

Corporate actors, environmental harms and the Draft UN Treaty on Business and Human Rights: History in the making?

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1. Introduction

Human rights-based complaints against corporate actors for environmental harms are on the rise globally and across multiple jurisdictions. These complaints must be viewed in the context of broader efforts to bridge the enforcement and accountability gaps that plague environmental law, both at the national¹ and at the international² level. This article considers the implications of the ongoing United Nations (UN) negotiations on a Legally Binding Instrument to Regulate the Activities of Transnational Corporations and Other Business Enterprises in remedying corporate environmental harms. First, we take stock of the judicial practice concerning corporate human rights abuses associated with environmental harms, including the emerging praxis of climate change litigation against corporations. Second, we draw lessons from this praxis to highlight gaps in the law and the role that the ongoing UN treaty negotiations might play in bridging these. Specifically, we consider whether and how

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¹ UNEP, 'Environmental Rule of Law: First Global Report' (2019) <www.unenvironment.org/resources/assessment/environmental-rule-law-first-global-report>.

² E Morgera, *Corporate Environmental Accountability in International Law* (OUP 2020).



a new treaty lends itself to address the multifaceted and complex enforcement and remedial questions associated with environmental harms caused by corporate actors. Third, we reflect on the ongoing law-making process concerning corporate due diligence in the EU and how the approach adopted in that context compares to that of UN treaty negotiations.

2. *Judicial practice on corporate human rights abuses associated with environmental harms*

The growing recognition of corporate actors' human rights responsibilities and accountability has been coupled with a rise in human rights-based litigation against corporations. National³ and international⁴ adjudicating bodies have increasingly maintained that businesses 'must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities'.⁵ International human rights bodies have bolstered these arguments, by suggesting that corporate responsibility exists 'regardless of whether domestic laws exist or are fully enforced in practice'.⁶ Specifically, the corporate responsibility to respect human rights as enshrined in the UN *Guiding Principles on Business and Human Rights* (UNGPs) has been increasingly interpreted into a duty of due diligence, which requires

³ See for example the decision of the Canadian Supreme Court in *Nevsun Resources Ltd v Araya* 2020 SCC 5 (CanLII) (28 February 2020). This case is part of a growing global trend of civil liability litigation against businesses for their alleged involvement of rights abuses. For other cases, see <www.law.ox.ac.uk/content/civil-liability-gross-human-rights-abuses>.

⁴ See eg the decision of the International Centre for Settlement of Investment Disputes in *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (2016) at 1993-9.

⁵ See eg the judgment of the Inter-American Court of Human Rights in *Kaliña and Lokono Peoples v Suriname* (2015) at 224.

⁶ UN Committee on Economic, Social, and Cultural Rights 'General Comment No 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' UN Doc E/C.12/GC/24 (10 August 2017) para 5.



corporations ‘to identify, prevent, mitigate and account for how they address their adverse human rights impacts’.⁷ Some countries have already adopted legislation on this matter,⁸ and more are in the process of doing so, including several EU Member States.⁹

This evolving legal framework on human rights corporate responsibility has been increasingly used also to complain directly for harm to persons, property and the environment caused by corporations, both at the national and at the transnational level,¹⁰ with varying degrees of success.¹¹ Here the leap between state obligations and corporate responsibilities is made more problematic by the often deliberate liability gaps left by environmental law, both at the national and at the international level. Examples of civil liability lawsuits for human rights harms are however not hard to find, as the long and grim judicial sagas associated with human rights abuses related to Shell’s operation in the Niger Delta clearly show.¹² Far from providing an optimal remedy, human rights are here

⁷ UN Human Rights Council ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ UN Doc A/HRC/17/31 (21 March 2011) Principle 17. Hereafter, UNGPs.

⁸ See the repository compiled by the Business and Human Rights centre ‘Mandatory Due Diligence’ (*Business & Human Rights Resource Centre*) <www.business-human-rights.org/en/big-issues/mandatory-due-diligence/>.

⁹ See ‘Comparing Corporate Due Diligence and Liability Laws and Legislative Proposals in Europe’ ECCJ (28 May 2020) <<https://corporatejustice.org/news/comparing-corporate-due-diligence-and-liability-laws-and-legislative-proposals-in-europe/>>.

¹⁰ A Savaresi, M McVey (eds) ‘Human Rights Abuses by Fossil Fuel Companies’ 350.org (2020) <<https://350.org/climate-defenders/>>.

