitoring obligations for both states and companies. As the duty to protect it is on states, at the same time it is expected that transnational companies' will respect through due diligence mechanisms, that is a monitoring system applicable from the parent company on subsidiaries and other companies contractually linked [18]. Even though the responsibility of business to respect is not the same as the duty of governments to protect[19], comparative research of different National Action Plans especially concerning companies' duties, connected to the national legislative background of each state, will help to understand if there is a possibility of establishing an international custom of due diligence or not. Countries both ruling over such phenomenon and without proper legislation will be taken into consideration. It follows an analysis of the peculiarities of international customary law, and it will be scrutinised if the prerequisites to establish an international custom are met. The first element to be clarified is terminology: do the terms 'multinational' and 'transnational' mean the same? Can the words corporation and enterprise be used indistinctly? Can one classification include both equity and non-equity groups? Global businesses are frequently built by both subsidiaries that belong to a group managed by a parent company, and external companies connected by contractual agreements with the main company, or business group. Thus, is it possible to find one definition which includes those two elements? If the legal system must adapt to social and economic developments, it may also be necessary to add in the legal taxonomy such type of business?

3. Towards a clear definition: Transnational Enterprises.

[18] UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, 2016.
[19] International Trade Union Confederation, The United Nations "Protect, Respect, Remedy" Framework for Business and Human Rights and the United Nations Guiding Principles for Business and Human Rights, A Guide for Trade Unionists, 2012.

As the definition of the terms Transnational and Multinational is unclear, and the alternative use of either enterprise or corporation, it is a leading priority to delineate the differences among them and to determine a sufficiently robust definition of business activities not formally belonging to the parent company but still operating within its scope. Multinational Corporations were first defined by David E Lilienthal as "corporations ... which have their home in one country, but which operate and live under the laws and customs of other countries as well"[20]. Such definition takes into consideration only the case of Muchlinski's uninational enterprises[21], i.e., companies from one country having foreign operations. What Lilienthal did not cover was the case of multiple national origin companies, such as Royal Dutch Shell (Anglo-Dutch), or Glencore (Anglo-Swiss). For this reason, it was necessary to distinguish the two cases, in order to avoid a "terminological confusion"[22]. Economists preferred to use the term Multinational Enterprises defining them as any business entity which "owns (in whole or in part), controls and manages income-generating assets in more than one country"[23]. It refers to any form of participation, for instance, Foreign Direct Investments (FDI), that confers any degree of managerial control. Muchlinski suggests that the term "enterprise" should be preferred to "corporation" as it avoids delimitating it in either incorporated business entities or corporate groups since international production can take place in different legal forms[24]. Notwithstanding, the UN did not focus on such differentiation but rather on understanding the different use of Multinational Corporation (MNC) and Transnational Corporation (TNC). Since 1974, the UN Group of Eminent Persons decided in their report that TNC would be more accurate than MNC. It chose "transnational" over "multinational" because it better conveys "the notion that these firms operate from their home bases across national borders"[25]. In the same report, from the analysis of the Atlantic Community Development Group for Latin America (ADELA), Muchlinski pointed out that the term multinational should be reserved for enterprises that

[20] D. K. FIELDHOUSE, The Multinational: A Critique of a Concept, in A. Teichova et al., Multinational Enterprise in Historical Perspective, Cambridge, 1986.
[21] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, 2007.
[22] *ibid.*
[23] N. HOOD, S. YOUNG, *The Economics of the Multinational Enterprise*, London, 3, 1979; J.H. DUNNING, *Multinational Enterprises and the Global Economy*, Massachussetts, 1993, pp. 3-4.
[24] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, n. 21.
[25] United Nations, *The impact of Multinational Corporations on Development and on International Relations*, ST/ESA/6 (1974). MNC was used in the United Nations, Multinational Corporations in World Development, ST/ECA/190 (1973). See also K. W. GREWLICH, *Transnational Enterprises in a New International Economic System*, Maryland, 1980; N. BERNAZ, *Business and Human Rights: History, Law and Policy - Bridging the accountability gap*, London and New York, 2017.

were jointly owned and controlled by entities from several countries[26]. "Formed by many corporations from several countries, none of which has a large share in the capital" with the purpose "to engage in joint ventures with local private or public capital and to start new industries"[27], they were different from uninational corporations operating across national borders[28]. The UN eminent group's report used the term MNC to conform to Economic and Social Council resolution 1721 (LIII), defining it as "enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private; they can also be co-operatives or state-owned entities"[29]. Therefore, TNC is the term used by the UN and its consequent publications and reports which overcome the difference between "multinational" and "transnational". It covers all types of cross-border business activities that engage in direct investment[30], excluding portfolio investment in which an adequate percentage of control is absent[31]. What was and is the UN choice to favour TNC over other options was not mirrored in the OECD's guidance.

In 1976, through its Declaration and Decision[32], OECD adopted the "Guidelines for Multinational Enterprises", remarking that: "A precise legal definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and to share knowledge and resources with the others. The degree of autonomy of each entity in relation to the others varies widely from one multinational enterprise to another, depending on the nature of the links between such entities and the fields of activity concerned. For these reasons, the guidelines are addressed to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of

[26] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, n. 21.
[27] United Nations, *The impact of Multinational Corporations on Development and on International Relations*, n. 25, p. 62.
[28] See UN Commission on Transnational Corporations, *Transnational Corporations in World Development: A Re-Examination*, UN Sales No E.78.II.A.5, Annex 1 at 159, 1978.
[29] United Nations, *The impact of Multinational Corporations on Development and on International Relations*, n. 25, p. 9.
[30] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, n. 21.
[31] K. E. MEYER, *Foreign Investment: Direct*, in International Encyclopedia of the Social & Behavioral Sciences, Second Edition, 2015.
[32] OECD, *Declaration and Decisions on International Investment and Multinational Enterprises*, 1976.

responsibilities among them on the understanding that they will cooperate and provide assistance to one another as necessary to facilitate the observance of the guidelines. The word 'enterprise' as used in these guidelines refers to these various entities in accordance with their responsibilities"[33]. The OECD used a pragmatic approach encompassing both non-equity and equity corporate groups[34]. It recognised that MNEs are a socioeconomic phenomenon, not a legal institution as such.

On the contrary, trying to describe it by legal terms would be an obstacle for enacting guidelines to be observed by MNEs[35]. The formula highlights the autonomy of each entity in relation to the others, accordingly to the actual set-up of the company, as well as the possibility that some of the entities could exercise some degree of influence over others' activity. The OECD's MNE is a broad categorisation that relies on how the entities are linked and on the field of activity concerned. Therefore, OECD Guidelines address MNEs as a whole and to every entity part of it in relation to their part of the responsibility. Such an approach has been referred to as "those-who-are-concerned" [36] since any element of the whole "enterprise" is subjected to the content of the guidelines. Differently than UN and OECD, the Governing Body of the International Labour Office (ILO) with the "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" extended the principle contained in it to any business activity, national, multinational, and transnational. As matter of fact, it does not focus on the definition, and in paragraph 5 of the "Aim and scope" section it stated as follow: "These principles do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises. They reflect good practice for all. Multinational and national enterprises, wherever the principles of the MNE Declaration are relevant to both, should be subject to the same expectations in respect of their conduct in general and their social practices in particular"[37].

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[33] OECD, *Guidelines for Multinational Enterprises*, I, par. 4, 1976.
[34] MNE are divided into: legal structures based on contract, equity based corporate groups, joint ventures between independent firms, informal alliances, publicly owned MNEs, and supranational forms of international business. The classification emerges from the following sources: C. M. SCHMITTHOFF, *The Multinational Enterprise in the United Kingdom*, in H. R. HAHLO, J. GRAHAM SMITH, R. W. WRIGHT, *Nationalism and the Multinational Enterprise*, Leiden, 1977, pp. 22-38; C. D. WALLACE, *Legal Control of the Multinational Enterprise*, New York, 1983, pp. 13-16.
[35] K. W. GREWLICH, *Transnational Enterprises in a New International Economic System*, n. 25.
[36] *IBID.*
[37] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Geneva, 2017.

