The European Union, Emerging Global Business and Human Rights

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Contents

1 Introduction

Human rights violations by corporations that operate in more than one state have attracted the attention of legal scholars over the past four decades.[1] The field of business and human rights has, however, been largely silent on private transnational corporations *from* so-called developing and emerging countries (TNC-DECs).[2] If corporations from developing and emerging states are included in the literature, then they are mostly studied in supply chain relations, as subsidiaries of corporations *from* European Union (EU) Member States and other economically developed states.[3] In other words, while human rights research has focused on issues relating to power diffusion, i.e. the growing influence of corporate non-state actors, issues relating to power transfusion, i.e. the rising influence of new – and currently particularly Asian – corporate non-state actors on the global stage, have been largely overlooked.[4]

[1] Some parts of Chapters 1 and 8 of this book have been published in Aleydis Nissen, 'Beyond the Western "Business and Human Rights" Tunnel Vision' (2020) 32 *European Review of Public Law* 1427–59 (subject to editorial changes), and are published herein with the permission of European Public Law Organization.

[2] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2nd edn, Oxford University Press 2013) 199; Florian Wettstein, Elisa Giuliani, Grazia Santangelo et al., 'International Business and Human Rights: A Research Agenda' (2019) 54 *Journal of World Business* 59–60.

[3] There are some exceptions. As discussed later, the return of China to the centre of the international system has attracted attention. The research on civil judicial remediation under the Alien Tort Statute 1789 (US) – discussed further in Chapter 2 (Section 2.3.3) – also needs to be mentioned here.

[4] Cf. Joseph Nye, *The Future of Power* (Public Affairs 2011) 204.

This research gap is surprising for two reasons. First, the continuing context of globalisation makes it necessary to look beyond the Western bias in legal research. Developing and emerging states have significantly fewer capabilities to install business and human rights requirements than economically developed states but TNC-DECs' impact can be powerful. TNC-DECs deploy economic activities on a global scale influenced by the rapid pace of technological change and introduce new products and services in direct competition with products and services that are produced by corporations from economically developed states. Some TNC-DECs even build their businesses through the acquisition of older Western firms. To be clear, TNC-DECs are not just copying the strategies of their Western competitors. TNC-DECs often possess unique competitive traits, such as frugal innovation capabilities and the strength to cope with more evolving government and legal systems.[5] Second, studying TNC-DECs can shed new light on the extensively documented poor track record of economically developed states to hold 'their' corporations accountable for their involvement in human rights violations in developing and emerging states. States often align themselves with the perceived short-term interests of corporations.[6] Globalisation has created a collective action problem: if some states regulate 'their' corporate nationals and invest in serious efforts to protect people impacted by them in third states, then competitors that do not have to respect the same standards (and bear the related costs) might undercut these responsible corporations. While all states are encouraged to hold 'their' corporations – or corporations in their value chains – accountable for human rights violations, their current track record in this matter is rather limited.

This book aims to investigate the conditions under which the EU and its Member States are attempting to overcome this collective action problem by creating an artificial level playing field in which private TNC-DECs can be held accountable for human rights violations abroad.

[5] Ravi Ramamurti, 'Competing with Emerging Market Multinationals' (2012) 55 *Business Horizons* 245; Richard Dobbs, Tim Koller and Sree Ramaswamy, 'The Future and How to Survive It' (2015) 93 *Harvard Business Review* 55.

[6] HRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises John Ruggie – Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) UN Doc A/HRC/8/5 para 22.

Any legal study of a level playing field requires the study of mandatory measures as a matter of regulatory compliance. Voluntary requirements or positive incentives do not impose immediate costs, and therefore do not necessarily create a competitive disadvantage for EU-based corporations. They do not contribute to a collective action problem. Olivier De Schutter and his co-authors carried out extensive and global stakeholder consultations to identify two types of mandatory measure.[7] First, there are direct obligations formulated in a rule. This book studies regulation in laws and trade agreements. Second, there are indirect obligations that offer corporations the opportunity to defend themselves against administrative, civil and criminal violations. This book focuses specifically on civil judicial remediation. By analysing how both types of requirement – preventive and remedial – function in relation to TNC-DECs in our globalised world, this book researches interactions in a multi-layered and multi-spatial order. Three perspectives will be examined: the international perspective (Part I; Chapter 2); the perspectives of the EU and a number of EU Member States (Part II; Chapters 3–5); and the perspectives of selected developing and emerging states (that have established trade relations with the EU) (Part III; Chapters 6 and 7).