¹¹ HM Osofsky, ‘Climate Change and Environmental Justice: Reflections on Litigation Over Oil Extraction and Rights Violations in Nigeria’ (2010) 1 J of Human Rights and the Environment 189; SJ Patel, ‘Delayed Justice: A Case Study of Texaco Arnd the Republic of Ecuador’s Operations, Harms, and Possible Redress in the Ecuadorian Amazon’ (2012) 26 Tulane Environmental L J 71; S Joseph, ‘Protracted Lawfare: The Tale of Chevron Texaco in the Amazon’ (2012) 3 J of Human Rights and the Environment 70; EO Popoola, ‘Moving the Battlefields: Foreign Jurisdictions and Environmental Justice in Nigeria’ Items (7 November 2017) <<https://items.ssrc.org/just-environments/moving-the-battlefields-foreign-jurisdictions-and-environmental-justice-in-nigeria/>>.

¹² See eg *The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 2170 (TCC); and *Oguru et al v Shell Petroleum NV*, Den Haag (29 January 2021) 200.126.804 and 200.126.834.



used as the last resort to hold corporate actors accountable and provide some redress to victims.¹³

This global trend has recently been corroborated by the small but rapidly rising number of rights-based domestic climate litigation specifically targeting corporations.¹⁴ In the end of May 2021, the world's most established climate litigation databases¹⁵ listed 16 cases against corporate actors, which relied in whole or in part on human rights.¹⁶ To put this data in perspective, on the same date the same databases reported 1,841 cases raising questions of law or fact regarding climate science, climate change mitigation or adaptation, which were brought before international or domestic judicial, quasi-judicial and other investigatory bodies.¹⁷ While both databases are admittedly incomplete, the data they report can be used to infer that presently rights-based climate litigation targeting corporations is comparatively rare.¹⁸

Even so, extant rights-based climate complaints typically argue that corporate actors have a *positive* duty to reduce emissions and to contribute to climate change mitigation.¹⁹ Others hinge on the corporate responsibility to disclose emissions, climate vulnerability and stranded assets.²⁰

For example, in *Notre Affaire à Tous and Others v Total*, citizens and NGOs sued France's largest oil company, relying on French corporate due diligence legislation which requires corporate actors to adopt

¹³ See A Savaresi, J Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry' in J Lin, D Kysar (eds), *Climate Change Litigation in the Asia Pacific* (CUP 2020); Savaresi and McVey (n 10).

¹⁴ A Savaresi, J Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation' (2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787963>.

¹⁵ See the databases curated by the Sabin Centre for Climate Change Law at Columbia Law School <<http://climatecasechart.com/>> and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics <www.climate-laws.org>.

¹⁶ Savaresi, Setzer (n 14).

¹⁷ D Markell, JB Ruhl, 'An Empirical Assessment of Climate Change in the courts: A New Jurisprudence or Business as Usual?' (2012) 64 Florida L Rev 15.

¹⁸ Savaresi and Setzer (n 14).

¹⁹ See eg, *Friends of the Earth Netherlands et al v Royal Dutch Shell PLC*, Hague District Court C/09/571932/HA ZA 19-379, 2021; and Republic of the Philippines, Commission on Human Rights, Case No CHR-NI-2016-0001.

²⁰ See eg *Development YES – Open-Pit Mines NO v Group PZU SA* (2016); and *Market Forces v Sumitomo Mitsui Banking Corporation, Mitsubishi UFJ Financial Group and Mizuho Financial Group* (2018).



measures to protect human rights and the environment.²¹ Similarly, the *Carbon Majors inquiry* by the Philippines Human Rights Commission investigated corporate actors' *positive* duty to support, rather than oppose, climate policies and their enforcement, as well as their *negative* duty to refrain from causing harm.²²

While the vast majority of these rights-based complaints remain pending, important milestones have already been marked. In May 2021, a court in the Netherlands ordered the world's second-biggest publicly traded oil company, Royal Dutch Shell, to reduce its greenhouse gas emissions.²³ The Court relied on international human rights treaties to define the contours of the corporate duty of care and of due diligence obligations under Dutch law. Specifically, it cited 'the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.'²⁴ The Court did not hesitate to rely on the UNGPs, brushing aside concerns about their legal status, asserting that since 2011, 'the European Commission has expected European businesses to meet their responsibilities to respect human rights, as formulated in the UNGPs.'²⁵ Indeed, the Court went as far as saying that the responsibility of business enterprises to respect human rights, as formulated in the UNGPs 'is a global standard of expected conduct for all business enterprises wherever they operate.'²⁶ These findings are remarkable, given that Shell is not a state and, as such, does not have formal obligations under international human rights law.²⁷

The Netherlands is one of few states that places international law obligations above its constitution within the domestic legal order.²⁸ This use

²¹ *Notre Affaire à Tous and Others v Total* (2018).

²² Republic of the Philippines Commission on Human Rights, Case No CHR-NI-2016-0001.

²³ *Friends of the Earth Netherlands et al v Royal Dutch Shell PLC* (n 19).

²⁴ *ibid* para 4.1.3.

²⁵ *ibid* para 4.4.11.

²⁶ *ibid* para 4.4.13.