The difficult task of defining legal institutions led to a misuse of both MNE and TNC. The two terms are wrongly used indistinguishably. In this respect, it may be helpful to analyse how Dunning differed MNEs from "uninational" enterprises[38]. Even though in both cases they take advantage of the large global economy to generate income from locations in different countries, there are many differences. The main one is that while MNEs are characterised by having placed managerial and controlling activity towards its assets also across national frontiers of the parent company, "uninational" enterprises remain within them[39].

Perlmutter's differentiation between ethnocentric (or home country-oriented), polycentric (or host country-oriented) and geocentric (or world-oriented) firms[40] is an additional theoretical tool to consider. In fact, what typifies transnational and multinational enterprises is the geocentric approach, meaning that "they seek the best men, regardless of nationality, to solve the company's problems anywhere in the world"[41]. Also, Professor Goetschin has framed some theoretical distinctions in the process of "multinationalisation"[42]. Goetschin distinguishes between national, international, transnational, multinational and supranational, each of which regards ownership, chartering, distribution of shares, the origin of sales and management.

Despite the unsteady use of different terms, how can a general category including any geocentric business firm, having or not "multilocated" main managerial departments, belonging to the same entity or linked by contractual agreement be defined? The term that may better enclose all those possibilities is Transnational Enterprise (TNE)[43]. Based on what has been described above, Grewlich preferred the use of TNE for the following reasons: "transnational" better gives the idea of transboundary business activity, or, using Goetschin' term, it is related to the concept of distribution of shares; "enterprise" is preferred

[38] J. H. DUNNING, *Multinational Enterprises and the Global Economy*, n. 23.
[39] P.T. MUCHLINSKI, *Multinational Enterprises and the Law*, n. 21.
[40] H. V. PERLMUTTER, *The Tortuous Evolution of the Multinational Corporation*, *Columbia Journal of World Business*, 4, 1969.
[41] *ibid.*
[42] P. GOETSCHIN, *L'entreprise multinationale - présent et futur*, *Revue économique et sociale*, Lausanne, 1973.
[43] Cf. A. A. FATOUROS, *Transnational Enterprise in the Law of Stale Responsibility*, in L. B. Richard, International law of state responsibility for injuries to aliens, Charlottesville, 1983. The definition of TNE was less inclusive than the one provided in the present research. It affirmed that a TNE is <<a complex of legally discrete entities (i.e., companies), established in several countries, forming a single economic unit (enterprise), which engages in operations transcending national borders under the direction of a sole decision-making center>>.

to "corporation" because it does not necessarily lock the undertaking with the legal form of incorporation[44].

In a globalised world, corporate structures have developed in many different manners, therefore "laws and bargaining structures have to follow to ensure union rights and living wages throughout global supply chains"[45]. A TNE operates in many countries producing, distributing and investing on a world scale. It is projected towards a global view where every single national entity is an apparatus of a bigger system. As such, every subsidiary, affiliate, outsourcee, and, more comprehensively, any unit attached through a contractual agreement is part of a chain, whose ultimate purpose is managed by the main enterprise, and in which each body is autonomously organized to achieve a specific result representing a small piece in the big puzzle. Following the above definitions, TNE refers to TNC[46], MNE [47] and Transnational Network (TNN) [48]. TNEs, with activities and responsibilities spread more evenly around the world, have profits or sales that surpass the ones of the country of origin, losing their national identities[49]. They are global citizens in which the nationality element is lost[50]. TNEs represent the last stage of companies' evolutions in a globalised world [51]. First, national companies start overseas operations "as mere appendages of a centrally directed domestic corporation"[52].

Secondly, they will acquire the multinationalism label as they decentralise responsibilities towards relatively independent businesses activities. Finally,

[44] K. W. GREWLICH, *Transnational Enterprises in a New International Economic System*, n. 25.
[45] J. RAINA, *Multinationals are responsible for their supply chains*, Industriall Global Union, 2016.
[46] It includes business activities in other countries than the main company, especially in the form on foreign direct investment (FDI). The limitation of such categorization is the involvement of contractual agreements relationships, for instance outsourcing contracts.
[47] Differently from TNC, MNE are characterized by the establishment of a whole entity by different companies from different countries.
[48] It is Muchlinski's categorization to deal with contractual connections amongst different enterprises, which <<managerial control and productive cooperation>> does not diverge from the equity based corporate groups. P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, n. 21.
[49] M. WEIDENBAUM, *The Rise of The Transnational Enterprise*, in K. CHILTON, M. WEIDENBAUM, R. BATTERSON, The Dynamic American Firm, Massachusetts, 1996.
[50] C. TORRES, *Morgan Stanley Is Betting on Big Growth Overseas*, The Wall Street Journal, 1992. For instance, Richard B. Fisher, chairman of Morgan Stanley Group, highlighted how the company shifted from being an American firm to <<a global firm that happens to be headquartered in New York>>.
[51] C. BARTLETT, *Managing Across Borders*, Massachusetts, 1991.
[52] ibid.

through the last two stages, the centralised control will fade out giving space to better coordination, cooperation, shared decision making, and "large flows of resources, people, and information will occur among relatively interdependent units"[53].

A TNE will be easily recognisable by two peculiarities: the ability to attract employees, capital, and suppliers from global sources; and the appeal to customers from all over the world[54]. The configuration of autonomy and network relationships (CANR)[55] used in TNC's subsidiaries is an organisational factor that ensures competitiveness in host locations[56]. The network relationship among those entities has a high value in the general management[57]. The coordination and control of external and internal relationships are set by parent companies, and the autonomy of subsidiaries is related to decisions in various strategic and operational matters of their own specific activities[58]. The terminology used in "Transnational Corporations Investment and Development" by United Nations Conference on Trade and Development (UNCTAD)[59], as well as in the other sources used, recalls the general UN's definition of TNC. As matter of fact, "the concept of CANR relates to organizational structures composed of inter-organisational network relationships (external to TNC relationships; network connections in the host location) and intra-organisational network relationships (internal to TNC relationships; within the TNC network)".
The general concept of TNC needs to evolve "interlinking social and business networks" among the various entities because of the heterogeneous and complex

[53] M. WEIDENBAUM, *The Rise of The Transnational Enterprise*, n. 49.
[54] M. K. STARR, *Global Corporate Alliances and the Competitive Edge: Strategies and Tactics/or Management*, New York, 1991, p. 141.
[55] On the influence of autonomy and the network relationships of subsidiaries on performance, cf. J. GAMMELGAARD, F. MCDONALD, A. STEPHAN, H. TUSELMANN, C. DÖRRENBÄCHER, *The impact of increases in subsidiary autonomy and network relationships on performance*, in *International Business Review*, 21, 2012, pp. 1158-1172.
[56] F. MCDONALD, J. GAMMELGAARD, H. TÜSELMANN, C. DÖRRENBÄCHER, *How TNC subsidiaries shine in world cities: policy implications of autonomy and network connections*, in *Transnational Corporations Investment and Development*, 27, 1, Geneva, 2020.
[57] U. ANDERSSON, M. FORSGREN, U. HOLM, *Subsidiary Embeddedness and Competence Development in MNCs. A Multi-Level Analysis*, Organization Studies, 22, 2001, pp. 1013-1034; U. ANDERSSON, M. FORSGREN, U. HOLM, *Balancing subsidiary influence in the federative MNC: a business network view*, in *Journal of International Business Studies*, 38, 2007, pp. 802–818.
[58] S. YOUNG, A. TAVARES, *Centralization and Autonomy: Back to the Future*, in *International Business Review*, 13, 2004, pp. 215-237.
[59] Transnational Corporations Journal, UCTAD, Geneva.

environments[60]. Such an interconnected network is what characterises the Global Value Chain (GVC)[61], in which the range of activities to bring a product/good or service is divided among multiple firms and geographic spaces[62].