As a legal analysis, this research does not attempt to engage in international relations debates. Various scholars have noted that legal researchers should 'avoid rearguing intellectual debates' that have been 'all but settled' in international relations theory.[8] The tools provided by these debates are, nevertheless, useful to trace political dynamics at play in transnational law-making in general and human rights in particular.[9] This research relies on the following models: realism; institutionalism; and constructivism. It has long been established that each model has its explanatory strengths and weaknesses.[10]

[7] Olivier De Schutter, Anita Ramasastry, Mark Taylor et al., 'Human Rights Due Diligence: The Role of States' (2012) www.cidse.org 4–5. See also Sigrun Skogly and Philippa Osim, 'Jurisdiction – A Barrier to Compliance with Extraterritorial Obligations to Protect against Human Rights Abuses by Non-State Actors?' (2020) *Human Rights & International Legal Discourse* 5.

[8] Tomer Broude, 'Behavioral International Law' (2015) 163 *University of Pennsylvania Law Review* 1107–8. See also Stefan Oeter, 'Towards a Richer Institutionalism for International Law and Policy' (2008) 62 *University of Illinois Law Review* 62.

[9] Broude (n8) 1107–8.

[10] Georg Sørensen, Jørgen Møller and Richard Jackson, *Introduction to International Relations: Theories and Approaches* (8th edn, Oxford University Press 2021) 62.

This research will also use the models critically, rather than as objective theories that create objective and universal knowledge.

Realism attends to the constant struggle for power. Where the classic realist approach explains state behaviour by the greedy forces inherent in human nature, which pursue self-interest,[11] the neorealist approach has been devoted to analysing and predicting conditioned state behaviour that is dictated by the anarchic structure of the international system.[12] States act to maximise power and increase their security and second-order interests, including upholding the population's socio-economic wealth.[13] States with the most military power and economic clout can exert defining influence[14] Accordingly, international law is a flexible tool for powerful states to pursue their material power and exercise control over the international agenda.[15]

Like realism, institutionalism perceives international relations in an instrumental manner. But states are sometimes willing to compromise their short-term self-interest in order to achieve bigger, longer-term goals that are also in their interest.[16] Accordingly, states cooperate when the perceived interests of doing so outweigh the costs. The perception of interests is contextual and dynamic. They depend on history, development and learning. Effective regulation and remediation might be considered to be either wise or unwise depending on their potential for maximising payoffs. Andrew Guzman emphasised the importance of reputation.[17] All other things being equal, it is generally, but not always, in a state's interest to protect its reputation by signalling that it is an appealing, cooperative partner. Again, states can object if they do not 'anticipate' getting returns from investments in their reputations or if the payoff of not cooperating is considered to be large enough.

[11] Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (5th edn, Alfred Knopf 1973).
[12] Kenneth Waltz, *Theory of International Politics* (McGraw-Hill 1979); John Mearsheimer, *The Tragedy of Great Power Politics* (W. W. Norton & Company 2001) 46.
[13] Mearsheimer (n12) 55.
[14] Sørensen (n10) 8.
[15] Morgenthau (n11) 271–2; Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press 2005).
[16] Robert Keohane, *After Hegemony* (Princeton University Press 2005).
[17] Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) 35.

Social constructivism argues that the international system is constituted by ideas.[18] There is a focus on identities, beliefs, in-groups and out-groups. Material power and state interests are relevant but only because they have been given certain meanings in social interactions. These interactions are not limited to states. It is often added that non-state actors, including private corporations, non-governmental organisations (NGOs) and international organisations, also participate in transnational networks.[19] They can decide to act as 'norm entrepreneurs' who 'attempt to convince a critical mass of states to embrace new norms'.[20] Through repeated engagement, the network actors can reconfigure the very nature of their identities in such a way that their identities reflect their status of being a party to the network. Accordingly, actors acquire identities by interacting in a multi-layered and multi-spatial order to 'make, interpret, internalize, and enforce rules of transnational law'.[21] The late United Nations (UN) Special Representative for Business and Human Rights John Ruggie explained in this regard that we give international law its normative shape over time through our collective participation in this process.[22]

Before explaining the contribution and methodology of each chapter, it is necessary to draw attention to two conceptual issues. First, there is currently no international agreement that determines when a corporation can be deemed a 'national' of a state. The criteria to define 'corporate nationality' are set by each sovereign state individually and the criteria of one state can overlap with the criteria of another state. These criteria include the place of incorporation, the place where the day-to-day decisions are made and the nationality of the owners. Corporations can also consist of separate legal persons with different nationalities connected through relationships of control. Second, the concept

[18] Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press 2000).

[19] Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stanford Journal of International Law* 283–327; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.

[20] Finnemore (n19) 895.

[21] Harold Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2626.

