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Corporate Human Rights Abuses committed by European Transnational Companies in Third Countries within the Textile, Oil and Defence Sector. Theory-Practice Inconsistencies in the UNGPs Implementation Process at EU level

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Abstract

The economic globalisation has facilitated opportunities for businesses such as the expansion of their business structure, exports of goods and services and operational outsourcing worldwide. Nevertheless, this phenomenon has also brought challenges for human rights protection. In Europe, human rights treaties attribute human rights obligations to the EU and EU Member States, hence they are accountable for protecting human rights from corporate harm. In addition, the EU committed to comply with UNGPs since they were elaborated. However, these obligations become diffuse when European Transnational businesses operate in third countries. These countries present low human rights standards, serious episodes of corruption and non-independent judicial systems. Several European multinationals, whose codes of conduct have non-legally binding nature, take advantage of such issues and neither do comply with their obligation to respect human rights, nor assume responsibility when abuses have been committed. And jurisdictional challenges at national and international level impede the achievement of effective remediation. Three sectors are especially vulnerable towards corporate abuses committed by European businesses: textile, oil and defence sectors. In this research work, three real cases of human rights abuses committed within these sectors are analysed, taking into account the legal and procedural barriers, the breaches of UNGPs, and the lack of effective actions provided by the EU Member States in question to tackle the challenges.

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Introduction & Methodology

The globalisation phenomenon enables business enterprises to expand their activities and operate transnationally, with no territorial boundaries. Companies may locate their corporate headquarters within the territory of a EU Member State (EU MS) while performing its business activities in other EU MS. It is also feasible, and in many occasions profitable, to dislocate their supply chain outside EU borders. Business-related matters are thereby a global issue in nature.

The global scope of business operations requires that human rights standards are equally fulfilled in this field. The EU has progressively reinforced human rights protection in the context of the workplace, to protect workers from slavery and exploitation, to guarantee safety and health conditions, and eventual measures have also been adopted to protect the environment from corporate harm. However, human rights standards that are legally binding for European companies when developing business activities within the EU, seem to weaken when these companies operate abroad, since jurisdictional and other legal barriers arise in these circumstances. Certain economic sectors are especially vulnerable to suffer human rights violations due to the lack of preventive measures, recognition of legal corporate liability and effective remediation. Business enterprises adopt their corporate social responsibility (CSR) on a voluntary basis, and commit to respect non-legally binding codes of conduct that will be hardly accepted by a Court as an evidence of assumption of responsibility made by the company. The absence of an international legally binding treaty, mandatory due diligence regulation and international legal responsibility of corporations are only some of the shortcomings given in the field of business and human rights that contribute to perpetuate an environment of corporate human rights abuses that remain unpunished.

The UN Guiding Principles (UNGPs) were elaborate in 2011 to provide a comprehensive guideline whereby States and businesses could address this issue. The European Institutions have claimed their conformity with these principles and committed to implement them at EU level. Since 2011, the EU has adopted different strategies and plans in this regards, and enacted directives and other regulations in certain business sectors that benefit the implementation of these principles. The EU is also part of the UN intergovernmental working group negotiations for the elaboration of a legally binding instrument on Business and human rights. The implementation of the UNGPs and the fight against human rights abuses is essential within the EU, not only for the protection of human rights, but to ensure coherence within the EU external action and the European core of values. The respect, protection and promotion of human rights underlies the political identity of the EU.

Nevertheless, theory-practice inconsistencies are frequently observed. Since the elaboration of the UNGPs and the decision of the EU to implement them, there have been many cases of European Transnational Companies violating human rights in third countries that remain unpunished.

This research work thereby pursues to provide, in the first chapter, a theoretical vision of business and human rights issues, based on the UN Guiding Principles three-pillars structure, analysing strategies, plans, policies and legislation adopted by the EU and its Member States to implement these principles. And, in the second chapter, a practical vision thereof, specifically related to a selection of three case studies of European Transnational Companies that committed human rights violations in third countries.

This selection is justified taking into consideration the following criteria: economic sectors where the corporate abuses took place, business relationship among the companies involved and the national or international level of judicial treatment. First, the chosen sectors are textile, oil and defence. These are especially vulnerable sectors towards corporate human rights violations committed by multinationals, and each of them find specific barriers of prevention and remediation. Secondly, the selected cases present different types of business relations involved: the retailer/supplier relationship, the parent company/foreign subsidiaries relationship and export licenses system/arms manufacturers, this last includes a political element involving the public administration. Finally, the cases provide a vision of different possibilities at national or international level for its judicial treatment; two of these cases have been heard before European national courts whilst the last one will be addressed by the International Criminal Court.

The last analytical chapter of this research paper proceeds to identify the main legal and judicial barrier present throughout the three cases, to analyse how these barriers are breaching the UNGPs and finally, based on the analysis of the NAPs of the EU Member States involved, tackle the actions that the States are adopting to confront these barriers and draw conclusions on their ineffectiveness.

Ultimately, related to the scope and data collection, this research work is conducted under a multifaceted and multidisciplinary approach, following the analytical structure of the UN Guiding Principles, since the main complexities identified in business and human rights studies appear precisely within its multidimensional nature. Related to data collection, this paper is based on desk research, and the literature underlying it is a combination of academic and NGOs publications in the field of International Human Rights Law and International Humanitarian Law. This research work is also based on European and Member States legislation, International and EU soft-law mechanisms and Action Plans, Stakeholders and corporative consultations, as well as other declarations and recommendations issued by EU institutions such as the EU Parliament and EU Commission, and negotiations taken place within the UN Open-ended Intergovernmental Working Group for the elaboration of an International legally-binding Treaty on Business and Human Rights.

❖ CHAPTER ONE: *Business and Human Rights within the EU in Theory*. EU International Human Rights obligations and UN Guiding Principles Implementation Process

The EU have adopted several strategies and policies to implement UNGPs since they were elaborated. Some of them are not exclusive strategies for implementation and have failed on this goal as they did not address business and human rights issues sufficiently. In parallel, EU MS have developed National Action Plans on Business and Human Rights with different alignments and objectives, which means the implementation process of UNGPs within the EU is not being developed consistently, and EU MS present different strengths and weaknesses within their business and human rights policies.