What has just been reported, accordingly to the definitions above, perfectly describes TNE. The introduction of this new categorisation helps to directly address the new way of undertaking businesses in the current globalised world, including contractual agreements and network into the GVC, as well as multinational and/or transnational equity-based groups.

The issue might be analysed from either an international or national law perspective. Concerning the former, the first limitation can be found in the absence of recognition of the International legal personality of TNE (or TNC, using UN terminology)[63].

Consequently, based on the terminological distinctions and the new classification of TNE, the present research will consider national laws concerning the regulation of such business activities, and it will be hypothesised the creation of international customary law.

Are TNEs regulated at a national level? If so, how are they regulated? And how are they referred to?

4. Comparative analysis of national legislations and NAPs: due diligence law and companies' liability.

The United Nations Guiding Principles on Business and Human Rights (UNGP) is based on three pillars: state duty to protect, corporate responsibility and access

[60] J. GAMMELGAARD, F. MCDONALD, *The firm as a differentiated network and economic geography*, in G. COOK, J. JOHNS, F. MCDONALD, J. BEAVERSTOCK, N. PANDIT, The Routledge Companion to the Geography of International Business, London, 2018, pp. 297-313; J. P. LIEBESKIND, *Knowledge, strategy, and the theory of the firm*, Strategic Management Journal, 17(S2), 1996, pp. 93-107.
[61] F. MCDONALD, J. GAMMELGAARD, H. TÜSELMANN, C. DÖRRENBÄCHER, *How TNC subsidiaries shine in world cities: policy implications of autonomy and network connections*, n. 56.
[62] S. FREDERICK, *Global Value Chains Initiative, Concept and Tools*, Durham, 2016.
[63] For a comprehensive understanding of International legal personality and Multinational Corporations, cf. C. VINCENT, *The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward*, Unity and Diversity of International Law, 2013.

to remedy. Thus, it is a states' prerogative to ensure that victims of human rights violations do not encounter obstacles or barriers in the judiciary process when addressing companies' responsibility by judicial means[64]. The company itself should be held civilly and criminally responsible for any human rights violations. On the other hand, laws such as the California Transparency in Supply Chains Act 2010[65], or the Modern Slavery Act 2015[66], even though they may represent important steps towards accountability, do not introduce a due diligence standard, and they do not clarify the conditions of liability for the parent or contracting companies. Similarly, other provisions like the Dodd-Frank Act on conflict minerals[67], or the EU Directive 2014/95 on Disclosure of Non-Financial Information[68] introduce a standard of conduct and obligation to compensate the harm, if companies fail to meet it. Nonetheless, corporate liability is neither mentioned nor elaborated on. [69]. Each country has its own national legislation on such matters, which means that they all have different approaches. Nowadays, the international community is more sensitive to such topics, and a process towards a transnational legislative adjustment is being advanced by issuing National Action Plans[70]. The regional and/or national application of UNGPs is a "smart mix"[71], meaning that voluntary measures need to be supported by mandatory measures when insufficient. In fact, the Guiding Principle 1 asserts

[64] Unanimously adopted by the United Nations Human Rights Council in its resolution 17/4 of 16 June 2011. United Nations Guiding Principles on Business and Human Rights (UNGP), article 25. The UNGPs do not create any new human rights standards or additional obligations in international law but refer to existing binding and non-binding human rights instruments, specifically: the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the ILO Core Labour Standards (freedom of association, the right to collective bargaining and the elimination of forced labour, abolition of child labour and of discrimination in employment and occupation).

[65] California Transparency in Supply Chains Act 2010 (US), s 1714.43(a)(1).

[66] Modern Slavery Act 2015 (UK), s 54(4)(a).

[67] Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (US), s 1502(b)(p)(1)(a).

[68] Parliament and Council Directive 2014/95/EU 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, art
19 a (1) (Non-Financial Disclosure Directive).

[69] N. BUENO, *The Swiss Popular Initiative on Responsible Business: from Responsibility to Liability*, in L.F.H. ENNEKING, I. GIESEN, F.G.H. KRISTEN, L. ROORDA, C.M.J. RYNGAERT, A.L.M. SCHAAP, Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights and Environmental Standards, London, New York, 2018, p. 18.

[70] J. RUGGIE, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, 2011.

71 Keynote Address by John Ruggie at the Conference "Business & Human Rights: Towards a Common Agenda for Action".

that states must have "effective policies, legislation, regulations and adjudication"[72]. It is a holistic approach and not a one-sided one. This paragraph will analyse the different *modus operandi* of countries around the world, but attention will be focused on countries that have National Action Plans (NAPs) as well as recent internal legislative developments or discussion on the matter in question. Therefore, the comparative approach will be based on the functional method. The overview of the legislation concerning the responsibility of TNEs, and more specifically, the endorsement of a mandatory due diligence law will clearly show what the general approach is worldwide. Where a mandatory due diligence law is not operative, then the NAP will delineate the legislative future and the attitude of states towards it. The final scope of the comparison is to consider the possibility of establishing an international customary law of due diligence. Based upon the result of the above, the results will either show that all the prerequisites to establish an international custom are in place, or it will show what direction states should take to reach their final destination. For this purpose, the use of NAPs is necessary. Since the UN Human Rights Council unanimously endorsed the UNGPs in 2011, they represent a framework for preventing, addressing, and remediating business-related human rights abuses. Under the guidance of the UN Working Group on Business and Human Rights (UNWG), UNGPs were implemented by providing recommendations on the development and update of NAPs on Business and Human Rights[73]. A NAP is defined as an "evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UNGPs"[74]. In other words, it represents the document by which a country sets challenges and goals to be achieved within a certain timeframe in the field of business and human rights. In the next paragraph will follow a comparative analysis of how some relevant national legislations on business and human rights and NAPs. The attention will be focused only on the most relevant legislations, i.e. legislations with noteworthy elements of due diligence laws.

- France

After having joined the United Nations Guiding Principles on Business and Human Rights, France committed itself to implement the principles, starting by

72 Guiding Principle 1.
73 Guidance on National Action Plans on Business and Human Rights, n. 18.
74 *Ibid.*

developing corporate social responsibility (CSR) policy. In 2013, the National Consultative Commission on Human Rights (CNCDH) was engaged by the French government to prepare action plans for the implementation of these principles[75]. In July 2015, the first version of the NAP was produced. In 2016, it incorporated the amendments presented by the Corporate Social Responsibility Platform (in which the CNCDH is also represented). In December of the same year, it was sent to the Prime Minister. Finally, in April of 2017, the NAP was officially published. Through the NAP, France committed itself to promote and respect the UNGPs in all their activities[76]. In fact, as shown in Action no. 6, importance is given to risk analyses, by holding collective discussions and creating a database of information coming from embassies and other sources (business circles, international organisations, trade unions, NGOs, etc.)[77]. The purpose is to reinforce due diligence and to encourage French businesses to develop and implement due diligence plans[78]. The NAP provides an analysis for every sector, such as agriculture and food, textile and garment, financial and, finally, extractive. The latter is often considered "opaque and at high risk of environmental and human rights abuses"[79]. Therefore, the French government has been seeking for a new way to engage this sector and encourage due diligence, such as taking part in the Extractive Industry Transparency Initiative (EITI). The aim was to raise awareness among French businesses of their due diligence obligations concerning mineral supply chains[80]. The promotion and training indue diligence is followed by some tools that are recognised by the NAP: the Business and Human Rights Resource Centre; business helpdesk of the International Labour Organisation (ILO); the Human Rights and Business Dilemmas Forum. The most revolutionary part of the French NAP can be found in the initiatives indicated to support an effective access to remedy. In fact, the French NAP not only encourages the development of real and tangible means to enable individuals, or groups, to lodge complaints at national, European and