²⁷ A Savaresi, M Wewerinke-Singh, 'Friends of the Earth (Netherlands) v Royal Dutch Shell: Human Rights and the Obligations of Corporations in the Hague District Court Decision' Global Network for Human Rights and the Environment (31 May 2021) <<https://gnhre.org/2021/05/31/friends-of-the-earth-netherlands-v-royal-dutch-shell-human-rights-and-the-obligations-of-corporations-in-the-hague-district-court-decision/>>.

²⁸ J Crawford, *Brownlie's Principles of Public International Law* (OUP 2019) 90.



of international law is easier for ‘monist’ states, where treaties are directly applicable in domestic law, but it is increasingly common also in ‘dualist’ states. So, it seems likely that the Shell decision will inspire similar lawsuits and possibly even similar judicial decisions in other countries.

Human rights law and bodies therefore increasingly are in the front-line of environmental and climate accountability and are helping to engender a change in attitude by courts and lawmakers.²⁹ Climate litigation against corporate actors provides yet another example of how human rights are being used as a ‘filler’ to plug the accountability gap left by international and national environmental law, both at home and abroad.³⁰ This trend is increasingly visible also in ongoing law-making process at the international and at the EU level.

3. *The ongoing UN treaty negotiations and the environment*

As noted in the introduction to this Zoom-in, in 2020, the Chairman of the UN open-ended intergovernmental working group released the second draft of a treaty establishing obligations for private commercial entities with a transnational character (OEIGWG draft).³¹ The treaty is meant to complement and go beyond the UNGPs. Here we analyse the sections of the text with greater potential to offer protection to environmental interests.

Generally, the OEIGWG draft is aimed at strengthening the respect, promotion, protection and fulfilment of human and environmental rights in the context of business activities, among others by ensuring effective access to justice and remedy for victims of violations and abuses.³² As

²⁹ As suggested also eg in A Savaresi, ‘Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation’ (2021) 77 *QIL-Questions Intl L* 1-3.

³⁰ See eg A Savaresi, J Auz, ‘Climate Change Litigation and Human Rights: Pushing the Boundaries’ (2019) 9 *Climate L* 244.

³¹ UN Human Rights Council OEIGWG ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, OEIGWG Chairmanship Second Revised Draft’ (6 August 2020) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>.

³² *ibid* art 2.



noted above, this is particularly important, in the context of the enforcement and accountability gap that generally characterises environmental law, both nationally and transnationally. The inclusion of ‘environmental rights’ is also remarkable and represents a novelty for an international human rights instrument.³³ Although the OEIGWG draft does not define environmental due diligence, the explicit reference to this concept may be regarded as a step in the right direction, in the sense of bringing the notions of due diligence under human rights and environmental law closer together.³⁴

Like the UNGPs, the OEIGWG draft relies on States as the main bearers of human rights obligations. It suggests that State Parties ‘ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character’.³⁵ In particular:

States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently control or supervises the relevant activity that caused harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.³⁶

³³ D Krebs, ‘Environmental Due Diligence in EU Law - Considerations for Designing EU (Secondary) Legislation, report on behalf of the German Environment Agency’ (Umweltbundesamt 2021) 14 <www.umweltbundesamt.de/publikationen>.

³⁴ It is, however, noteworthy that there is no explanation of environmental rights in the Explanatory Notes published by the OEIGWG. UN Human Rights Council OEIGWG ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, OEIGWG Chairmanship Second Revised Draft, Explanatory Notes’ <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/igwg-key-issues-2nd-revised-draft.pdf>.

³⁵ *ibid* art 8(1). See also the preamble, ‘Stressing that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State...’.

³⁶ *ibid* art 8(7).

Failure to comply with these duties could result in ‘commensurate sanctions, including corrective action where applicable, without prejudice to the provisions on criminal, civil and administrative liability under Article 8’.³⁷

In order to facilitate access to cross-border human rights litigation against businesses, Article 9 makes it mandatory for courts in States Parties to accept civil cases on wide reaching bases of jurisdiction.³⁸ Thus, irrespective of their nationality or place of domicile, alleged victims may bring complaints against acts or omissions on three bases: first, for human rights abuses that have actually occurred; second, for an act or omission contributing to a human rights abuse that has actually occurred; and third, where the legal or natural persons alleged to have committed an act or omission is domiciled. In addition, Article 9(3) prohibits State Parties from declining jurisdiction on the basis that another forum is better suited to hear the case (*forum non conveniens*). Instead, Article 9(5) contains a *forum of necessity* provision, requiring courts in State Parties to exercise adjudicative jurisdiction over non-domiciled entities ‘if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection’.

As noted above, the OEIGWG draft explicitly acknowledges the link between human and environmental rights. Its definition of ‘human rights abuse’ includes:

‘...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*’.³⁹

Victims of human rights abuses must be guaranteed ‘environmental remediation, and ecological restoration’.⁴⁰ The OEIGWG draft also requires State Parties to ensure that human rights due diligence measures

³⁷ *ibid* art 6(6).