This Chapter will be dedicated to demonstrate EU accountability for corporate human rights violations committed by European Transnational companies in third countries, given EU human rights obligations, human rights protection as part of EU identity, and, to a greater or lesser degree of effectiveness, EU strategies, plans, regulations adopted to implement the principles. Notwithstanding EU accountability is demonstrated and recognised by the EU itself, there is no EU framework in place yet to achieve effective human rights protection for non-EU victims of European multinationals adverse impact.

1. Applicability of the UN Guiding Principles in the European Union

1.1 United Nations Guiding Principles: State duty to protect, Corporate Social Responsibility and Access to Remedy.

Dr. John Ruggie, the UN Secretary-General´s Special Representative for Business and Human Rights (SGSR) from 2005-2011 was entrusted to create a common framework on business and human rights for all UN Member States. The SGSR presented the "Protect, Respect and Remedy" Framework in 2008. The same year the Human Rights Council extended the SGSR mandate for other three years, in order to promote and make operational this Framework, which concluded with the elaboration of the "UN Guiding Principles" in 2011.

This Framework rests on three pillars: The State duty to protect against human rights abuses by third parties, the corporate social responsibility to respect human rights and the access to remedy for victims of corporate human rights abuses. Each pillar is divided into foundational and operational principles, and the sum of all the principles make a total of 31.

In this regards, Ruggie renounced to the idea of focusing only on the establishment of an international code of conduct relating corporate responsibilities (second pillar) but creating a broader framework which includes the State duty to protect and access to remedy, as he stated "each pillar is an essential component in an inter-related and dynamic system of preventive and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation

society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse".[1]

Many different sources of literature have addressed these thirty-one principles highlighting its main contributions and challenges since they were elaborated, and notwithstanding the criticism they could have received and its questionable effectiveness, it is undeniable the success of these principles in the field of business and human rights, taking into account that, as John Ruggie pointed out himself, they are elaborated to mark "the end of the beginning".[2] They serve as a multi-layered, comprehensive and universally accepted guideline as first step towards accountability, but these principles will not have the capacity their own to ultimately resolve all human rights challenges in this field.

The UNGPs have a non-legally binding nature as Ruggie renounced to call for the adoption of a treaty on business and human rights, concluding that business have non legal responsibility, adopting the term *responsibility to respect* embedded in the concept of Corporate Social Responsibility making reference to the process of human rights due diligence which do not entrust legal obligations as such.[3] However, this does not mean that Business are not subject to International Human Rights Standards (Ruggie establishes the International Bill of Human Rights and ILO Declaration as the minimum HRs core that Companies are obliged to respect).[4]

Ruggie chose a pragmatic approach over an ambitious legally binding treaty, given the fact that neither states nor businesses would have accepted a legally binding instrument that translates UNGPs into legal obligations. By contrast, the principles were approved unanimously. However, he left open the possibility of adopting more ambitious initiatives by referring to UNGPs as "The end of the beginning". Probably Ruggie knew that UNGPs non-legally binding nature eventually need to be transformed in legally binding mechanisms to achieve real implementation of the principles themselves. Otherwise, non-legally binding instruments used to implement non-legally binding principles are bound to result in non-effective human rights protection in the business field.

Many other questions have been raised among scholars; "Should Ruggie have proposed to the Human Rights Council the pursuit of an international treaty on Corporate Social Responsibility (CSR)? Should he have maintained that companies have legal responsibilities under IHRL? Do states have an obligation to reach extraterritorially as part of their duty to protect against corporate abuses?".[5] Throughout this research work, reflection on these questions and other similar will be raised, with a focus on the EU and EU MS duty to protect, the analysis of the EU strategies for implementation, the CSR of European Transnational Companies and the

[1] UN Human Rights Council (HCR) '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*, 21 March 2011, A/HRC/17/31, para. 6, https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (accessed 18 March 2020).
[2] Ibid., para. 13.
[3] R. Mares, *Business and Human Rights After Ruggie: Foundations, Art of Simplification and the Imperative of Cumulative Progress,* Leiden, Boston, Martinus Nijhoff Publishers 2012, p. 8.
[4] HCR, 'Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie', *Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework*, 22 April 2009, A/HRC/11/13, para. 52-54, https://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf (accessed 18 March 2020).
[5] Mares, *Business and Human Rights After Ruggie,* p. 7.

effective access to remedy for victims of corporate abuses committed by these companies in third countries.

1.2 EU duty to protect and Human Rights Obligations

1.2.1 EU Human Rights Obligations

The European Union is a political and economic Union, with a complex legal nature: Neither it is an international organisation nor a Federal State. EU MS have ceded only part of their sovereignty, which has generated the distinction of exclusive, shared and supporting competences. According to the article 5 TFEU "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

Business and human rights is not a competence as such, but it is an intersectional point that entails different competences, political, legal and corporative disciplines. The elaboration of effective legislation and policies will be thereby complex and will require great effort on developing coherent strategies among EU and EU MS. In addition, EU external action shall be performed in coherence and according to EU core of values.

In this regards, the respect, protection and promotion of human rights is defined as part of the EU values recognised in the article 2 TEU. There are many legally binding instruments that attribute EU and EU MS with human rights obligations. The EU Charter of Fundamental Rights entered into forced simultaneously to the Lisbon Treaty, obliging the EU to respect, protect and promote human rights in all its actions, and also bounds the EU MS within the scope of EU competences, when applying EU law. In the rest of their competences, all EU MS have ratified the ECHR, thus they are still bounded by human rights obligations.

Regarding EU external action specifically, the article 21 TFEU refers expressly to human rights as one of the objectives that must be embedded in all EU external policies and actions: "the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to […] consolidate and support democracy, the rule of law, human rights and the principles of international law".

As a result, the compliance of EU human rights obligations in the field of business and human rights requires that the EU acts in coherence with the competences framework, EU external governance action and EU core of values (i.e. respect, protect and promote human rights).