[75] The same year the CNCDH suggested some recommendations. Commission national consultative des droits de l'homme.
[76] French Due Diligence Law n ° 399, 2017.
[77] Rapport du Groupe de travail n° 3 – Implications de la responsabilité des entreprises sur leur chaîne de valeur (filiales et fournisseurs) (report by working group 3 – The implications of corporate responsibility on business's value chains (subsidiaries and suppliers), November 2014, §A and §D.
[78] French National Plan.
[79] *ibid.*, p 34.
[80] Cf. OECD Due Diligence Guidance and the EU Conflict Minerals Regulation and national law on due diligence.

international level, but it also extends the liability of the main French companies to violations of human rights committed by its subsidiaries and contractual partners. In 2013, to fully apply the UNGP 26, the CNCDH recommended that the parent company should be held responsible for the acts committed by the foreign subsidiaries, as well as the contracting party for acts committed by its subcontractors[81]. Moreover, in addition to the European and international judicial and non-judicial mechanisms, the French NAP recognises an extension of both civil and criminal courts' jurisdiction to harmful events that happened outside French territory by a French domiciled company. Whether civil or criminal proceeding, the main challenge remains to establish a chain of liability. In this regard, in 2017 the French National Assembly and the Senate passed Law n. 399, through which they regulated the duty of vigilance of parent companies[82]. Article 1 defines the entity as "any company which employs, at the end of two consecutive financial years, at least five thousand employees", "or at least ten thousand employees within it and in its direct or indirect subsidiaries", whose headquarters are established on French territory (in the second case even abroad). These entities, together with subsidiaries and controlled companies which meet the elements indicated, are obliged to establish and "effectively implement" a vigilance plan[83]. The innovation contained in the French law is the explicit reference to "activities of subcontractors or suppliers with which is maintained an established commercial relationship". Therefore, it extends the discipline to non-equity-based groups, i.e., contractual agreements relations. The French Due Diligence Law 399/2017 stands tall for a progression in the regulation of what has been categorised in the first paragraph as TNE to prevent and ease the recognition of liability in case of violation of human rights. It establishes a link between due diligence and corporate liability. In fact, the liability of companies obliges them to compensate the victim for harm that occurred, since due diligence would have prevented it from happening. With this law, France sends an important message to the international community, and, above all, to states afraid of disadvantaging the business activities of their own country through such regulation (cf. Switzerland). Since the law was adopted in 2017, lawsuits have been filed and formal notices have been sent by NGOs to companies. For instance, the big supermarket chain "Groupe Casino" has been

[81] CNCDH, Business and human rights: opinion on the issues associated with the application by France of the United Nations' Guiding Principles, Plenary meeting of 24 October 2013.
[82] French Due Diligence Law, n. 76.
[83] *ibid.*, Article 1.

sued by a group of NGOs over deforestation and human rights violations. Allegedly Groupe Casino regularly bought beef from three slaughterhouses owned by JBS, a giant meatpacker. The three slaughterhouses sourced cattle from 592 suppliers responsible for at least 50,000 hectares of deforestation between 2008 and 2020[84]. Another example is the lawsuit again Total, an oil and gas company headquartered in France, for its drilling operations and constructions of pipeline causing a negative impact on communities and nature in Tanzania and Uganda[85]. Allegedly Total failed to comply with the duty of vigilance law in their mining project in Uganda. The lawsuit was filed in 2019 by six civil society organisations in France but the case is still ongoing[86].
Moreover, the French NAP prioritises the legal protection of whistle-blowers. Therefore, it stressed the need of amending article 113-8 of the Penal code so that a prosecutor's decision not to open an investigation into a complaint lodged by the victim of a crime committed by a French entity abroad can be appealed[87].

It is interesting to see how the French penal code refers to the question of criminal responsibility in general terms, when committed by legal persons. It holds a company criminally responsible for illicit actions committed by their representatives or organs.[88]. The offence must be committed on its behalf and interest and does not exclude the personal responsibility of the perpetrator. To conclude, the big innovation of the mandatory vigilance plan is not accompanied by a specific reference to TNE in the criminal law realm.

- *Germany*

The new "Supply Chain Due Diligence Act"[89] will enter into force in 2023 and will oblige companies with 3,000 or more employees (1,000 or more from 2024) with

[84] M. GOMES, Steak in the supermarket, forest on the ground, Reporter Brasil, 2021; see also Amazon indigenous communities and international NGOs sue supermarket giant Casino over deforestation and human rights violations, Sherpa NGO, 2021; Deforestation Fronts Drivers and Responses in a Changing World, WWF, 2021.
[85] Total in court for human rights violations in Uganda: Historic hearing in France under the duty of vigilance law, Friends of the earth International, 2021.
[86] Cour d'appel de Versailles, Aff. ActionAid France, CCFD-Terre Solidaire, Collectif Ethique sur l'étiquette, Les Amis de la terre, Survie v. Total S.A., 2020 (the judges ruled in favour of Total not on the merits, but due to jurisdictional issues); Cour de Cassation, Aff. ActionAid France, CCFD-Terre Solidaire, Collectif Ethique sur l'étiquette, Les Amis de la terre, Survie v. Total S.A., Arrêt n 893 FS-B, 2021 (it ruled to resolve procedural issues in favour of the six non-profit groups).
[87] French National Plan, Proposal for Action no. 4.
[88] Article 121-2, French Criminal Code.
[89] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Act on Corporate Due Diligence on Supply Chain), 2021.

a registered office or branch in Germany to fulfil their due diligence obligations in their supply chains with regard to respecting internationally recognized human rights and certain environmental standards. It represents an important shift from voluntary corporate social responsibility to binding human rights and environmental obligations for companies. Important aspect is the possibility for affected parties to authorize NGOs and trade unions to raise such claims on their behalf directly before German courts, which allows them to feel protected. Moreover, the law will also cover foreign companies that have a branch office in Germany. Nevertheless, many are the aspects still missing. First of all, the due diligence obligations apply only to the company's own business operations and direct suppliers, but not to indirect suppliers. Therefore, companies are required to conduct a risk analysis only in case of "substantiated knowledge" of a potential human rights violation. Secondly, limited reference to environmental conventions reduces the environmental aspects to take into account. Thirdly, it does not include companies with a smaller number of employees. SMEs can equally have a negative impact on human rights and environmental rights[90].

- European Union

In 2011, the European Union (EU) and its Member States pledged full support to the UN Guiding Principles on Business and Human Rights (UNGPs). In the previous sub-paragraphs, it has been shown how some Member States have approached these issues in virtue of harmonisation of European single national legislations[91]. Despite national legislation, how the European Union will act in such regard is a relevant subject for discussion.

Firstly, it is important to understand if such a topic is within the competence of the European Union. From the combined provisions of articles 2[92], 3.5, 21 of the Treaty of the European Union (TEU) it is reasonably possible to set the EU's duty to promote respect for human rights and the environment when it adopts and implements legislation[93]. Furthermore, based on Article 50 of the Treaty on the Functioning of the European Union (TFEU), the EU has the competence to

[90] Initiative Lieferkettengesetz, What the new Supply Chain Act delivers and what it doesn't, 2021.
[91] Cf. European Coalition for Corporate Justice (ECCJ), *The EU competence and duty to regulate corporate responsibility to respect Human Rights through mandatory Human Rights Due Diligence*, 2017.
[92] "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".
[93] Articles 2, 3.5, 21, Treaty of the European Union.

harmonise national company laws. The European Court of Justice has made remarkably clear that the EU institutions can "act in order to forestall measures which would probably have been taken by the Member States", so to prevent discordancy of the internal market[94]. According to the principle of subsidiarity, the EU does not have to wait for the Member States to cause deformity by divergent laws, but it is required to intervene when it can be more effective than national, regional or local actions[95]. As matter of fact, the EU has already made some relevant and noteworthy steps: Non-Financial Reporting Directive (NFRD), Action Plan on Sustainable Finance and Conflict Minerals Regulation. The NFRD Directive (Directive 2014/95/EU), established that large listed companies, banks, insurance companies and other companies designated by national authorities as public-interest entities with more than 500 employees are required to publish reports on the policies they implement in relation to "environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including: (a) a brief description of the undertaking's business model; (b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented; (c) the outcome of those policies; (d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks; (e) non-financial key performance indicators relevant to the particular business" [96]. It is the Commission's responsibility to prepare non-binding guidelines on methodology for reporting non-financial information [97]. However, as highlighted by the Commission's public consultation on 20 February 2020, it is important that companies and financial institutions improve their disclosure of non-financial information. Users of this information, mainly investors and civil society organisations, are demanding more and better information from companies about their social and environmental performance and impacts [98]. Therefore, the European Commission set the first quarter of 2021 as the target[99].
The Action Plan on Sustainable Finance was announced in 2018 as a consequence