³⁸ For comments, see Sarah Joseph, ‘BHR Symposium: The Business and Human Rights Treaty and Private International Law’ *Opinio Juris* (09 September 2020) <<http://opiniojuris.org/2020/09/09/bhr-symposium-the-business-and-human-rights-treaty-and-private-international-law>>.

³⁹ *ibid* art 1(2). Emphasis added.

⁴⁰ *ibid* art 4(2)(c).



include ‘regular environmental and human rights impact assessments throughout their operations’ as well as ‘[r]eporting publicly and periodically on... environmental standards throughout their operations, including in their business relationships’.⁴¹

These expressions clearly build on the long and by now well-established practice of using human rights law and institutions to protect environmental interests, which we mentioned above.⁴² The OEIGWG draft treaty therefore attempts to translate this practice into obligations that specifically apply to corporate actors in a transnational context.

Some States have expressed scepticism over the ‘environmental’ provisions included in the OEIGWG draft. For example, Brazil has cautioned that ‘the conceptual basis for environmental measures should emanate from international agreements that deal specifically with that issue.’⁴³ Similarly, the Philippines suggested deleting the reference to environmental rights.⁴⁴ The EU has more diplomatically raised questions over the scope of such environmental rights, suggesting that this term has no

⁴¹ OEIGWG Chairmanship Second Revised Draft (n 32), art 6(3) (a and e).

⁴² See the mapping studies prepared by the UN Special Rapporteur on Human Rights and the Environment <www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx>; UN Human Rights Council ‘Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Compilation of good practices’ UN Doc A/HRC/28/61 (3 February 2015) <www.srenvironment.org/report/good-practices-report-2015>; UN Human Rights Council ‘Right to a healthy environment: good practices: Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ UN Doc A/HRC/43/53 (30 December 2019) <www.srenvironment.org/report/good-practices-in-implementing-the-right-to-a-healthy-environment-2020>.

⁴³ The views of States are contained in a compilation of oral statements delivered by States and other relevant stakeholders during the 6th session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights and published as an Annex to the report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. UN Human Rights Council ‘Annex to the report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’ UN Doc A/HRC/46/73 <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/igwg-6th-statement-compilation-annex.pdf>.

⁴⁴ *ibid* 33.

clear meaning in international law.⁴⁵ However, other States, including Cuba, Ecuador, Egypt, Senegal and Mexico have supported the inclusion of environmental rights in the draft.⁴⁶ The fact that the OEIGWG draft does not define a substantive normative standard for environmental due diligence is however problematic, as the spectrum of conceivable approaches to mandatory due diligence is significantly wider in relation to the environment.⁴⁷

More generally, the OEIGWG draft's wide-reaching provision concerning access to justice has received little support. For example, the United Kingdom has said:

'...the provisions on adjudicative jurisdiction appear to breach key principles of sovereignty and due process. Article 9 requires the courts of a given State party to hear claims against businesses for abuses, acts or omissions on the State's territory, even if there is another jurisdiction which is more convenient or in which parallel proceedings are underway. Most egregiously, this provision requires the courts of a State party to hear a claim under this treaty against a business even if the State where the business is domiciled is not a party to the treaty'.⁴⁸

The UK is not alone in its objections. China has said that the draft should avoid universal jurisdiction, which would give victims the right to choose courts and initiate 'abusive prosecution'.⁴⁹

This opposition to the OEIGWG draft's extensive jurisdictional scope is unsurprising, given past failed attempts to consolidate rules on jurisdiction,⁵⁰ and that only very few States allow their courts to exercise

⁴⁵ *ibid* 34. Although the European Parliament has called on Member States to 'support and engage' in the ongoing negotiations. See eg 'European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL))' <www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title2>.

⁴⁶ For support on the inclusion of environmental rights, see UN Human Rights Council (n 44) Cuba, 8; Ecuador, 9; Egypt, 10; Senegal, 18; Mexico, 29.

⁴⁷ Krebs (n 34) 26-33.

⁴⁸ UN Human Rights Council (n 44) 20.

⁴⁹ *ibid* 61. Authors' own translation. See also statements by Ethiopia 11; India 12; and Russia 64. For support, see statements by Egypt 10; and Palestine (Observer) 54.