1.2.2 Implementation of the UNGP first pillar in the EU

The EU has recognised in many occasions its conformity with the UNGPs by calling them "the authority policy framework" in the field of business and human rights and the reinforcement of due diligence principles within the EU. In fact, The Commission held that the implementation of the UNGPs contributes to EU objectives related to the protection and promotion of human rights[6].

[6] European Commission, 'Commission Staff Working Document' *on Implementing the UN Guiding Principles on Business and Human Rights – State of Play*, 2015, p. 2. https://ec.europa.eu/anti-

Given EU legal nature, the State duty to protect is a shared duty of the EU and Member States, the latter consequently bonded by UNGPs. In order for the EU to adopt a comprehensive and coherent strategy is necessary the cooperation of EU Commission, the European External Action Service (EEAS), as internal and external policy-makers, EU MS and other non-States actors such as stakeholders. However, different policies, strategies or action plans have been developed separately within the EU during the past nine years; EU internal policies, EU external policies and National Action Plans of EU MS, which causes a fragmentation of the UNGPs implementation process in the EU, and hazard the coherence, consistency and effectiveness of such process.

From an internal policy perspective, in line with the implementation of the first Guiding Principle (**1 GP**), the EU adopted in 2011 **the European Strategy on Corporate Social Responsibility**, in which the Commission gave a call to Member States to produce business and human rights **National Action Plans (NAPs)** to implement the UNGPs at a national level. To date, seventeen Member States have developed NAPs and there is one on development status.[7] They are different for each country, which means they present different alignment issues; some of them cover the three UNGPs pillars unevenly, paying little attention to the third pillar, others focus on the second pillar and give less importance to the scope of the State duty to protect.[8] Therefore, each EU MS plan and execute different actions to face business and human rights issues.

Moreover, these NAPs have become the focal point of corporate human rights protection within the EU, due to the lack of EU effective strategies or that they have not been approved through the adequate participatory process. Thus, NAPs must adopt actions not only targeting human rights protection within their national territory as part of the internal policy, but they must include extraterritorial regulation that mitigate corporate abuses committed by national companies abroad, in other EU MS and in third countries, in line with the second GP.

Regarding EU External Policy attempts to achieve compliance with UNGPs, the EU adopted in 2012 **the Strategic Framework and Action Plan on Human Rights and Democracy**[9]**,** in implementation of **2 GP**; However, this was not an specific strategy for implementing UNGPs, not sufficient for the complex issues present in the business and human rights discipline.

The most recent strategy adopted to implement UNGPs, at both internal and external level is **the Shadow EU Action Plan** (2019 to 2024) whose purpose is "the establishment of human rights due diligence standards for business operations, supply chains and business relationships; improving access to remedy; strengthening the protection of human rights

trafficking/sites/antitrafficking/files/swd_2015_144_f1_staff_working_paper_en_v2_p1_818385.pdf (accessed 20 March 2020).

[7] See the entire list of Member States NAPs in Council of Europe, *Human Rights and Business, National Action Plan* [website] https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/national-action-plans (accessed 20 March 2020).

[8] D. Augenstein, M. Dawson and P. Thielbörger, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights? Insufficient Alignment of the Pillars, coupled with a Failure to Adopt a Smart Regulatory Mix', *Business and Human Rights Journal*, vol. 3, 2018, p. 10.

[9] Council of the European Union. 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 25 June 2012, 11855/12 https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed 22 March 2020).

defenders and putting safeguards in place to prevent human rights harm through EU trade and investment."[10]

The Shadow EU Action Plan has a unique focus on the effective implementation of UNGP and gives a call for coherence and working together among EU institutions, all Member States and the EEAS.[11] Thus, this strategy, unlike the previous, has a consistent internal and external dimension and focus on the implementation of the first and third pillars of the UNGP. On the other hand, the presence of the second pillar is weaker. This could be explained by the fact that this Plan is a document from within the EU Parliament, but it has not been approved through the adequate participatory process, based on a baseline assessment including a consultation with the relevant stakeholders from civil society.[12] Therefore, no commitment has been made by the stakeholders towards CSR that could be reflected in this Plan, neither stakeholders have stated to be conform with it, which suggests that this Plan is likely to find many shortcomings to be effectively implemented.

Therefore, regarding high-level EU policies, the main weakness identified is the fragmentation of the UNGPs implementation process which trigger many other challenges, such as the lack of coordination among EU MS, credibility and coherence. However, other strengths can be identified in the exercise of EU duty to protect, particularly related to the implementation of GP 3, and 8 to 10.

Regarding GP 3 implementation, related to enforcement of laws and policies in order to ensure that businesses respect human rights, the EU has enacted concrete legislation pieces to comply with its duty to protect, a few important examples are: [13]

- *Directive 2011/36/EU* on preventing and combating trafficking in human beings and protecting victims.
- *Directive 2014/95/EU* which contains the rules on disclosure of non-financial and diversity information by large companies. This Directive has been especially important, as a result, businesses are required to include non-financial statements in their annual reports since 2018.
- *Regulation 2017/821/EU* on 'Conflict Minerals' which establishes due diligence obligations for supply chains which import tin, tantalum, gold and other materials from conflict-armed and risky areas. [14] This last Regulation is also dedicated to **GP 7** implementation, related to supporting business respect for human rights in conflict areas, establishing that States must ensure that businesses operating in such areas are

[10] European Parliament Working Group on Responsible Business Conduct (RBC) 'Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights', 19 March 2019. https://responsiblebusinessconduct.eu/wp/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf (accessed 22 March 2020).
[11] Ibid., p. 4.
[12] Ibid., p. 2.
[13] For an overview on legislation at national level, see the European Coalition for Corporate Justice (ECCJ) 'ECCJ Briefing: The EU competence and duty to regulate corporate responsibility to respect Human Rights through mandatory Human Rights Due Diligence', November 2017, p. 2, https://www.businesshumanrights.org/sites/default/files/documents/Brief_The%20EU%20competence%20and%20duty%20to%20legislate_BLayout.pdf (accessed 22 March 2020).
[14] European Commission, 'Combatting conflict minerals, Negotiations and agreements', [website], https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/ (accessed 22 March 2020).

not involved in human rights abuses. In addition, in March 2014, the European Commission proposed "A comprehensive EU supply chain initiative for responsible sourcing of minerals originating in conflict-affected and high-risk areas"[15].