[22] John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar 2020) 63–86.

of 'transnational corporations' is unclear. In this book, this concept is used to refer to companies that undertake 'transnational' activities. According to the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Intergovernmental Working Group), a business activity is 'transnational' if it

> (a.) is undertaken in more than one jurisdiction or State; or (b.) it is undertaken in one State but a significant part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another state or jurisdiction; or (c.) it is undertaken in one State but has significant effect in another State or jurisdiction.[23]

The first part of this book (Chapter 2) considers the international perspective. This part uses the doctrinal approach to introduce ideas and controversies that surround the legal scholarship on business and human rights. The UN Guiding Principles on Business and Human Rights ('UN Guiding Principles') – endorsed by the UN Human Rights Council (HRC) in 2011 – remain the most comprehensive template to deal with such issues.[24] These principles integrate existing standards and practices under international law and are organised around a three-pillar framework introduced by Ruggie in 2008: the state's duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy for those whose rights have been violated.[25] While the UN Guiding Principles have been extremely influential in putting ideas forward, they have also been criticised as not being comprehensive (or far-reaching) enough. In particular, various UN treaty bodies, Special Procedures and legal scholars have argued that there is an emerging consensus that there exist 'extraterritorial obligations' relating 'to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human

[23] Art 1(4) Intergovernmental Working Group, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises – Third Revised Draft' (2021) www.ohchr.org/

[24] HRC, 'John Ruggie Report – Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework' (2011) UN Doc A/HRC/17/31 Annex (endorsed by UN General Assembly, Res 17/4 (2011) UN Doc A/HRC/RES/17/4).

[25] A/HRC/8/5 (n6).

rights outside of that State's territory'.[26] Chapter 2 then answers the separate question of whether there are legal limitations on the EU and its Member States when regulating and remedying corporate human rights violations committed by TNC-DECs. Import-restrictive measures may appear an attractive solution for states that are increasingly expected (or obliged) to rein in their corporate nationals when they violate human rights in third states. Such measures allow a state to create an artificial level playing field that enforces the same standards across both national and foreign corporations that operate in its market. The issue of a social clause is, however, contested. The separate development of international labour standards in the International Labour Organization (ILO) and trade regulation in the World Trade Organization (WTO) is symptomatic of this debate. The chapter explains that EU Member States are all Parties to the 1994 General Agreement on Tariffs and Trade (GATT) and have limited ability under this treaty to impose import restrictions.[27] The attitude–behaviour gap, the behavioural phenomenon of people's actions not correlating with their attitudes, is used as a theoretical lens in the analysis of the GATT regime to add nuance to the existing debates. Finally, it is explained that each state has acted unilaterally in developing the rules governing the use of civil adjudicative jurisdiction, as their use has not been regulated by international law to any great extent. The two ways in which extraterritorial states can strengthen access to judicial remedies over TNC-DECs are introduced. First, it is explained that the extraterritorial state can support capacity building in the developing or emerging state where corporate human rights violations occur. This analysis is inspired by the constructivist perspective in the Commentary to UN Guiding Principle 10. Second, extraterritorial litigation in business and human rights is discussed. Two lines of research need to be re-assessed in this discussion. The most expansive line of research considers litigation as a key component of a truly global human rights regime. The other line focuses on cost-benefit critiques of extraterritorial remediation for the forum state.

[26] Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 8 ('Commentary to Maastricht Principles').

[27] General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (GATT).

The second part of this book (Chapters 3–5) considers the supranational perspective of the EU and the national perspectives of selected EU Member States. Only regulations that have been adopted with specific reference to the UN Guiding Principles since 2011 are analysed. The existing business and human rights regimes vary greatly in terms of the legal obligations imposed, the sectors and duty-bearers covered, the human rights targeted and the way in which the obligations are monitored and enforced. These regimes can be split into two categories.

The first category of initiatives requires corporations only to 'show' information about the impact of their operations and value chains on human rights. After Ruggie created the 'protect, respect, remedy' framework, such legislation was adopted in South Africa (2009).[28] Section 1504 of the United States (US) Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) also introduced transparency rules in the extractive industries in 2010.[29] After the HRC endorsed the UN Guiding Principles, the EU adopted country-by-country reporting rules that mirror section 1504 for the extractive and logging industries.[30] Furthermore, 'show' regulations relating to human rights have been adopted in Australia, California, India, the Philippines and the United Kingdom (UK).[31] In various EU Member States, transparency laws were also adopted (which may or may not cover a corporation's policies and activities relating to human rights) in response to growing public sensitivity to Corporate Social Responsibility (CSR). In 2014, these led to a regulatory initiative in the EU which exercises the

[28] King III Code of Corporate Governance 2009 (SA).

[29] There is discussion whether Section 1504 Dodd-Frank Act is or should be understood to be 'know and show' regulation. See Aleydis Nissen, 'Stag Hunt: Anti-Corruption Disclosures Concerning Natural Resources' (2021) 1 *Chicago Journal of International Law Online* 1–20.