[94] Case C 58/0 8 Vodafone v. Secretary of State for Business, Enterprise and Regulatory Reform, paras. 45 46, 2010 E.C.R. I 4999.
[95] M. EVANS, A. ZIMMERMANN, *Global Perspectives on Subsidiarity*, Dordrecht, 2014.
[96] Directive 2014/95/Eu, European Parliament and of the Council, 2014.
[97] ibid., art. 2.
[98] European Commission, *Consultation strategy for the revision of the Non-Financial Reporting Directive*, 2020.
[99] European Commission, *Commission Work Programme 2020*, COM 440, 2020.

of the recommendations of the High-Level Expert Group (HLEG)[100] to include environmental, social and governance (ESG) considerations in the decision-making process of investors and asset managers[101]. The action plan set out a comprehensive strategy to further connect finance with sustainability. It included ten key actions to reorient capital flows towards a more sustainable economy, to mainstream sustainability into risk management and to foster transparency and long-termism. The Action Plan on Sustainable Finance represents an important cornerstone in the European development in the field of business, human rights and sustainability. It is aligned towards an establishment of a clear and detailed EU taxonomy, a classification system for sustainable activities, a creation of an EU Green Bond Standard and labels for green financial products, fostering investment in sustainable projects, incorporating sustainability in financial advice, developing sustainability benchmarks, better integrating sustainability in ratings and market research, clarifying asset managers' and institutional investors' duties regarding sustainability, introducing a "green supporting factor" in the EU prudential rules for banks and insurance companies, strengthening sustainability disclosure and accounting rule-making, fostering sustainable corporate governance and attenuating short-termism in capital markets[102]. Of those ten key actions, some regulations have already been published in the Official Journal, and soon will be entirely and directly binding in all Member States. As matter of fact, the Taxonomy Regulation for climate change mitigation (EU) 2019/2088[103] entered into force, as well as the Regulation (EU) 2019/2089[104] and Regulation on sustainability-related disclosures in the financial services sector (EU) 2019/2088[105].

[100] The High-Level Expert Group (HLEG) was established by the Commission in December 2016 to develop a comprehensive EU strategy on sustainable finance.
[101] European Commission, *Renewed sustainable finance strategy and implementation of the action plan on financing sustainable growth*, 2020.
[102] *ibid.*
[103] European Parliament, Council of European Union, Regulation (Eu) 2020/852 on the establishment of a framework to facilitate sustainable investment, 2020. This Regulation establishes the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable.
[104] European Parliament, European Council Regulation (Eu) 2019/2089, 2019. It amends the benchmark regulation creating a new category of benchmarks comprising low-carbon and positive carbon impact benchmarks, which will provide investors with better information on the carbon footprint of their investments.
[105] European Parliament, Council of European Union, Regulation (Eu) 2019/2088 on sustainability-related disclosures in the financial services sector, 2019.

Finally, the Conflict Minerals Regulation[106] was adopted on 17 May 2017 and it will be directly applicable to the Member States as of 1 January 2021. It imposes to EU importers to ensure that their supply chain policy standards, contracts and agreements are consistent with the OECD Due Diligence Guidance; to identify and assess risks of adverse impacts in their supply chains and implement a strategy to respond to the identified risks (Risk management obligations); to carry out independent third-party audits. Therefore, EU importers shall disclose the results of their third-party audits to member state competent authorities and publicly report the results of their due diligence practices. Consequently, it will be Member States' task to lay down the rules applicable in cases of infringement, to control and enforce. This will lead to risks of inconsistency and different levels of control throughout the EU. The Conflict Minerals Regulation is missing two important elements: the inclusion in the regulation of TNE, and the establishment of companies' duty of care or parent company liability.

From the previous *excursus* is evident that an EU mandatory Human Rights Due Diligence (HRDD) is still needed. HRDD is an ongoing risk management process that a company needs to have in place in order to identify, prevent, mitigate, and account for how it addresses its adverse human rights impacts throughout its value chain[107]. Despite the launch of a green card initiative by eight countries calling on the EU Commission to initiate a legislative procedure to enhance corporate respect for human rights and the environment[108], also the Council of the EU has repeatedly "encouraged the Commission to enhance the implementation of HRDD"[109]. The European Parliament affirmed that "new EU legislation is necessary to create a legally binding obligation of due diligence for EU companies outsourcing production to third countries"[110], and the EU Agency on Fundamental Rights stated that the recent French legislation "could serve as

[106] European Parliament, Council of European Union, Regulation (EU) 2017/821, laying down supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.
[107] European Coalition for Corporate Justice (ECCJ), n. 93.
[108] ECCJ, *Members of 8 European Parliaments support duty of care legislation for EU corporations*, 2016.
[109] Council of the European Union, *The EU and Responsible Global Value Chain, Brussels European Council*, 8833/16, para. 9, 2016; Council of the European Union, Council Conclusion on Business and Human Rights, Brussels European Council, 10254/16, para. 6, 20 June 2016.
[110] European Parliament resolution on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact (2015/2589(RSP)), para. 23, 28 April 2015.

a model for the EU"[111]. The first step was made by the European Parliament by establishing the Responsible Business Conduct Working Group (RBC Group). The RBC Group presented the Shadow EU Action Plan, as a signal to the European Commission and the Council of the European Union to show that it is time to consider systematic and effective measures to implement the UNGPs[112]. The purpose of the EU Action Plan is the "creation of a systematic and coherent approach on the implementation of the UNGPs in all relevant policy areas while maintaining sufficient flexibility to respond to new challenges as they arise"[113]. In other words, it is expected all business enterprises domiciled or conducting business within the EU and/or member states' jurisdiction to respect human rights throughout their operations. This Shadow plan is a preliminary document not developed in a structured, participatory process. It is recommended that a future EU Action Plan will be based on a systematic consultation of relevant stakeholders from civil society[114].

In the meantime, the Shadow Plan (2019-2024) set the priorities to be addressed by the EU in the field of business and human rights, such as the establishment of human rights due diligence standards for business operations, supply chains and business relationships; improving access to remedy; strengthening the protection of human rights defenders and putting safeguards in place to prevent human rights harm through EU trade and investment[115]. HRDD is still missing, but the European Commission has committed to tabling EU-wide human rights due diligence law by June 2021. In the meantime, the EU tracked its policy direction (promote, respect, protect, and fulfil human rights and democracy) in physical and digital space. Notwithstanding such regulations do not introduce a mandatory due diligence rule, yet the Council's EU Action Plan on Human Rights

[111] European Union Agency on Fundamental Rights, Opinion on improving access to remedy in the area of business and human rights at the EU level, Vienna, 10 April 2017, FRA Opinion 1/2017, p.17.
[112] Responsible Business Conduct Group, Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU, 2019.
[113] ibid.
[114] ibid.
[115] ibid.

and Democracy (2020-2024)[116], the Digital Services Act (DSA)[117], and Digital Markets Act (DMA)[118] (first drafts of the European Commission) are doubtlessly pointing out the absolute necessity of improving the respect, protection and fulfilment of human rights and the principle of democracy, notably in a digitalised market (e-market), which lacks more comprehensive legislation, and where many unfair acts take place.