Finally, **GPs 8 to 10** are related to the required policy coherence among all state institutions, department and agencies when observing State human rights obligations. As discussed before, to achieve policy coherence is one of the most difficult challenge for the EU. However, the evolution of the EU trade policy and the Common Commercial Policy in the last years should also be highlighted as an achievement towards EU policy coherence, moreover since this specific policy is of great significance for the extraterritorial protection of human rights from European companies adverse impact.

This policy has moved from an exclusive economic interest towards the inclusion of human rights standards in international trade agreements signed by the EU and third countries. The insertion of the *power through trade* concept was a step forward in this regards. *Power through trade* must be distinguished from *power in trade*, which refers to the power given to a State by an increase of its exportations in goods, capital and services. Instead, *power through trade* refers to the exportation of laws, regulations, human rights standards and eventually values and ideas.[16] This is, the reinforcement of EU external governance, the use of the EU powerful position in trade international relations to promote human rights.

To conclude, notwithstanding the progress made in EU external relations, consistency and coherence is still a serious compliance issue with the EU duty to protect, and a grave complication for the UNGPs implementation process. This means that no EU Framework have being effectively implemented to protect human rights from corporate harm, which is especially hazardous for those abuses committed out of the EU, that find many barriers to be prevented and prosecuted, and urgently needs a coherence respond from the EU, including the enforcement of legally binding mechanisms.[17]

1.3 Corporate Social Responsibility of European Transnational Companies

1.3.1 The Concept of Corporate Social Responsibility

Corporate Social Responsibility (CSR) is a multifaceted and complex concept that have been studied in different academic perspectives since it was pronounced for the first time.

On the one hand, from inner business, the stakeholder approach in 1960s and 70s, promoted the importance of good relations among stakeholders and companies, in contrast to the traditional shareholder values that focused in short-term benefits. This stakeholder perspective early included a social aspect which focused on long-term benefits by pursuing not only corporate but also societal goals. As workers' rights and consumers' awareness kept growing, CSR eventually included the ethics component.[18] Hence, CSR was born within business practices but was progressively acquiring broader relevance. Nonetheless, despite its social

[15] European Commission, 'Commission Staff Working Document', p. 15.
[16] S. Meunier and K. Nicolaidis, 'The European Union as a conflicted trade power', *Journal of European Public Policy*, vol. 13, no. 6, 2006, p. 910.
[17] J. L. Černič, 'European Perspectives on the Business and Human Rights Treaty Initiative' in J. L. Černič and N. Carrillo-Santarelli (ed.), *The Future of Business And Human Rights Theoretical and Practical Considerations for a UN Treaty*, 1st edn., Intersentia, 2018, p. 245.
[18] A. Kleine and M. von Hauff, 'Sustainability-Driven Implementation of Corporate Social Responsibility: Application of the Integrative Sustainability Triangle', *Journal of Business Ethics*, vol. 85, 2009, p. 2.

impact, the main corporate nature raises difficulties for this pillar to be addressed and implemented at a national or EU level, especially when it comes to the enforcement of legal due diligence obligations for businesses.

On the other hand, parallel to the development of CSR concept, the Sustainability Concept was introduced by the United Nations in the World Commission on Environment and Development in 1987, which had a close relation with CSR, with a broader scope and emphasising its social dimension.[19] The intersection between both concepts strengthen the conception of CSR implementation, which cannot be ultimately left to the decision-making department within businesses, but it also needs to be included in sustainability goals at high level strategies, policies and legislation. At a EU level, examples of these concepts overlap could be noticed in the "Recommendations to the European Commission by the subgroup on Corporate Social Responsibility of the Multi-Stakeholder Platform on the Implementation of the Sustainable Development Goals in the EU" in 2018.

Ultimately, the complexity embedded in the CSR concept makes also complex its implementation, and hazard the coherence of general policies and strategies whose aim is the implementation of UNGPs. CRS social dimension needs to be justified and reinforced throughout the sustainability concept, consolidating that the establishment of CSR cannot be a decision for businesses to make on a voluntary basis.

1.3.2 Implementation of the UNGP second pillar in the EU

One of the objectives within the third section of the EU Shadow Action Plan is especially relevant; the establishment of mandatory due diligence for EU and non-EU businesses that operate within the EU. The enforcement of legislation at EU and national level requiring businesses to adopt mandatory due diligence is a very important novelty, since the non-legally binding nature of Businesses' codes of conduct is the main cause for their lack of compliance.

Operational principles (**GPs 11 to 15**) do not refer specifically to legal obligations of CSR for businesses, but it focusses on the responsibility of businesses to respect human rights, through the adoption of policies to prevent potential corporate risks for human rights. To comply with it and the foundational principles (**GPs 16 to 23**), businesses frequently adopt codes of conducts or ethic codes, i.e., statements of commitment towards due diligence and respect for human rights, whose adoption is a voluntary decision for business.

Mandatory due diligence, on the other hand, is a measure still absent in the majority of countries[20], also missing in EU MS NAPs[21]. As discussed before, the fact that the Shadow EU Action Plan has not been approved by the proper process and the lack of advances insofar put into question the real implementation of this specific objective, and the entire Plan, within the expected period of time, 2019 to 2024. This is a serious issue, since all the cases of corporate human rights abuses have been triggered due to the businesses in question did not comply with their codes, and from a remediation perspective, companies never respond for this fact, since

[19] M. Yevdokymova, V. Zamlynskyi, S. Minakova, O. Biriuk and O. Ilina, 'Evolution of corporate social responsibility applied to the concept of sustainable development, *Journal of Security and Sustainability Issues*, vol. 8, 2019, p. 475.

[20] For further information on global initiatives upon Codes of Conduct, see M. Mahmudur Rahim, *Code of Conduct on Transnational Corporations*, 1st edn, London, UK, 2019, p. 12.