⁵⁰ The process of multilateral discussions and negotiations under the auspices of the Hague Conference on Private International Law, which took place between 1992 and 2001 (the 'Judgments Project'), failed to consolidate rules on civil jurisdiction. See E Jueptner, 'The Hague Jurisdiction Project – what options for The Hague Conference?'



universal civil adjudicative jurisdiction without some connecting factor, such as a territorial or national nexus to the tort in question.⁵¹ In addition, common law countries do not generally recognise the notion of forum of necessity,⁵² nor is the latter applied in all civil law countries.⁵³

One celebrated example of universal civil jurisdiction is the Alien Tort Statute (ATS), a federal law originally adopted in 1789 that gave US federal courts jurisdiction to hear lawsuits for torts ‘in violation of the law of nations or of a treaty of the United States.’⁵⁴ In its original form, the ATS allowed non-US citizens to sue foreign companies before US courts, thus going well beyond the scope of adjudicative jurisdiction prescribed in Article 9 in the OEIGWG draft. For some time, the ATS enjoyed ‘surprisingly little opposition.’⁵⁵ The US Supreme Court significantly reduced the ATS’ extraterritorial reach in *Kiobel*, where the United Kingdom, The Netherlands and Germany intervened against the US’ ‘overly broad assertions of extraterritorial civil jurisdiction.’⁵⁶ In *Jesner* the Supreme Court subsequently held that non-US corporations may not be

(2020) 16 J of Private Intl L 247, 262-263 and see C Ryngaert, L Roorda, ‘Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction’ (2016) 80 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 783.

⁵¹ Most states require some connection with the forum in order to trigger necessity-based jurisdiction. See eg the comparative analysis prepared for the Chamber and updated by the Grand Chamber in *Ait-Liman v Switzerland* App no 51357/07 (ECtHR, 21 June 2016) paras 48-76 and (ECtHR Grand Chamber, 15 March 2018) paras 69-93. The analysis considered the domestic law and practice of 39 States, as well as EU law. Of those, only the Netherlands recognises universal civil jurisdiction in respect of acts of torture. See also Ryngaert, Roorda (n 51) 796-797 and Jueptner (n 51) 250-251.

⁵² Common law countries generally apply the principle of *forum non conveniens*, which enables domestic courts to refuse to examine a case if a court of another State has a more appropriate connection. See the Grand Chamber in *Ait-Liman v Switzerland* (n 52) para 90.

⁵³ *ibid.* See also Ryngaert, Roorda (n 51).

⁵⁴ Originally the US Alien Tort Claims Act 1789, now codified as the Alien Tort Statute 28 USC §1350. For an overview of the caselaw, see ‘Corporate Accountability for Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms’ (FIDH) <<https://corporateaccountability.fidh.org/>>.

⁵⁵ Crawford (n 28) 459.

⁵⁶ See brief of the governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *amici curiae* in support of the respondents in *Kiobel v Royal Dutch Petroleum Co* 569 US 108, 14 (2013). See also the brief of the Federal Republic of Germany.



subject to liability under the ATS.⁵⁷ Other states allow their courts to hear cases without a strong nexus between the claim (or plaintiff or defendant) and the forum state itself.⁵⁸ This happens with a view to preventing a denial of justice. The number of cases brought under such laws is, however, limited.⁵⁹

Many States engaged in the OEIGWG process seem to fear that their courts will be swamped with foreign claims, similar to the US before *Kiobel*. Indeed, the US did experience a steep rise in cases in the decades that followed the landmark decision in *Filártiga*,⁶⁰ which brought the largely unknown ATS into judicial and academic prominence.⁶¹ From the mid-1990s, the Alien Tort Statute started being used against alleged corporate involvement in human rights violations perpetrated in foreign countries. Since then, more than 150 cases have been brought before the US federal courts against a wide range of multinationals.

Yet, the practice of lawsuits brought in civil law countries on the basis of necessity jurisdiction seems to suggest that this is not necessarily the case. A 2019 study only identified 35 foreign direct liability claims in the whole of the EU.⁶² If jurisdiction was to be established on the basis of a broad international agreement, which uniforms access to justice for corporate human rights abuses across State Parties, increases in the volumes of litigation are likely to be modest.

Even so, the political will supporting the OEIGWG process is scant. The vast majority of the world's industrialised states have opposed the

⁵⁷ In a 5-4 vote, the Supreme Court affirmed the US Court of Appeals for the Second Circuit's dismissal of the case. *Jesner v Arab Bank PLC*, 584 US, 138 S Ct 1386, 1407 (2018). Justice Sotomayor, dissenting, and joined by Justices Ginsburg, Breyer and Kagan, criticized the decision for 'absolv[ing] corporations from responsibility under the ATS for conscience-shocking behavior' 1.

⁵⁸ For an overview, see Ryngaert, Roorda (n 51) 785.

⁵⁹ *ibid.*

⁶⁰ *Filártiga v Pena-Irala*, 630 F2d 876 (2d Cir, 1980).

⁶¹ See L Enneking, 'Judicial Remedies: The Issue of Applicable Law' in JJ Álvarez Rubio, K Yiannibas (eds), *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 40.