[30] Art 42(1) European Parliament and Council of the EU, Directive Nr 2013/34/EU on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings [2013] OJ L182/19; Art 6 European Parliament and Council of the EU, Directive Nr 2004/109/EC on the Harmonisation of Transparency Requirements in Relation to Information about Issuers whose Securities are Admitted to Trading on a Regulated Market [2004] OJ L390/38 (amended by Art 1 Directive Nr 2013/50/EU [2013] OJ L294/13).

[31] California Transparency in Supply Chains Act 2010; Section 135 Companies Act 2013 (IN); Modern Slavery Act 2015 (UK); Modern Slavery Act 2018 (AU); Philippines (Securities and Exchange Commission), 'Sustainability Guidelines for Publicly-Listed Companies' (2019) Memorandum Circular Nr 4.

powers conferred by its Member States.[32] The Non-Financial Reporting Directive requires certain corporations to disclose non-financial information concerning respect for human rights and a limited number of related matters.[33] Like many 'show' regulatory frameworks, this Directive has been criticised for its limited impact and relevance. As a result, this Directive will soon be amended and renamed the Corporate Sustainability Reporting Directive.

The second category of regulations requires corporations to engage in human rights 'due diligence'. Due diligence enables a reasonable and prudent company to 'know' what human rights it is impacting and to 'show' what it is doing about this in light of its circumstances.[34] It is thus not possible for corporations to comply with due diligence regimes merely by reporting on the steps that they did or did not take. While the use of the concept of 'due diligence' in the UN Guiding Principles is not consistent, the UN High Commissioner for Human Rights (OHCHR) has defined it as 'an on-going management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights'.[35] The 2011 update of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises indicated that through this process, corporations can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems.[36]

Section 1502 of the US Dodd-Frank Act introduced 'know and show' rules in the extractive industries in 2010.[37] These inspired the EU to

[32] Daniel Kinderman, 'The Struggle over the EU Non-Financial Disclosure Directive' (2015) 6 *WSI-Mitteilungen*.

[33] European Parliament and Council of the EU, Directive Nr 2014/95/EU As Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups [2014] OJ L330/1 (Non-Financial Reporting Directive).

[34] Commentary to UN Guiding Principle 15 referring to UN Guiding Principles 16–24.

[35] OHCHR, 'The Corporate Responsibility to Respect Human Rights' (2012) HR/PUB/12/02 6.

[36] OECD, *OECD Guidelines for Multinational Enterprises* (2nd edn, OECD Publishing 2011) para 14.

[37] There is discussion whether Section 1502 Dodd-Frank Act is or should be understood to be 'show' regulation (see Nissen (n29) 19). Section 307 Tariff Act 1930 (US) is older. It targets forced, indentured and/or convict labour. See Chapter 3 (Section 3.3.2.3).

adopt the Conflict Minerals Regulation in 2017.[38] France was the first state in the world to adopt sector-wide 'know and show' legislation covering all human rights risks when it adopted the Law on Parent Corporations' Vigilance in 2017.[39] Afterwards, the Dutch Child Labour Duty of Care Law, the German Law on Corporate Due Diligence in Supply Chains and the Norwegian Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions were adopted.[40] 'Know and show' requirements were also adopted in India in 2021.[41] At the time of writing, Switzerland, Mexico, Finland, the Netherlands and Belgium are also planning to adopt due diligence legislation or considering doing so. For some EU Member States, such laws are planned because the European Commission has delayed acting upon its 2020 promise to propose an EU-wide sustainable corporate governance initiative. The Commission proposal has been postponed for the fourth time at the time of finishing this book.

Chapter 3 analyses the factors that lead the EU to cooperate in a collective action problem. This chapter needs to deal with two issues. First, this chapter investigates whether competition from TNC-DECs has been taken into account, and whether – and to what extent – they have been regulated by the EU to minimise any negative impact on EU-based corporations. All unilateral regulatory initiatives that have been taken in the EU to implement the UN Guiding Principles (2011) to date will be studied. Various documents of the relevant EU bodies and national actors have been examined. The discourse employed in the European Commission's impact assessments lends itself particularly well to in-depth analysis of framing processes and strategies, as policy coordination is the prevalent interpretation

[38] European Parliament and Council of the EU, Regulation Nr 2017/821 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.

[39] Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre 2017 (FR).

[40] Wet houdende de Invoering van een Zorgplicht ter Voorkoming van de Levering van Goederen en Diensten die met Behulp van Kinderarbeid tot Stand zijn Gekomen 2019 (NL); Gesetz über die Unternehmerischen Sorgfaltspflichten in Lieferketten 2021 (DE); Lov om Virksomheters Åpenhet og Arbeid med Grunnleggende Menneskerettigheter og Anstendige Arbeidsforhold (Åpenhetsloven) 2021 (NO).