[21] The question related to actions taken by EU MS on mandatory due diligence within NAPs will be analysed in the third chapter, related to the EU MS involved in the chosen case studies.

there is neither code compliance monitoring mechanism in place, nor legal obligation for businesses to do it.

1.4 Access to Remedy for victims of Corporate Human Rights Abuses committed by European Transnational Companies.

UNGP third pillar has a close relation with the State duty to protect, since the State has to guarantee effective judicial mechanisms of remediation, the most important avenue for victims to access to remedy. UNGPs also foresee non-judicial grievance mechanisms provided by businesses or States, however it must be taken into account that these mechanisms will issue non-legally binding resolutions that could be positive but need to be accompanied by the adequate judicial mechanism and guarantees provided by the EU and EU MS.

1.4.1 Stated-based Judicial Mechanisms in the EU **(GP 26)**

Courts and judges shall be subject to principles of impartiality, independence, integrity and ability to accord due process. Within the EU, the Stated-based judicial mechanism is provided by EU MS to ensure access to National Courts for victims of corporate abuses. Even in cases where victims are not nationals they are entitled to raise complains before National Courts if there is a jurisdictional link between the victim and the State according to private international rules. Nonetheless, extraterritoriality *per se* does not have a defined scope, which triggers a wide debate in international law.[22]

Certain extend of extraterritoriality has been generally accepted in international human rights law. The Human Rights Committee has pronounced about the extraterritoriality issue in Canada for the commission of corporate human rights abuses, concluding that "the State party should (a) enhance the effectiveness of existing mechanisms to ensure that Canadian corporations under its jurisdiction […] respect human rights standards when operating abroad; […] (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad."[23] In another occasion the Committee pronounced similarly in relation to Germany[24]. Likewise, The European Court of Human Rights (ECtHR) defines jurisdiction by not being delimited to state territories, but this scope must be extended to the actions performed by other States that produce effects out of their territory. After the Court receives the case, this decides on jurisdiction according to rules of private international law, respecting the article 6 of ECHR, related to the right to judicial guarantees.[25] Within the EU, Brussels I Regulation as private international law mechanism has been used by non-EU claimants to bring cases of corporate abuses to EU National Courts, holding that the defendant company is national from the EU MS.

Regarding the EU Court of Justice (CJEU), despite this Court has left the door open on the extraterritoriality question, [26] it has neither pronounced expressly about it, nor has heard any

[22] S. I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Intersentia, 2006, p. 43.

[23] HRC, 'Concluding observations on the sixth periodic report of Canada', 13 August 2015, CCPR/C/CAN/CO/6, para. 6, https://www.refworld.org/docid/5645a16f4.html%20[accessed%2023%20July%202020] (accessed 4 April 2020).

[24] HRC, 'Concluding observations on the sixth periodic report of Germany', 18 October 2012, CCPR/C/DEU/CO/6, para 16, https://digitallibrary.un.org/record/737828 (accessed 5 April 2020).

[25] J.J. Álvarez Rubio, and K. Yiannibas, *Human rights in business: Removal of barriers to access to justice in the European Union*, London, Routledge, 2017, Section 1.2.3.

[26] In 2014 for the first time one case is brought before the CJEU related to the issue of horizontal applicability in relation to a provision of the EU Charter of Fundamental Rights; see E. Frantziou, 'Case C-176/12 Association

case for a breach of EU Charter of Fundamental Rights outside EU territory. Once again, this means that the EU is failing to provide a judicial remediation framework for victims of European businesses activities outside the EU. Instead, EU MS National Courts are hearing some of these cases, and still many jurisdictional barriers at national level jeopardise the achievement of justice. In this sense, different types of barriers appear depending on the civil, criminal and administrative nature of the proceedings. Several EU and National initiatives have been elaborated to tackle these issues, for instance the 2016 Council of Europe recommendation that propose measures for Member States to overcome civil, criminal and administrative barriers,[27] however they continue to happen. These barriers will be deeply analysed in the next chapters.

1.4.2 Non-judicial Stated and Non-Stated-based grievance mechanisms **(GP 27-31)**

Non-judicial mechanisms supplement and complement judicial mechanisms on carrying the burden of addressing all corporate alleged abuses. The UNGPs distinguish between Stated and non-Stated based mechanisms.

At EU level, one of the main Stated-based grievance mechanisms is the OECD National Contact Point (NCPs), established by the OECD Guidelines for Multinational Enterprises. This is a supranational mechanism, in which 23 EU MS adhered to the Guidelines. The NCPs have the power to influence businesses and drive them to comply with the OECD Guidelines. Other remarkable EU mechanisms are adopted by the EU Directives on Racial Equality, Gender Goods, Employment Equality, in which it was required the establishment of conciliation or mediation equality bodies, to address complains as a previous to judicial avenue. Finally, the National Human Rights Institutions are relevant in some EU MS for all type of human rights violations, and some of them similarly to EU Directives, operate throughout equality bodies. [28]

Multi-stakeholder or company-based mechanisms are very diverse as they are inner mechanisms of business enterprises, and they present different structures and procedures, which will depend on the company type and corporate level grievance mechanism. One important example within the EU is the "data controller", a company that is obliged to develop an internal system in place in order to be able to answer the questions raised by "data subjects" who have the right to ask, recognised by EU law. If the data subjects do not receive an adequate answer, they may raise a complaint to the national Data Protection authorities, which is a Stated-based mechanism. [29]

However, on the one hand, the main weaknesses of Stated-based mechanisms are challenges of visibility, transparency, accessibility and independence. Particularly, NCPs ineffectiveness will be further discussed in KiK case. Equality bodies, for instance, present significant level of political indifference and disproportionate budget cuts which leaves these bodies under-funded

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de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union.' *European Constitutional Law Review*, vol. 2, no 2.

[27] Council of Europe, 'Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States' *Human Rights and Business*, 2 March 2016, CM/Rec(2016)3, para. 35, 44 and 47. https://rm.coe.int/human-rights-and-business-recommendation-cm-rec-2016-3-of-the-committe/16806f2032 (accessed 8 April 2020).

[28] Ibid., p. 55.