⁶² European Parliament Directorate General for External Policies of the Union, *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries* (Publications Office 2019) <<https://data.europa.eu/doi/10.2861/59434>>.



process, which is mainly supported by states in the Global South.⁶³ The fact that only 47 States, including the EU, have commented on the second OEIGWG draft well illustrates this lack of support. Also some States that do engage in the process have been damning in their criticism.⁶⁴ Therefore, it seems doubtful that the OEIGWG draft will gather enough political support to succeed.⁶⁵ Yet, this section has shown that the bases for jurisdiction contemplated by the draft are already embedded in the law of some countries and therefore do not represent an absolute novelty. At the same time, the caselaw that we discussed in section 1 shows how actors all over the world increasingly rely on extant human rights law to complain about corporate behaviour. The next section considers how these developments have influenced the evolution of the law of the EU.

4. *Due diligence in the EU*

On 29 April 2020, the European Commissioner for Justice, Didier Reynders, announced that the EU would introduce rules for mandatory corporate environmental and human rights due diligence, as part of a Sustainable Corporate Governance initiative.⁶⁶ In March 2021, the European Parliament adopted a resolution including recommendations to the

⁶³ See eg, B Hamm, ‘The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty’ (2021) *Human Rights Rev.*

⁶⁴ In addition to the statement by the United Kingdom above, see eg statements by China 7-8; Ethiopia 11; India 12; and the EU 21. UN Human Rights Council (n 44).

⁶⁵ This view was also expressed by the UK delegate, who said ‘It is regrettable, therefore, that the process adopted by this intergovernmental working group does not engender serious engagement. By failing to return to the Human Rights Council in 2017 when the group’s mandate was due to be renewed, the leadership of this group forfeited a key moment to secure both cross-regional political backing for its continuation, and the Council’s guidance for its direction. Instead, year after year, fewer and fewer delegations appear here, in this negotiation room. This absence signifies not apathy for this important topic, but lack of faith in the text before us.’ *ibid* 19.

⁶⁶ ‘EU Commissioner for Justice commits to legislation on mandatory due diligence for companies’ *Business & Human Rights Resource Centre* (30 April 2020) <www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies/>.



European Commission on corporate due diligence and corporate accountability.⁶⁷ The resolution comprises an annex with the text of a draft directive.

The resolution notes how some Member States have already adopted legislation to enhance corporate accountability and have introduced mandatory due diligence frameworks, whereas others are currently considering such legislation.⁶⁸ It therefore urges the EU to adopt binding requirements on due diligence covering ‘all publicly listed small and medium-sized undertakings, as well as high-risk small and medium-sized undertakings’.⁶⁹

The EU Parliament recommends that EU legislation progressively and constructively build on existing frameworks and standards, such as due diligence frameworks and standards developed by the UN, the Council of Europe, the Organisation for Economic Co-operation and Development and the International Labour Organization. It however underscores that these standards are ‘voluntary and, consequently, their uptake has been limited’.⁷⁰ The Parliament also notes that EU Member States should support and engage in the ongoing OEIGWG process described above and give a mandate to the EU Commission to be actively involved in negotiations.⁷¹

According to the resolution, the notion of ‘due diligence’ should be understood as:

‘...the obligation of an undertaking to take all proportionate and commensurate measures and make efforts within their means to prevent adverse impacts on human rights, the *environment* or good governance

⁶⁷ European Parliament resolution of 10 March 2021 (n 46).

⁶⁸ *ibid* letter Y.

⁶⁹ *ibid* Annex, art 2. In the context of EU law, an ‘undertaking’ encompasses ‘every entity engaged in an economic activity, regardless of the legal status of the entity in domestic law. Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-01979, para 21.

⁷⁰ European Parliament resolution of 10 March 2021 (n 46) letter W.

⁷¹ On the mandate, see M Krajewski, ‘BHR Symposium: Aligning Internal and External Policies on Business and Human Rights – Why the EU Should Engage Seriously with the Development of the Legally Binding Instrument’ *Opinio Juris* (11 September 2020) <<https://opiniojuris.org/2020/09/11/bhr-symposium-aligning-internal-and-external-policies-on-business-and-human-rights-why-the-eu-should-engage-seriously-with-the-development-of-the-legally-binding-instrument/>>.



from occurring in their value chains, and to address such impacts when they occur'.⁷²

The draft directive, instead, defines 'potential or actual adverse impact on human rights' as:

'any potential or actual adverse impact that may impair the full enjoyment of human rights by individuals or groups of individuals in relation to human rights, including social, worker and trade union rights, as set out in Annex xx to this Directive.'

This approach is seemingly inspired by the UNGPs, in particular Principle 12.⁷³ The draft directive underscores that due diligence must be understood as a process which is aimed to:

'...identify, assess, prevent, mitigate, cease, monitor, communicate, account for, address and remedy the potential and/or actual adverse impacts on human rights, including social, trade union and labour rights, on the environment, including the contribution to climate change, and on good governance, in its own operations and its business relationships in the value chain'.⁷⁴

The draft directive envisages that compliance with EU due diligence obligations should be a condition to access the EU's internal market and that operators should be required to provide evidence that the products that they place on the internal market are in conformity with the environmental and human rights criteria set out in future EU due diligence legislation.⁷⁵ Thus, the EU Parliament proposes to impose due diligence obligations also on undertakings outside the EU that sell goods or provide services in the internal market.