[41] India (Securities and Exchange Board), 'Business Responsibility and Sustainability Reporting by Listed Entities' (2021) Circular SEBI/HO/CFD/CMD-2/P/CIR/2021/562.

given to these assessments.[42] Second, while the EU Member States did not agree with a full harmonisation of jurisdiction rules in the Brussels Ibis Regulation,[43] it is useful to analyse the current state of affairs. This analysis is also a necessary introduction to the discussion of civil judicial remediation for foreign victims of TNC-DECs in Chapters 4 and 5.

Chapters 4 and 5 analyse national perspectives. Most 'show' laws in EU Member States were adopted or changed after the adoption of the Non-Financial Reporting Directive. Some EU Member States made their national laws less strict, while others used their discretion to impose particular obligations.[44] These national changes influenced, in turn, the Commission's Corporate Sustainability Reporting Directive proposal. Similarly, some EU Member States have 'over-transposed' the country-by-country reporting rules.[45] As such, these laws sometimes need to be considered as 'know and show' regulations.

Due to space limitations, it is not possible to study all laws that have been created in EU Member States to implement the UN Guiding Principles. This book will focus on the first two ground-breaking national laws – adopted in France and the Netherlands – that introduced sector-wide 'know and show' obligations. For both laws, it is determined to what extent competition from TNC-DECs has had an impact on the stringency and reach of these legislative initiatives. France – as will be argued in Chapter 4 – had the explicit ambition to adopt due diligence regulation early in order to determine the form that such regulation should take. The German Law on Corporate Due Diligence in Supply Chains has, for example, drawn inspiration from the French law. As noted, in other states, including the Netherlands, proposals have also been made to adopt a due diligence law. The Netherlands has, however, already adopted a due diligence law that focuses on one single human

[42] See Emanuela Bozzini and Stijn Smismans, 'More Inclusive European Governance through Impact Assessments' (2016) 14 *Comparative European Politics* 103.

[43] European Parliament and Council of the EU, Regulation Nr 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters [2012] OJ L351.

[44] For an overview, see European Commission, 'Impact Assessment Directive Corporate Sustainability Reporting' SWD(2021)150final Annex 9.

[45] See Lucas Porsch, Lucie Lechardoy, Timothé Peroz et al., 'Study: Review of Country-by-Country-Reporting Requirements for Extractive and Logging Industries' (2018) https://ec.europa.eu 27–8.

rights violation, child labour (2019). While a future due diligence law in the Netherlands might lead to the repeal of the Child Labour Duty of Care Law, it is useful to analyse the parliamentary discussions behind this law in Chapter 5. This law was the first (and at the time of writing only) due diligence regulation within the EU that explicitly covers *all* corporations that operate in the Netherlands, including TNC-DECs. The Belgian due diligence bill draws inspiration from the Dutch law. The bill is applicable to all corporations that are based in or active in Belgium.[46]

It is furthermore explained in Chapters 4 and 5 that the Dutch and French governments prefer supporting local access to judicial remedies in developing and emerging states for victims of corporate abuse over strengthening extraterritorial remediation. A number of opportunities to bring civil claims against TNC-DECs in France and the Netherlands are, nevertheless, identified. One promising way to obtain damages in France is civil remediation directly related to the commission of a criminal offence. Several claims against the South Korean transnational group Samsung have been brought on this ground.

The third part of this book (Chapters 6 and 7) investigates whether the EU exercises global regulatory influence in selected developing and emerging states via bi- and plurilateral trade agreements and participation in transnational regulatory networks.[47] It is well known that the EU systematically negotiates human rights obligations through such agreements. It is furthermore assessed what contribution the EU can make to the development of local remedies that benefit victims of both EU-based corporations and local TNC-DECs. Such an assessment requires an analysis of the extent to which people in developing and emerging states are able to access justice when they allege that their human rights have been violated by TNC-DECs.

Barriers to justice often exist because they are deeply embedded in broader patterns of exclusion and marginalisation.[48] People who

[46] Art 2 Wetsvoorstel houdende de Instelling van een Zorg- en Verantwoordingsplicht voor de Ondernemingen, over hun Hele Waardeketen Heen 2021 (BE) referring to Art I.1(1°) Wetboek van Economisch Recht 2013 (BE).

[47] De Schutter (n7) 36–7; Surya Deva, 'Business and Human Rights: Alternative Approaches to Transnational Regulation' (2021) 17 *Annual Review of Law and Social Science* 139–58.

[48] Sonia Cardenas, 'Human Rights in Comparative Politics' in Michael Goodhart (ed), *Human Rights: Politics and Practice* (Oxford University Press 2009) 81; Roderick

cannot enjoy their rights struggle to get their rights recognised and protected by legal systems, governments and other institutions. Limited protection and limited access to justice are not problematic for everyone.[49] The denial of rights and remediation often serves to protect the power of a smaller group of people and their business allies with whom they have privileged (and profitable) relations.[50] Similarly, laws can be created and legal lacunae are sometimes left unfilled precisely because they are functional for serving the perceived interests of these people.