[29] Ibid. p. 57.

and under-resourced.[30] The effectiveness of these mechanisms needs to be reinforced by engaging national politics and at the same time, ensuring their independence, transparency and visibility. On the other hand, non-Stated-based mechanisms are very fragmented, in some occasions provoking overlapping remedies which affect to common citizens access, to the point of not providing the suspension of judicial actions limitation periods, which could result in losing the right to bring the case before a court. Moreover, both Stated and non-Stated mechanisms do not issue legally binding resolutions whose enforcement could be claim in a Court.[31]

2. Working on a future UN Treaty on Business and Human Rights

The elaboration of a legally binding instrument on transnational corporations and other businesses and human rights has been a focus of concern in the past years, since it is held by many international actors that UNGPs non-legally binding nature is not sufficient to achieve human rights protection. Indeed, a legally binding international treaty may resolve many of the issues discussed above.

On 26th June 2014 the UN Human Rights Council decided "to establish and open-ended intergovernmental working group (IGWG) on transnational corporations and other businesses enterprises with respect to human rights"[32] to elaborate an international legally binding on business and human rights.

Five sessions of the IGWG have taken place so far. It was until the fourth session when the Chair-Rapporteur dedicated to the preparation of the zero draft on the legally binding treaty proposed by Ecuador. The fifth session addressed the revision of the draft, consisting in discussions and negotiations article by article, proposal of amendments and other suggestions made by Governments, regional and political groups, intergovernmental organisations, national human rights institutions, stakeholders, etc.

The reviewed zero draft reduced its previous ambitions to facilitate acceptation by the States, and still it provides an international framework that could tackle the main issues in field of business and human rights, especially extraterritorial jurisdictional challenges. The main outcomes of the revised zero draft are:[33]

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[30] European Commission, 'European network of legal experts in gender equality and non-discrimination', *Equality bodies making a difference*, 2018, p. 127 https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf (accessed 12 April 2020).

[31] L. Lizarazo Rodríguez, *UNGP on business and human rights in belgium. State-based judicial mechanisms and state-based non-judicial grievance mechanisms, with special emphasis on the barriers to access to remedy measures*, University of antwerp, 2017, P. 72, https://www.duurzameontwikkeling.be/sites/default/files/content/ungp_access_to_remedy_mapping_and_barriers_201707_university_of_antwerpen.pdf (accessed 12 April 2020).

[32] HRC, 'Resolution 26/9 on the Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', 14 July 2014, A/HRC/RES/26/9, p. 2, para. 1, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement (accessed 12 April 2020).

[33] C. Lopez, 'The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking improvements and brighter prospects', *International Institute for Sustainable Development (IISD)*, 2 October 2019, https://www.iisd.org/itn/2019/10/02/the-revised-draft-of-a-treaty-on-business-and-human-rights-ground-breaking-improvements-and-brighter-prospects-carlos-lopez/ (accessed 12 April 2020).

- The proposed treaty is aligned with the provisions and due diligence purposes of the UNGPs.
- The scope of the proposed treaty is not limited to transnational business, but it encompasses all business enterprises. Making a special emphasis on transnational activities, as mentioned in the art. 3.1
- It contains provisions that aim to create a comprehensive legal system of liability for human rights violations committed by businesses or associated. These provisions address civil, criminal and administrative liability, including forms of negligence based on tort principles.
- It provides a list of well-defined offences that in principle may fall under principles of international humanitarian law, but in case of being committed by business enterprises they could be civil, administrative or criminal offences providing legal liability to the non-State entities involved. States are obliged to enforce legislation and adequate mechanisms to establish the liability of such legal persons, which suppose an important advance, given the fact that there are countries such as Russia and Argentina that do not recognise legal criminal liability for business enterprises as legal persons.
- Future trade and investment agreements shall not contain any conflictive provision with the proposed treaty.

Related to the participation of the EU in the draft negotiations, a glimpse of inconsistency is revealed by the absence or non-active role of the EU in the negotiations, despite its effusive welcoming towards UNGPs implementation.

The 2nd July 2018 the European Parliament's committees on Development, International Trade and Human Rights presented a question related to the passive role on the negotiation process of the binding treaty to the Parliament: "What are the main reasons that have prevented the EU and its Member States from actively participating in the process? Is the EU envisaging a common position for the October 2018 IGWG session, and if so, what process will be followed and how will the EU engage with stakeholders and the European Parliament?"[34]

The EU continued holding a non-active participation in the fourth and fifth session of the IGWG in which maintained the reservation of its position towards the proposed treaty. Justification of the EU to refrain from accepting the zero draft underlies in the rejection of previous EU proposals. One example is the petition that the EU made on expanding the scope of transnational companies towards all type of business enterprises: "there are complex business networks and many different modes of operation between transnational corporations and a vast number of other enterprises operating at the domestic level. Covering all companies is important to ensure non-discrimination and a level playing field".[35] When this proposal was

[34] Question for oral answer O-000078/2018 to the Council. L. McAvan, on behalf of the Committee on Development, B. Lange, on behalf of the Committee on International Trade, P. A. Panzeri, on behalf of the Committee on Foreign Affairs, 2nd July 2018, https://www.europarl.europa.eu/doceo/document/O-8-2018-000078_EN.pdf (accessed 15 April 2020).

[35] HRC, 'Addendum to the report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', 6 March 2019, A/HRC/40/48/Add.1, p. 28 https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Pages/ListReports.aspx (accessed 15 April 2020).

included in the revised draft the EU recognised the arrangement but held that "there is a need for greater clarification on the definition of the scope [of all business enterprises]".[36]

Ultimately, the EU position in the IGWG negotiation process demonstrates its conflict of interests between its commitment on implementing the UNGPs in order to achieve protection and promotion of human rights, and the establishment of hard-law instruments that implies the imposition of legal obligation to business enterprises. Decision that will not be very welcoming by European transnational companies.