Lastly, on 10 March 2021, the European Parliament adopted the resolution on "Corporate due diligence and corporate accountability"[119] following the revised report of the European Parliament's Committee on Legal Affairs (JURI Committee) containing a draft directive. The resolution stresses the importance of mandatory due diligence, as well as the primacy of States over private actors in the protection of human rights[120]. As a resolution, it does not have a legislative but a prepositive power. Therefore, it addresses the Commission to propose a mandate for the Union "to constructively engage in the negotiation of a UN international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other businesses"[121]. Moreover, it requests the Commission to submit a legislative proposal on mandatory supply chain due diligence and to take into consideration the recommendations provided in it.

The European Parliament continues to push towards European legislation on corporate due diligence and accountability, and the same must be said for member states. Nevertheless, the EU still needs to take steps further to be a proactive part in the creation of an international and European legally binding instrument on business and human rights.

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[116] Council of the European Union, *EU Action Plan on Human Rights and Democracy 2020-2024*, 2020. The new Action Plan on Human Rights and Democracy 2020-2024 sets out the EU's ambitions and priorities for concrete action for the next five years in the field of external relations, in which the Council welcomes its central role in guiding the implementation. Moreover, it promotes a global effort towards the implementation of UN Guiding Principles on Business and Human Rights, including fostering the development and implementation of national action plans in Member States, upholding human rights, and supporting multi-stakeholder processes to develop.

[117] European Commission, *Digital Services Act*, 2020.

[118] European Commission, *Digital Market Act*, 2020.

[119] European Parliament, *Corporate due diligence and corporate accountability*, 2021.

[120] ibid., art 2.

[121] ibid., art 30.

Important developments have happened on February 2022 when the European Commission has adopted a proposal for a Directive on corporate sustainability due diligence[122]. Such proposal applies to the company's own operations, as well as their subsidiaries and their direct and indirect business relationships (value chains). The proposed corporate due diligence duty will induce companies to: integrate due diligence into policies; identify actual or potential adverse human rights and environmental impacts; prevent or mitigate potential impacts; bring to an end or minimise actual impacts; establish and maintain a complaints procedure; monitor the effectiveness of the due diligence policy and measures; and publicly communicate on due diligence[123].

- *Rest of the world*

Apart from the Dutch shy attempt to have a due diligence law which regulates only child labour[124], other European states are still far from a thorough due diligence law. In Switzerland, despite the Swiss Coalition for Corporate Justice's (SCCJ) "Swiss Responsible Business Initiative", the parliament adopted new measures[125] where there is no evidence of the extension of liability to TNEs for human rights abuses. Italian legislation, on the other hand, is advanced. It recognises criminal, civil and administrative responsibility of companies, as well as "culpa in vigilando" (duty care) for holding companies. Unfortunately, it does not refer to a general categorization of TNE making the distribution of responsibility of non-equity groups uncertain[126].

[122] C. WIGAND, K. KOLANKO, F. MICCOLI, Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains, press release, 23 February 2022.
[123] ibid.
[124] Child Labour Due Diligence Law ("Wet Zorgplicht Kinderarbeid"), 2019; see also ILO-IOE Child Labour Guidance Tool for Business, 2015; The Liability of Legal Persons for Foreign Bribery: a Stocktaking Report, OECD, 2016.
[125] C. V. Y. WEGELIN, *Der Lange Arm von Swiss Holdings*, 2020; SCCJ, Parliament dumps compromise proposal, the public will have final say on initiative, 2020.
[126] Cf. D. Lgs. 8 giugno 2001, n. 231, "Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300" ("Administrative responsibility of legal persons, companies and associations, even without legal personality pursuant to article 11, law 29th September, 2000, n. 300"); Italian National Action Plan on Business and Human Rights 2016-2021; Proposta di legge n. 1323 "Istituzione della Commissione nazionale per la promozione e la protezione dei diritti umani fondamentali" (Legislative Proposal n. 1323 "Establishment of the Indipendent National Human Rights Institutions"); Law 29 ottobre 2016, n. 199 "Disposizioni in materia di contrasto ai fenomeni del lavoro nero, dello sfruttamento del lavoro in agricoltura e di riallineamento retributivo nel settore agricolo"; Cassazione Civile, n. 1759, 1992; Cassazione Civile,

Outside Europe, U.S. business and human rights legislation is strictly sectorial[127], and it misses the broader consideration of a wider legal guarantee. Furthermore, there is no reference to the concept of TNE, which represents a new legal challenge. The latest "Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019"[128] is an important step further but, first, it is still pending, secondly, it does not currently create liability for any adverse human rights impacts or provide for a victims' right to claim. U.S. government needs to concretise what was promised in the NAP[129] so that a more tangible legal protection towards victims of business violations of human rights may be applied. Similar considerations apply to UK. UK's legislative *status* is far from perfect and it needs a prompt adequation to the other states' more advanced approaches. Firstly, a clearer structure of criminal corporate responsibility; secondly, UK needs to take steps towards the establishment of human rights' due diligence law. UK legislations are fragmentary and there is no reference to TNEs, or at least to what it has been defined in this study as TNE[130].

In Asia, only Thailand[131] and Japan[132] issued a NAP on business and human rights to adapt to internationally recognised human rights. In Oceania, Australia and NSW have regulated only modern slavery which cannot be considered a

n. 16707, 2004; G. SALATINO, La responsabilità della Holding nel nuovo art. 2947 c.c.: davvero una "nuova frontiera" della responsabilità civile?, in La responsabilità civile, 4, 2010; Cassazione Penale, Sezione V, n. 24583, 2010; Cassazione Penale, Sezione V, n. 4324, 2013; Cassazione Penale, Sezione II, n. 52316, 2016

[127] For example, California Transparency in Supply Chains Act (SB 657), Trade Facilitation and Trade Enforcement Act of 2015, Dodd Frank Act, the Global Magnitsky Human Rights Accountability Act.

[128] U.S. House of Representatives Committee on Financial Services, Discussion Draft Bill "'Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019", 116th Congress, 1st session, 2019.

[129] U.S.A. National Action Plan, Responsible Business Conduct, 2016.

[130] Cf. Tariff Act of 1930 (19 U.S.C. §1307), section 307, 1930; Cf. Congressional Research Service, Section 307 and Imports Produced by Forced Labor, 2020; The Fair Labor Standards Act of 1938, 29 U.S.C. 201, et seq., 1938; Civil Rights Act of 1991 (P.L. 102-166), 1991; Age Discrimination in Employment Act of 1967 (Pub. L. 90-202) (ADEA), 1967; Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations, 2015; The Companies Act 2006 (Strategic Report and Directors' Report) Regulations, 2013.

[131] National Action Plan on Business and Human Rights (2019-2022), Thailand, 2019.

[132] National Action Plan on Business and Human Rights (2020-2025), Japan, 2020.

substitute of human rights due diligence law[133]. New Zealand, instead, only applied OECD Guidelines' NCPs[134].

Nevertheless, worth mentioning are two recent judicial cases: Association Environmental Defense v. Royal Dutch Shell (Netherlands)[135], and Okpabi and others v Royal Dutch Shell Plc and another (UK)[136]. In the first case, the Hague District Court recognised Shell's liability for climate change and ordered Shell to reduce its emissions by 45% by 2030, making its decision provisionally enforceable. In the second case, it was confirmed that companies may be held accountable in negligence to third parties for environmental and human rights harms caused by their overseas subsidiaries. The decision is part of a broader judicial trend whereby courts are increasingly more prepared to hold parent companies responsible for the acts of their overseas subsidiaries[137].