These considerations call for an interdisciplinary method that can put the spotlight on social forces that impede the enjoyment of rights in context. Case study research is particularly well suited to shedding empirical light on contemporary phenomena within their real-world context, especially when the boundaries between the phenomena and the context are not evident.[51] Legal research can benefit from the realist tradition of case study research as theorised by Robert Yin. Lisa Webley writes that this mode of inquiry allows the uncovering of the underlying dynamics that can impede the enjoyment of rights in complex and relational contexts.[52] In particular, case studies establish 'how laws are understood, and how and why they are applied and misapplied, subverted, complied with or rejected'.[53] According to Aikaterini Argyrou, legal case study researchers submit doctrinal propositions to a 'reality check' 'to see the reality with a more holistic, in-depth and contextual view'.[54] Evidence from the field also allows the identification, via inductive analysis, of issues and concepts that have not been considered or theorised in the European and Anglo-American literature.

Legal case study researchers usually rely extensively on interviews with those concerned with law and policy-making.[55] Dispute settlers,

Macdonald, 'Access to Civil Justice' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 510.

[49] Susan Marks, 'Human Rights and Root Causes' (2011) 74 *The Modern Law Review* 71.

[50] Cardenas (n48) 81.

[51] Robert Yin, *Case Study Research and Applications. Design and Methods* (Sage 2018) 15.

[52] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research' (2016) 3 *Law and Method* 12–4.

[53] Ibid. 3.

[54] Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13 *Utrecht Law Review* 102.

[55] A major drawback is that affected right-holders were not interviewed. There were not sufficient resources to protect their vulnerabilities, including the risk of job loss.

government officials, NGO and trade union representatives, lawyers and other independent experts with relevant knowledge of the issues at hand, sufficiently differentiated along age and gender lines, were interviewed. The meaning that these research participants give to their experiences with legal systems can uncover the influence of socio-economic factors on the law, legal processes and institutions. Interview and non-verbal data can convey a true picture of the social fabric in which legal practices are embedded and of the law's impact in local contexts. An array of other sources (including court cases) and methods (including thought experiments) were added to generate a spectrum of rich data.[56] When triangulated, these data provide a means through which robust, valid and reliable inferences about the law in the contemporary real world can be drawn. The focus – like the rest of this book – is on civil judicial remedies. Yet other valuable grievance mechanisms are also identified and examined in context so that access to justice is not measured solely through preconceived views.

The Kenyan floriculture and South Korean electronics industries have been selected as case studies. The field research in Kenya lasted for four weeks and the research in the Republic of Korea (Korea) for six weeks. The saturation point was reached after interviewing fourteen participants in Kenya, and ten participants in Korea. By reporting the case studies separately in Chapters 6 and 7, it is acknowledged that specified contextual conditions may have more influence on the findings than the conditions that can be found across the two case studies.

Chapter 6 presents the case study in the Kenyan floriculture industry. This case study has been chosen as the 'typical' or 'representative' case, and operates as a reference point.[57] Kenya has often been the subject of research focusing on 'access to remedies' and business and human rights.[58] The country is the fourth largest exporter of cut flowers in the world (after the Netherlands, Colombia and Ecuador).[59] It is estimated that Kenyan flowers now contribute 1 per cent of the country's

[56] Cf. Yin (n51) 15.
[57] Cf. ibid. 50.
[58] E.g. World Bank, 'Justice for the Poor' (2009) http://web.worldbank.org/
[59] David Whitehouse, 'Kenya's Flower Growers to Share Brexit Pain' (17 April 2019) The Africa Report.

Gross Domestic Product (GDP).[60] The primary supply and distribution channels of this industry are concentrated along the EU–Africa axis. This industry is almost exclusively occupied by corporations with Kenyan, Dutch and other European owners. A minority of corporations are owned by Indians, who have entered the industry since the 1990s. All these corporations tend to produce their products in Kenya, although their supply chains are sometimes moved to Ethiopia, where production costs are lower. The industry is export-driven, with almost all produced flowers being air-transported to Europe. Up to two-thirds of exports are distributed via the Dutch auction.[61] From there, they are further distributed to other EU Member States, Japan and the US. The floriculture industry is labour-intensive. Workers are reportedly expected to work up to sixteen hours a day.[62] Floriculture corporations currently directly employ around 100,000 people.[63] The number of floriculture jobs has doubled over the last decade, while the number of jobs in other industries has stagnated.