While the EU Parliament advocates for an EU-wide approach to due diligence, its proposal hinges on national law. The draft directive specifies that EU Member States' national laws must provide a liability regime under which:

⁷² European Parliament resolution of 10 March 2021 (n 46) recital 20. Emphasis added.

⁷³ Krebs (n 34) 24.

⁷⁴ European Parliament resolution of 10 March 2021 (n 46) Annex art 1(2).

⁷⁵ *ibid* art 2(3). See also Recital 10.

‘...undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions’.⁷⁶

The actual basis for liability is not specified, although the draft directive states that the ‘fact that an undertaking respects its due diligence obligations shall not absolve the undertaking of any liability which it may incur pursuant to national law.’⁷⁷ In addition to fines, sanctions could include exclusion from public procurement processes, state aid and public support schemes. EU Member States would therefore have discretion to set proportionate sanctions, but there is no provision on individual director or criminal liability. The focus is clearly on civil and administrative law.

The draft directive says that its aim is:

‘...to ensure that undertakings can be held accountable and liable in accordance with national law for the adverse impacts on human rights, the *environment* and good governance that they cause or to which they contribute to their value chain and aims to ensure that victims have access to legal remedies’.⁷⁸

Similar to the OEIGWG draft, the EU draft directive does not define a substantive normative standard for environmental due diligence. Instead, the resolution underlines that due diligence strategies should be aligned with international standards and existing obligations, including the United Nations Sustainable Development Goals and EU policy objectives in the field of human rights and the environment, like the European Green Deal, and the commitment to reduce greenhouse gas emissions by at least 55% by 2030, and EU international policy, especially the Convention on Biological Diversity and the Paris Agreement.⁷⁹

Unlike the OEIGWG draft, therefore, the EU Parliament’s draft directive makes explicit references to the main legal sources of international environmental obligations. Thus, the Parliament has made some effort to

⁷⁶ *ibid* art 19(2).

⁷⁷ *ibid* art 19.

⁷⁸ *ibid* art 19(2). Emphasis added.

⁷⁹ *ibid* recital 12.



implicitly define the scope of environmental due diligence. It does not, however, ‘clarify and facilitate’ the implementation of existing obligations.⁸⁰ Nor does it make any reference to the extensive jurisprudence of the European Court of Human Rights, either in regard to environmental protection or civil remedies for violations of human rights.

These efforts to establish an overarching legal instrument targeting all sectors may be contrasted with the product-specific approach that has so far characterised EU law.⁸¹ For example, under the EU’s Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan,⁸² the EU established a licensing scheme to try and ensure that only timber products produced in accordance with the exporting nation’s legislation enter the EU market.⁸³ This includes specific due diligence rules and a system to ensure the legality of imports of timber products.⁸⁴ More recently, the Sustainable Finance Disclosure Regulation⁸⁵ required companies and financial entities to conduct human rights due diligence for any good or service to qualify as ‘sustainable’.

As explained by the parliamentary rapporteur, Lara Wolters, the purpose of the new due diligence framework under consideration by the EU is to ‘set the standard for responsible business conduct in Europe and

⁸⁰ OEIGWG Chairmanship Second Revised Draft (n 32), art 2(1)(a).

⁸¹ See ‘European Parliament Report with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation’ (2020/2006(INL)) <www.europarl.europa.eu/doceo/document/A-9-2020-0179_EN.html>. See for example Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1.

⁸² EU Commission ‘Communication – Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an Action Plan’ COM (2003) 251 final (21 May 2003) (FLEGT Action Plan).

⁸³ EU Council Regulation No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community [2005] OJ L347/1 (FLEGT Regulation).

⁸⁴ EU Commission Regulation No 1024/2008 of 17 October 2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community [2008] OJ L 277/23 (FLEGT Implementing Regulation).

⁸⁵ Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317.



beyond.⁸⁶ This is something that environmental NGOs have long been advocating for.⁸⁷

In the past the EU had already tried to expand the reach of its climate legislation, by encompassing in its Emission Trading System (ETS) also emissions from aviation outside of the EU territory. This operation was met with strong objections from other States and the proposal was eventually dropped.⁸⁸ Presently, new restrictions to access to the EU market are being considered as part of a new carbon border adjustment mechanism, included in the package of measures announced with the European Green Deal.⁸⁹ If adopted, the mechanism would place a carbon price on imports of certain goods, as a way to reduce ‘carbon leakage’.⁹⁰ Given past opposition to the extension of the EU ETS,⁹¹ it would seem logical for the EU to dampen resistance and potential legal objections to its carbon border adjustment mechanism, by supporting the OEIGWG process.⁹²

Admittedly, it would seem easier for the EU to pass legislation and to bring forward the due diligence agenda than it is for the UN. The EU is made of a fairly homogenous group of states with developed economies and aligned political interests. EU law-makers can build on the extant *acquis communautaire*, which already encompasses some due diligence

⁸⁶ ‘Press Release: MEPs: Hold companies accountable for harm caused to people and planet’ European Parliament (27 January 2021) <www.europarl.europa.eu/news/en/press-room/20210122IPR96215/meps-hold-companies-accountable-for-harm-caused-to-people-and-planet>.