3. Conclusions

In theory, the EU committed to implement UNGPs since they were elaborated nine years ago, in compliance with EU International human rights obligations, in order to act in coherence with its own identity, respecting, protecting and promoting human rights. However, this seems difficult to achieve in the field of business and human rights, especially on the prevention and remediation of human rights abuses committed by European businesses in third countries, as the jurisdictional and territorial challenges have not been effectively tackled by the EU to comply with its duty to protect, CSR of European Transnational Companies and access to remedy for victims, given the following circumstances:

First, the EU has not yet established a comprehensive and coherent strategy that bound internal and external EU policies, EU MS and stakeholders, that is approved through the adequate process. There is no EU Framework that address corporate human rights issues in a consistent way for all EU MS, leaving to the latter the responsibility of developing their own and different NAPs.

Second, CSR multidisciplinary nature raises additional complexities to implement the second UNGPs pillar. The establishment of mandatory due diligence for businesses in the EU and the enforcement of national laws in this regards have not been achieved yet. Hence, the adoption of code of ethics (and to comply with them) is a voluntary decision for businesses enterprises.

Third, the CJEU has never heard any case of breach of EU Charter of Fundamental Rights committed out of the EU by an European company. There is no International or EU judicial remediation framework provided for victims of European businesses activities outside the EU. EU MS National Courts have heard some of these cases on application of private international rules, which are not adequate for the protection of human rights.

And finally, the inactive role played by the EU in the negotiations for the elaboration of an international legally binding treaty on business and human rights.

Subsequent to the identification of theoretical challenges to achieve EU compliance with UNGPs, three case studies that represent concrete economic sectors will be analysed, in-practice compliance challenges will be identified, which are precisely a projection of the previous shortcomings identified in the EU theoretical framework. The following chapters will

[36] HRC, *Fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises* [website], Oral Statements, International Organizations, European Union, p. 3. https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx (accessed 15 April 2020).

prove theory-practice inconsistencies between the EU obligation to respect, protect and promote human rights, and three case studies where the EU and EU MS failed to prevent and remedy corporate human rights abuses committed by businesses with European nationality.

❖ CHAPTER TWO: *Business and Human Rights within the EU in practice.* Three Case Studies of European Transnational Companies that committed human rights violations in third countries: KiK, RINA, Ali Enterprise vs Jabir and Others, Shell vs Nigerian communities and European Defence Industry vs ECCHR and other organisations

Many examples of European transnational companies that commit human rights abuses abroad have been identified in the past ten years. In many occasions, corporate abuses are collateral effects of their business operations, as a result of lack of accountability given the high standards protecting corporate interests and low standards protecting human rights in the global arena. These companies take advantage of the corruption and loose regulatory frameworks of certain non-EU countries that allow them to reduce their expenses theoretically set aside for human rights protection, due diligence and CSR.

As discussed in the previous chapter, in the context of business enterprises, human rights standards are established in a soft-law format consisting on the establishment of codes of conduct and voluntary commitments, which are not sufficient to ensure human rights protection. Moreover, the complexities of their business structure; supply chain relationships, foreign subsidiaries and the principle of independent legal personality with their parent or retailer company, allow the latter to avoid responsibility for such abuses, among other arguments used for denying liability. There are certain economic sectors that are especially vulnerable to suffer systematic and gross human rights violations, such as the textile, oil and defence industry. Moreover, these sectors may be essential to maintain the economy of a developing country, frequently dependant on the exports and business relations established with these multinationals, hence a higher economic and political interest become a serious barrier to prevent and remedy human rights violations.

The aim of this chapter is to analyse three case studies representing these sectors whereby European transnational companies provoked human rights abuses in third countries in order to eventually, in the third chapter, identify the main challenges of compliance with the UNGPs and draw conclusions over the ineffectiveness of Member States NAPs and the lack of international standards to protect human rights from corporate harm. These cases are first, KiK, RINA and Ali Enterprise vs Pakistani citizen (textile sector). Second, Shell vs Nigerian Communities (oil and petroleum sector). Third, European arms manufacturers vs ECCHR and others (Defence Industry).

1. Case Mapping: General overview of the three case studies

Company name and (Nationality)	Economic Sector	Claimants and nationality	Business / Political relationship	Alleged HRs abuses	Court Decision	Main Obstacles
KiK (German) and RINA (Italian)	Textile	Pakistani citizens	KiK is the main retailer of Ali Enterprise, a Pakistani garment factory (KiK purchases more than 70% of its annual production). RINA is an auditing company.	A fire took place in the Pakistani factory and 260 workers died because Ali Enterprise did not meet the safety requirements. Claimants argue that KiK and RINA breached the duty of care that they owed to Pakistani workers.	National Courts in: ▪ Pakistan: Pending ▪ Italy: Pending ▪ Germany: Dismissed	Procedural barriers related to the applicable law and short statutory limitation periods in tort actions. To demonstrate the close relation between KiK as retailer and Ali Enterprise as supplier, and the causal link between the act of omission and the damage.
Shell (Anglo-Dutch)	Petroleum	Nigerian citizens from communities settled in the Niger Delta	Shell is the parent company of SPDC, a Nigerian foreign subsidiary that operates in the Niger Delta.	SPDC extracting activity provoked environmental harm and economic loss for certain Nigerian Communities. Affectees claimed that Shell owed them a duty of care as parent company.	National Courts in: ▪ Nigeria: Dismissed ▪ Netherlands: Partially settled ▪ The UK: non-judicial compensation/ Dismissed	Procedural barriers related to the applicable law and the addition of SPDC as party to the case before National Courts. To demonstrate that Shell as parent company exercised sufficient control over SPDC as subsidiary.
Airbus and Space (Spain and Germany), BAE Systems Plc. (UK), Dassault Aviation S.A. (France), Leonardo S.p.A. (Italian) and Rheinmetall AG (Germany)	Defence	ECCHR (Germany), Mwatana (Yemen) and other partner NGOs	Governments of Member States granted export licenses to the defendants that allow them to sell military equipment to a warring coalition party in Yemen.	European arms manufacturers sold military equipment to the coalition leaded by Saudi Arabia that was being used for the commission of war crimes in Yemen. Claimants pursue the recognition of criminal corporate liability.	ICC: Pending. Communication submitted to the Office of the Prosecutor. Awaiting for a preliminary investigation.	Expected procedural barriers related to the lack of jurisdiction over corporation in International Criminal Law. High standards of means rea to demonstrate the complicity of corporate actors in the commission of the crime.