Chapter 7 presents the case study in the Korean electronics industry. This case study has been chosen as the 'atypical' case, which is in many facets unique.[64] Atypical case studies can give access to rich information clarifying 'the deeper causes behind a given problem and its consequences' rather than describing 'the symptoms' of the problem.[65] While Korea's GDP is higher than those of various EU Members States in 2021, the country is not yet recognised as an economically developed state by leading indexes, such as Columbia University's Emerging Market Global Players Project and the Morgan Stanley Capital International Emerging Markets Index.[66] When Korea joined the OECD in 1996, the country's government committed to reforming existing labour regulations in line with international standards, including those concerning

[60] Kenya Flower Council, 'Floriculture in Kenya' (2018) http://kenyaflowercouncil.org.
[61] Winnie Mitullah, Paul Kamau and Joshua Kivuva, 'Employment Creation in Agriculture & Agro-Processing Sector in Kenya in the Context of Inclusive Growth' (2017) *Partnership for African Social & Governance Research Working Paper Nr* 20 25.
[62] Kenya National Commission on Human Rights, 'The NAP. Report on Stakeholder Consultations held in Nakuru' (2017) 7.
[63] Whitehouse (n59).
[64] Cf. Yin (n51) 52.
[65] Bent Flyvbjerg, 'Five Misunderstandings about Case-Study Research' (2006) 12 *Qualitative Inquiry* 13.
[66] Columbia University (Center on Sustainable Development), 'Emerging Market Global Players Project' (2018) https://emgp.orgf; Morgan Stanley Capital International, 'Emerging Markets Index' (2021) www.msci.com.

the freedom of association.[67] In 1997, however, the problematic Trade Union and Labour Relations Adjustment Act, which largely ignored union demands, was adopted during a parliamentary session at dawn without an opposition party present. After massive protests, the Act was partly revised and the OECD created a Special Monitoring Process to closely monitor Korea's progress in bringing its labour laws in line with international standards.[68] This process stopped in 2007, but various issues remain open.[69]

The Korean case study was strategically chosen to falsify some of the doctrinal assumptions that have been made in discourses on business and human rights issues. The revelatory character of this case study heightens this effect; the timing of the field research created the opportunity to gather data that might have been previously difficult to access.[70] The field research was carried out in a politically favourable climate at the beginning of 2018, shortly after President Moon Jae-in – who was often portrayed as a relatively moderate leader – entered the Blue House (then the presidential residence and office). Moon's predecessor was impeached because she had solicited bribes from the Samsung group.

The electronics industry has played a major role in Korea's economic success story. Korea is home to some of the most globally successful semiconductor corporations; these sell to individual consumers and business customers all over the world, including in the EU. Three of the four biggest Korean conglomerations – the Samsung group, the LG group and the SK group – are active in electronics. These so-called *chaebols* account for more than 30 per cent of Korea's GDP.[71] The founding families of the *chaebol* controls the entire business through a complicated web of cross-shareholdings, even though they do not have the majority of shares. Samsung is by far the largest *chaebol*. Samsung Electronics was the highest ranked Korean company (taking 58th place) in the UN Conference on Trade and Development Transnationality Index

[67] Susan Kang, *Human Rights and Labor Solidarity: Trade Unions in the Global Economy* (University of Pennsylvania Press 2012) 85.

[68] Angel Gurría, 'A Vision for Korea: Laying the Foundations to Join the Most Advanced Countries in the World' (Seoul, 22 September 2006).

[69] Trade Union Advisory Committee to the OECD, 'Upholding Labour Rights in Korea in an OECD Context' (2016) https://members.tuac.org 3.

[70] Cf. Yin (n51) 50.

[71] 'Samsung, Hyundai Motor, SK, LG Behind Half of Corporate Sales, Payroll in Korea' (2 June 2021) *Pulse News*.

(2020).[72] This index ranks the world's top non-financial corporations on the basis of three ratios: foreign sales to total sales; foreign assets to total assets; and foreign employment to total employment.

While Korean electronics corporations moved low value-added products to production lines in Southeast Asia in the first half of the 1990s, semiconductors and other high value-added products are still being manufactured in Korea. More than 100,000 people are employed in this specialised and capital-intensive industry in Korea alone.[73] Samsung Electronics and SK Hynix produce approximately three-quarters of the world's dynamic random-access memory semiconductors and half of its NAND flash memory. Such products have been sourced from Korea by various other transnational corporations, including the French-based Orange and the US-based Apple. Samsung Electronics currently has only one competitor – the Taiwan Semiconductor Manufacturing Company – which is also able to fabricate the latest generation of 5-nanometre nodes chips.[74]

Semiconductors are entangled in geopolitics because they serve innovation in the digital economy and security goals. They are central in the current 'technological' cold war between the United States and China. These countries see control over the fabrication of critical semiconductor components as a priority. They prefer to be self-reliant and manufacture chips at home. But any chips that are produced in these countries are several generations those of behind Korea and Taiwan. While the United States is a leader in design, it is not a leader in manufacturing. The EU's concerns about strategic autonomy in semiconductors intensified in early 2021 when chip shortages during the COVID-19 pandemic led to production delays for key European industries.