5. Critical analysis and assessment of the identification of a customary international law.

In the field of business and human rights, NAPs are expressions of the intentions of each State to deal with business and human rights, and the UNWG's Guidance is a fundamental reference guide for all stakeholders involved in NAP processes [138]. NAPs are "an important process to aid States in their implementation of the United Nations Guiding Principles"[139], and the most

[133] Australia Modern Slavery Act 2018 - No. 153, 2018; NSW Modern Slavery Act 2018, No. 30.
[134] Ministry of Business, Innovation and Employment, OECD guidelines for multi-national enterprises, New Zealand, 2020, www.mbie.govt.nz; OECD, Guidelines for Multinational Enterprises, National Contact Points, 2011.
[135] Milieudefensie et al. The claimants (Milieudefensie, Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends, Jongeren Milieu Actief and ActionAid) v. Royal Dutch Shell PLC, The Hague District Court, C/09/571932, 2021
[136] Okpabi and others v Royal Dutch Shell Plc and another, UK Supreme Court, 2021
[137] Cf. Vedanta Resources PLC and Anor v. Lungowe and Ors, 2019; C. Hackett, S. Hopkins, C. O'Kelly, C. Patton, Okpabi and Others v Royal Dutch Shell plc and Another [2021] UKSC 3, in Northen Irelnd Legal Quarterly, Vol. 72 No. 1, 2021
[138] Guidance on National Action Plans on Business and Human Rights, n. 18. The NAP is defined as an <<evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights (UNGPs)>>.
[139] Council of Europe, National Action Plans, www.coe.int.

efficacious mechanism also for stakeholders to fulfil UNGPs[140]. Moreover, in the Follow-up and Review (FUR) of the 2030 Sustainable Development Agenda, states are encouraged to conduct regular and inclusive reviews of progress at the national, regional, and international levels[141]. This can happen by a specific development of NAP's lifecycle which comprises five phases linked in a continuous loop: establish a governance framework for the NAP; conduct a National Baseline Assessment (NBA); elaborate NAP: Scope, Content, and Priorities; implement, monitor, and review the NAP; update the NAP[142]. NAPs are pivotal for a political, social, and legal concern in the field of business and human rights, yet it is not certain if they represent a source of international custom. Such uncertainty can be solved by referring to Conclusion 6 of the ILC's draft[143]. It comprises "implementation of resolutions", thus the fulfilment of what states have agreed in the resolution. In the case of NAPs on Business and Human Rights, in 2014 the Human Rights Council[144] - an inter-governmental body within the United Nations made up of 47 United Nations Member States elected by the UN General Assembly responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them - Resolution 26/22 encouraged the development of NAPs, as well as the establishment of a Working Group "to build a database of national action plans"[145]. Hence, the NAP represents a "conduct in connection with resolutions"[146], a benchmark to consider the general practice, which is the first element to evaluate the existence of an international custom[147].

All that being said, the last step is to understand if the identification of international custom can be ascertained by the content of NAPs, together with

[140] UN News, *UN Human Rights Council endorses principles to ensure businesses respect human rights*, 2011. The 16th of June 2011 the UN Human Rights Council "endorsed… the guiding principles as the authoritative global reference point for business and human rights".
[141] For further information, see The Danish Institute for Human Rights, *Human Rights in the Follow-Up and Review of the 2030 Agenda for Sustainable Development*, 2016.
[142] The Danish Institute for Human Rights, The International Corporate Accountability Roundtable, *National Action Plans on Business and Human Rights toolkit*, 2017.
[143] International Law Commission, *Draft conclusions on identification of customary international law (with commentaries)*, Conclusion 6, Yearbook of the International Law Commission, 2018.
[144] UN General Assembly, Human Rights Council, Resolution adopted by the General Assembly, 60/251, 2006.
[145] UN General Assembly, Human Rights Council, Human rights and transnational corporations and other business Enterprises, 26/22, 2014.
[146] Draft conclusions on identification of customary international law (with commentaries), n. 133, Conclusion 6
[147] Cf. Paragraph 4, subparagraph b.

national legislative trends. Therefore, it must be considered whether there is a general practice, and, secondly, if such practice is accepted as law. In the current research, the scope is to understand if the promoted responsibility of the parent company towards subsidiaries and other business partners' activities can establish a customary international law of mandatory due diligence. The assessment of general practice will be settled around the NAPs' reference to an implicit or explicit due diligence burden on the parent company, as well as the national legislative response. The practice, regardless of its duration, is to be "sufficiently widespread and representative", but, most importantly, "consistent"[148]. It is evaluated based on "all available practice", and it should not vary[149]. The above analysed NAPs and national legislations show a slowly evolving process where states (and TNEs) are reluctant to take the final decisive step to legislate the mandatory due diligence law. Therefore, episodic and fragmentary provisions, though following the same thread, manifest a lack of a general practice, and, consequently, the opinio juris.

To conclude, States are not reluctant to extend the responsibility to TNEs, but they are reticent. States do not oppose, but in many cases, they remain silent on the matter, in other words, they do not take a step further. New means of TNEs' self-regulation, alternative modules to States, rediscovering TNEs' old values of a social purpose and social interest are not the consequence of States' failure to regulate the issue[150]. On the other hand, it is also in TNEs' interests to slow down the process to nationally extend responsibility. Only a few states (for instance, the majority of Asian states, as Turkey[151]) do not recognise legal persons' responsibility, whereas the majority of the states do it, and some of them are in the process of recognising a mandatory due diligence law in TNEs' activities (for instance, Switzerland, Italy, U.K., U.S.). Therefore, according to the author, the issue is slowly and positively opening out, but no international custom can be identified for the present time.

[148] Draft conclusions on identification of customary international law (with commentaries), n. 133, Conclusion 8
[149] ibid., Conclusion 7.
[150] Bonavero Institute of Human Rights and Oxford Business and Human Rights Network, *Can Corporate Law Advance Fundamental Rights?*, Webinar 2 December 2020, reply of Peter Muchlinski to David Bilchitz "Embedding the Multi-Factoral Model in Corporations: The Role of Corporate Law".
[151] Turkish Criminal Code No. 5237, art 20

6. Conclusionary remarks. The new "frontier" for mandatory due diligence: UN Treaty on Business and Human rights?

The previous analysis had the purpose to understand if, in the absence of legislation, the mandatory due diligence law could be extracted from the general practice arising from a mix of NAPs and national legislations. The analysis clarified that the mix of the two is an evolving process made of steps, each of them to be singularly implemented.

The rule of customary law is not crystalised, yet there is a tendency to the development of mandatory due diligence legislations, also corroborated by the recent Dutch and UK domestic courts' decisions[152]. As matter of fact, in 2014 the Human Rights Council established an "Open-Ended Intergovernmental Working Group (OEIGWG) on transnational corporations and other business enterprises concerning human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises"[153]. Ahead of the sixth session, OEIGWG released a second revised draft legally binding instrument on business activities and human rights, and it represents the basis for State-led direct substantive intergovernmental negotiations. The High Commissioner for Human Rights, during the session, stated that "modalities of mandatory human rights due diligence regimes … could play a vital role as part of a smart mix of measures to effectively foster business respect for human rights"[154]. In the session, stakeholders and other participants pointed out elements to be further discussed. For instance, it was suggested to change the term "victim" with "rights holder" or "affected individuals and communities; to use "contractual relationship" instead of "business relationship"; to elucidate phrases as "internationally recognized human rights" for it could lead to different interpretations; to untangle doubts around the constitution of a specific international tribunal; to institute a Committee to be competent in supporting State parties, in making general comments, normative recommendations, and

[152] Milieudefensie et al. The claimants v. Royal Dutch Shell PLC, n 128; Okpabi and others v Royal Dutch Shell Plc and another, n 129.
[153] UN General Assembly, Human Rights Council, *Elaboration of an international legally binding instrument on*
transnational corporations and other business enterprises with respect to human rights 26/9, 2014.
[154] UN Human Rights Council, *Report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, 2020.

observations on reports submitted by State Parties, and in submitting annual reports on its activities; to further discuss the international fund for victims; to set up a regular Conference of States Parties[155].