⁸⁷ See eg, ‘Corporate Accountability’ (*Friends of the Earth*) <<https://friendsoftheearth.eu/corporate-power/corporate-accountability/>>.

⁸⁸ J Hartmann, ‘A Battle for the Skies: Applying the European Emissions Trading System to International Aviation’ (2013) 82 *Nordic Journal Intl L* 187.

⁸⁹ See ‘A European Green Deal’ European Commission <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en>.

⁹⁰ The European Commission’s Committee on the Environment, Public Health and Food Safety published a report entitled ‘Towards a WTO-compatible EU carbon border adjustment mechanism’, which noted that a carbon border adjustment mechanism is a complementary necessity for the EU ETS, EU 2020/2043 (INI) <www.europarl.europa.eu/doceo/document/ENVI-PR-648519_EN.pdf>. The mechanism was also included in the EU’s ‘Fit-for-55’ package. See the Commission’s ‘Proposal for a establishing a carbon border adjustment mechanism’ COM(2021) 564 final <https://ec.europa.eu/info/sites/default/files/carbon_border_adjustment_mechanism_0.pdf>.

⁹¹ See J Hartmann, ‘Unilateralism in International Law: Implications of the Inclusion of Emissions from Aviation in the EU ETS’ (2015) 11 *QIL-Questions Intl L* 19.

⁹² *ibid* 28-30.



measures concerning specific products, as note above. Even so, there are diverging views on due diligence within the EU, and formidable resistance from the private sector has already meant that the adoption of the proposal for a directive has been postponed to the autumn of 2021.⁹³

5. Conclusion

The biodiversity and climate crises engulfing the planet demand robust action to hold to account corporate actors for their environmental impacts, both at home and abroad. Human rights are increasingly used as an imperfect tool to bridge the accountability and enforcement gap that plagues environmental law, especially in relation to climate change. In this piece, we have focused specifically on the role of human rights in providing remedies, where no other is available. While litigation against corporations has been steadily growing globally, recent developments in climate litigation show that there is yet more scope to interpret human rights law to protect environmental interests. The OEIGWG process therefore comes at a momentous time, when activists and lawyers all over the world are seeking to improve and strengthen environmental law enforcement. These UN negotiations are fraught with technical difficulties and political controversy. When compared with the UN process, EU law-making seems more likely to succeed, although it is not without challenges.⁹⁴

What is clear is that the long and windy roads to greater corporate accountability for human rights and environmental harms seem to be converging at last. Despite the theoretical and political squabbles over the UNGPs and their status, national courts increasingly treat the UNGPs as a source of law and enforce its principles as such.⁹⁵ While this praxis has been viewed with suspicion by some, we paraphrase the UN Special Rapporteur on Human Rights and the Environment when we say

⁹³ 'Europe Inc. wins as EU delays new business rules' Politico (21 May 2021) <www.politico.eu/article/europe-inc-puts-brussels-new-business-rules-on-ice/>.

⁹⁴ See eg 'Off the hook? How business lobbies against liability for human rights and environmental abuses' Corporate Europe Observatory (16 June 2021) <<https://corporateeurope.org/en/2021/06/hook>>.

⁹⁵ See eg *Friends of the Earth Netherlands et al v Royal Dutch Shell PLC* (n 19) at 4.4.13.



that ‘it is impossible to resist an idea whose time has come’.⁹⁶ The interdependence of human rights and the environmental law is here to stay, and the law on corporate responsibility is in the process of evolving to better encapsulate this new reality. The law in this area is therefore steadily reaching maturity. As the readers of this journal certainly realise, this move along the spectrum of sources from soft to hard is far from unique in international law.⁹⁷ So we are here witnessing another chapter in the making of international legal history concerning the environment and human rights. For the sake of the planet, we cannot but hope it is a good one. And that ongoing law-making processes at the UN and EU level succeed in delivering legal instruments that are not only pathbreaking, but most importantly, provide effective means to better enforce environmental and human rights standards against corporate actors.

⁹⁶ UN Human Rights Council ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ UN Doc A/HRC/37/59 (24 January 2018) para 20.

⁹⁷ CM Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 ICLQ 850; AE Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 ICLQ 901; Alan Boyle, ‘Soft-Law in International Law Making’ in MD Evans (ed), *International Law* (OUP 2006).