Case studies strive for generalisable theories that go beyond the setting for the specific case that has been studied.[75] The findings of case study research are generalisable to theoretical propositions but they cannot be generalised across populations or universes.

[72] UN Conference on Trade and Development, 'Web table 19. The World's Top 100 Non-Financial MNEs, Ranked by Foreign Assets' (2020) https://unctad.org.

[73] Ifo Institute and Civic Consulting, 'Evaluation of the Implementation of the EU-Korea Interim Technical Report Part 1: Synthesis Report' (2017) http://trade.ec.europa.eu 294.

[74] Niclas Poitiers and Pauline Weil, 'A New Direction for the European Union's Half-Hearted Semiconductor Strategy' (2021) Bruegel Policy Contribution Nr 17/21 6.

[75] Yin (n51) 37.

Reporting multiple case studies increases the external validity of case study research because a more accurate and complete picture can be provided.

Any selection of case studies ultimately depends on whether their investigation provides insights relating to the research aim. The main reason why the Kenyan floriculture and Korean electronics industries have been selected is that they seamlessly complement the studies on 'extraterritorial' access to remediation presented in Chapters 4 and 5. It has been noted that both Dutch and Kenyan entrepreneurs are active in the Kenyan floriculture industry and that most flowers are exported to the Dutch auction. The research results, therefore, provide concrete insights into how local capacity building might remedy human rights violations by *all* corporations active in this industry. It has also been noted that extraterritorial claims against the Korean corporation Samsung have been brought in France. This made it possible to research the advantages and disadvantages of extraterritorial remediation vis-à-vis support for local remediation.

While the presented findings have garnered rich insights, they are also essentially limited. Additional case studies would be useful to further refine and make the analytical implications found in respect of the doctrinal propositions more robust. The mining industry in the Democratic Republic of the Congo or adjoining states would be particularly interesting to study, in light of the sector-specific unilateral regulations that have been taken at the EU level. It would also be interesting to collect and interpret data from hegemonic states. For example, the meat industry in Brazil would be a valuable additional case study.

A particular case is Chinese business, which has become more relevant since the advent of the Belt and Road Initiative and the 'Made in China 2025' industrial strategy. Chinese corporations have not been selected in the case studies because this book focuses exclusively on private corporations.[76] There seems to be a consensus that it would be hard to qualify corporations in 'state capitalist' China as private actors. Mihaela Barnes, in her book on state-owned entities and human rights, refers to the use by the WTO's Appellate Body of the concept of 'governmental authority' (as opposed to government ownership) to

[76] Mihaela Barnes discussed this topic in her book *State-Owned Entities and Human Rights: The Role of International Law* (Cambridge University Press 2021).

determine whether a corporation is state-owned.[77] She notes, however, that this conceptualisation might be insufficient in the case of China as 'there is no denying' that the relationship between business and government is unique.[78] Similarly, Ronald Gilson and Curtis Milhaupt argue that 'at least in the realm of globally competitive or potentially competitive firms Communist China is indivisible from Corporate China'.[79] With reference to the *chaebol*, they write that the relations of political and economic actors in China are 'bound up together' 'to a far greater extent than was ever the case in South Korea'.[80] Ciprian Radavoi and Bian Yongmin seem to agree.[81] They think that the government's CSR guidelines and industry guidelines in China have the same author – the government. Johan Lagerkvist analyses that the Chinese state has been planning to divest from state-owned corporations since 2012.[82] He notes, however, that this has been largely unsuccessful, due to the vested interests of China's elites, 'even for the exceptionally powerful [President] Xi Jinping'.[83] China's return to the centre of the global stage gives rise to various predictions and hypotheses. While this book does not focus on Chinese corporations, Chapter 8 will use the research findings of the third part of this book to propose hypotheses concerning China.

[77] Ibid. 77–8 referring to WTO, *US: Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Appellate Body* (11 March 2011) WT/DS379/AB/R paras 317–8.

[78] Barnes (n76) 77.

[79] Ronald Gilson and Curtis Milhaupt, 'Economically Benevolent Dictators: Lessons for Developing Democracies' (2010) 59 *American Journal of Comparative Law* 83.

[80] Ibid.

[81] Ciprian Radavoi and Yongmin Bian, 'Isomorphic Mutation and Strategic Adaptation in China's CSR Standards for Overseas Investors' in Belén Díaz Díaz et al. (eds), *Responsible Business in a Changing World* (Springer 2019) 264.

[82] Johan Lagerkvist, 'Moral Discourse and China's Evolving Enterprise Society' in Eva Hansson and Meredith Weiss (eds), *Political Participation in Asia* (Routledge 2017) 64.

[83] Ibid. 65.