The treaty may be a future materialisation of a (forming) rule of customary international law, or, more plausibly, the final piece to achieve a formally concluded and ratified agreement between states on the matter de quo. On the 14th of January 2021, the Human Rights Council published the "Report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises concerning human rights"[156]. Together with the Second Revised Draft, they represent the latest step in the process of the final legally binding treaty. It is composed of 24 articles and its core purpose is to protect victims from "human rights abuses"[157]. The Statement of Purpose[158] applies "to all business enterprises … that undertake business activities of a transnational character"[159], and it shall encompass all internationally recognised human rights law[160]. The draft gives importance to the prevention of the occurrence of human rights abuses. It refers to the mandatory human rights due diligence to be undertaken by business enterprises in their transnational activities. Therefore, it is convenient to reflect on the problematic aspect of due diligence. The introduction of a mandatory due diligence law will represent an important step towards the recognition of obligations on TNEs. Though, it is relevant to underline peculiar aspects that will make it effective. The monitoring needs to be complete and pragmatic, as well as the risk assessment

[155] *ibid*. A third revised draft legally binding instrument is encouraged to be prepared no later than the end of July 2021, for consideration and further discussion.
[156] UN Human Rights Council, *Report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human right*, 2021.
[157] OEIGWG, *Second Revised Draft "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises"*, article 1, 2020. It refers to "any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights".
[158] *ibid.*, article 2. "…effective implementation of the obligation of States to respect, protect and promote human rights in the context of business activities; b. To prevent the occurrence of human rights abuses…; c. To ensure access to justice and effective remedy for victims…; d. To facilitate and strengthen mutual legal assistance and international cooperation to prevent human rights abuses in the context of business activities and provide access to justice and effective remedy to victims of such abuses".
[159] *ibid.*, article 3 (1).
[160] *ibid.*, (3).

for the identification and prevention of human rights abuses. The main company of the TNE must be aware of everything happening at a peripheral level and must avoid any action that could have negative impacts on the full respect of internationally recognised human rights[161]. The questions to be cleared are what and how to assess the risk of human rights' abuses. The Second draft requires State parties to impose on business activities to undertake human rights due diligence based on the identification and assessment of any actual or potential human rights abuses; taking appropriate measures to prevent and mitigate "the identified actual or potential human rights abuses"; monitoring the efficacy of those measures; frequently communicating with stakeholders, "particularly to affected or potentially affected persons"; "reporting publicly and periodically on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators on concerning human rights, labour rights and environmental standards throughout their operations, including in their business relationships" [162]. These provisions need to be strengthened by a more detailed explanation of how due diligence must be put in place. To achieve the scope of identifying and preventing human rights abuses the main company of a TNE shall have comprehensive, direct, and continuous control over all other companies and activities in the chain. When it comes to identifying and assessing human rights risks TNEs are expected to consider a wide view of possible impacts of a company's business activities and relationships, including "whether and how the design, development, promotion, sales, licensing, contracting and use of its products and services could lead to adverse human rights impacts"; prioritise the gist on the "most serious, widespread or lasting harms on people"; interact meaningfully with stakeholders to inform and explain its human rights risks assessment and prioritisation[163]. Sometimes it may be helpful the use of "external advisory groups or other forms of engagement with external stakeholders and intended users". Once preventive measures have taken place, the company must monitor and protect both the full respect of these manoeuvres and the victims. *De lege ferenda*, an important tool is represented by the use of internal hotlines, or external entities to receive grievances by employees and third party's suffering certain abuses coming from TNEs' operations. In both cases, the claim is anonymous but must be based on video/photographic, or documental evidence.

[161] OEIGWG, Second Revised Draft, n. 146.
[162] *ibid.*, art. 6 (2), (3).
[163] Business and Human Rights in Technology Project (hereinafter "the B-Tech Project"), Identifying and Assessing Human Rights Risks Related to End-Use, Foundational Paper, 2020.

The first option will rely on procedures set forth by the company. The claimant might feel in danger of future retaliation and not fully protected[164]. Moreover, it must be supported by stringent whistle-blower protection's legislation. On the other hand, the second alternative will ensure more impartiality and will facilitate the access to remedy[165]. How? By easing the access to lawyers, or advocates. In other words, the use of a third entity to receive anonymous claims and give access to lawyers would constitute a remarkable solution for a closer view over companies' acts and more protection for (alleged) victims. The main company will have to interact with this entity and find possible solutions; the third entity, on the other hand, will have to first try to solve the issue extra-judicially and to dialogue with the company before any legal action. This approach will facilitate the monitoring and it will avoid judicial consequences, from one side; victims will feel more protected and represented, from the other side.

For a wide-ranging use of the third entity, any stakeholder (indigenous group, a specific category, etc.) may decide to interact with it, reporting and /or requesting support. In this way, the legal imposition of the mandatory use of third entities, capped off by the rule of transparency and whistle-blower protection, will have positive impacts in the prevention and protection of human rights in business activities.

The efficacy of due diligence under a UN treaty on business and human rights should not be considered regardless of state control. States hold an important role in such regulation. As stated in the second draft, states parties must "ensure compliance with the obligations laid down" [166]. Therefore, the due diligence shall be supported by a monitoring power of the state party. Such super parties veiled

[164] Cf. S. ZAGELMEYER, L. BIANCHI, A. R. SHEMBERG, *Non-state based non-judicial grievance mechanisms (NSBGM): An exploratory analysis*, Manchester, 2018. <<Is anonymity of the claimant provided? There is no information available in the existing literature on whether anonymity of the claimant is an issue in the international framework agreements, or whether non-retaliation and safety of the claimant are considered an issue… Are claimants protected from retaliation - Specific clauses of non-retaliation are typically in place. However, this would include retaliation from the company itself. Other protections against ridicule, pressure or violence based on cultural context is not typically provided. Confidentiality is widely guaranteed, and anonymity provided upon request, presumably to protect claimants. However, this should be verified>>.
[165] Cf. SHIFT, OXFAM, GLOBAL COMPACT NETWORK NETHERLANDS, *Doing Business with Respect for Human Rights: A Guidance Tool for Companies*, 2016. Some sort of third-entity-hotline already exists, for instance Clear Voice Hotline Service, a project of The Cahn Group, LLC, a corporate responsibility consultancy dedicated to promoting long-term business success by providing corporate responsibility solutions to companies and communities.
[166] OEIGWG, Second Revised Draft, n. 146, article 6 (5)

supremacy of states is agreeably fitting within the concept of regulating TNEs' activities through obligations based on states' treaty. In fact, it confirms the above mentioned modified "State-only" approach where states are the only actors of international law, and TNEs are secondary subjects with influential attitude in the global realm but with duties to respect. A noteworthy human rights due diligence is not one, but multiple. TNEs are made of subsidiaries, subsidiaries of subsidiaries, contractual partners, contractual partners of subsidiaries, and so on. Therefore, the due diligence shall be put in place by each company of the group and the network, and transversally by the main company. The binding treaty on business and human rights can be effective if modelled concerning some important elements previously pointed out. It is important to have clear terminology regarding the object of the treaty and to establish efficacious measures, such as mandatory due diligence law which shall be constructed in function of the widest prevention, monitor, and remedy from the various interconnected companies. The evolutive process in the field of business and human rights is clear. The change from soft law to hard law is tough but the current situation is leading towards it. States have understood the potential threat of TNEs, and have felt the necessity to intervene. Although States are concerned about the possible repercussions on the public economy, the "human rights revolution", has acted to unify the global legal system. Such slow and sectoral development is a major reason to reject the recognition of an international custom on mandatory due diligence, however, the comparative analysis has shown a progressive improvement characterised by a balance of different interests. Switzerland, for instance, is an example of this attitude. Notwithstanding the initiative and the referendum, it decided that the best solution for the state's interests was to reject an amendment of the rules concerning Swiss companies' responsibilities.

The purpose of this study was to interpret and frame such processes, and for this reason, following the negative answer to the question of the recognition of an international customary law, it was necessary to wonder how an international crystallisation of rules on mandatory due diligence could be put in place. The UN Treaty on Business and Human Rights[167] represents the step that is needed to develop equal legislation on business and human rights. In the last ten years, States have made big improvements to their respective national legislation. However, the fear of hindering national origin companies restrains further

[167] *ibid.*

development. A Treaty would seem the best way forward on this issue, because States together will decide the content, as well as how, when, and what to regulate. It is the safest solution for equal progress in an interconnected globalised economic system.