2. KiK RINA Ali Enterprise vs Jabir and Others

2.1 Factual Background

Ali Enterprise, a textile factory in Pakistan was set on fire on 11 September 2012 causing approximately 260 deaths and 32 injured people. This number is not accurate because some bodies could not be recognised and moreover most of the workers of this factory, as the majority in Pakistan, did not have formal contracts[37]. The cause of the fire was revealed in a federal report; a wooden mezzanine that burned quickly leaving the stairway blocked and allowed the fire to spread out through the second floor[38]. But this was not the only irregularity, the report also disclosed that there were not fire alarms or emergency exists, and that the only two existing exits were permanently locked, among other obstacles that made impossible for workers to run away from the fire.

KiK is a German company and also the biggest client of Ali Enterprise, purchasing the 70% of the garment produced by the factory in 2011[39]. Having KiK as client retailer was key to maintain the business and turn it into a major enterprise. This retailer, as many of the same nature does, hired an Italian auditing company RINA to ensure the supplier met all the safety and health requirements in order to comply with its code of conduct and corporate social responsibility[40]. In this regard, only a few weeks before the accident took place, the auditing company had issued the SA8000 certification confirming that Ali Enterprises complied with all safety and health measures to prevent potential risks.[41] In order to carry out this task, RINA outsourced the inspection to a Pakistani company which would never do act of presence in the garment factory[42].

After the incident, KiK agreed to pay one million US dollars to survival workers and deceased´s family members on voluntary basis in the concept of "immediate relief" to the families, this operation being coordinated by an independent commission set up by the Pakistani High Court of Sindth. However, KiK desisted from this agreement when an investigation report established

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[37] Clean Clothes Campaign, 'Ali Enterprises' *Justice for the Enterprises victims* [website], https://cleanclothes.org/campaigns/past/ali-enterprises (accessed 22 April 2020).
[38] Ibid.
[39] European Centre for Constitutional and Human Rights (ECCHR), 'Case report: Pakistan – cheap clothes, perilous conditions', April 2017, p. 1, https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_August2019.pdf (accessed 22 April 2020).
[40] In this regards, see C. Terwindt and M. Saage-Maass, *Liability of Social Auditors in the Textile Industry*, 1st edn., Friedrich Ebert Stiftung, 2016. https://www.ecchr.eu/fileadmin/Publikationen/Policy_Paper_Liability_of_Social_Auditors_in_the_Textile_Industry_FES_ECCHR_2016.pdf (accessed 22 April 2020).
[41] See Social Accountability International, 'SA8000 Guidance – 2008 Standard', June 2013.
[42], 'Complaint filed against Italian auditor for ignoring fatal flaws in garment factory' *Clean Clothes Campaign*, 2 February 2019, https://cleanclothes.org/news/2018/09/11/complaint-filed-against-italian-auditor-rina-for-ignoring-fatal-flaws-in-garment-factory-on-anniversary-of-deadly-factory-fire-in-pakistan (accessed 25 April 2020). And also see, D. Walsh and S. Greenhouse, 'Inspectors Certified Pakistani Factory as Safe Before Disaster', *New York Times*, 19 September 2012, https://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html (last accessed 30 April 2020).

that the fire had been caused by arson and not accidentally[43]. Three years later an investigation was opened in Pakistan on whether the fire was caused by a terrorist attack[44].

Nevertheless, Survivors and bereaved kept negotiating with KiK since 2012 claiming an economic compensation for families whose only income was the factory salary. Muhammad Jabir, victim's father, founded the Ali Enterprises Factory Fire Affectees Association (AEFFA) and within a year two hundred survivors and family representatives of deceased workers had join this Association[45]. They claimed that they were not accusing KiK to cause the fire but people died and were injured because the safety measures were not adequate and KiK had to face responsibility for this[46].On December 2014, KiK made an offer that was not accepted by the Affectees Association, given the fact that KiK was not willing to recognise responsibility or pay any damages[47].

On September 2016, a 5,5 Million US Dollars compensation was announced to be paid by KiK after a dialogue coordinated and facilitated by the International Labour Organisation (ILO)[48]. ILO involvement was requested by the German Federal Ministry of Economic Cooperation and Development and the Pakistani Ministry of Overseas and Human Resource Development. Therefore, the offer was stayed on the basis of the ILO Convention principles so that the economic compensation covered material damages but excluded moral and psychological pain. Likewise this compensation did not include any assumption of shared responsibility[49].

2.2 Proceedings before National Courts

Actors involved in the conflict have different nationalities: Pakistani Factory, German Retailer and Italian auditing company. This complexity implies different jurisdictions and applicable law possibilities, subsequently, parallels proceedings opened simultaneously in which different judges prosecuted and applied different laws, following the rules of private international law. The European Centre for Constitutional and Human Rights (ECCHR) accompanied the claimants and provided legal support in all the proceedings. These three judicial proceedings share a common aim pursued by the claimants; according to the ECCHR "it is essential that a comprehensive investigation is undertaken into the circumstances of the fire and in particular the role of the international companies involved. Those affected by the disaster have a right to learn the truth and an investigation may also help to prevent similar tragedies from occurring in the future."[50]

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[43] Z. Ashraf, 'Families of Baldia factory fire victims seek justice in German Court', *The Express Tribune,* 5 June 2016, https://tribune.com.pk/story/1116567/families-baldia-factory-fire-victims-seek-justice-german-court (accessed 30 April 2020).

[44] '90-day grilling: 'Baldia factory fire suspect detained', *The Express Tribune*, 16 April 2016, https://tribune.com.pk/story/1085688/90-day-grilling-baldia-factory-fire-suspect-detained (accessed 30 April 2020).

[45] ECCHR, 'Case Report: RINA certifies safety before factory fire in Pakistan', November 2018, p. 1 https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_RINA_20181121.pdf (accessed 22 April 2020).

[46] Z. Ashraf, 'Families of Baldia factory', *Legal Opinion*.

[47] ECCHR, 'Case report: Pakistan., p. 1.

[48] 'Compensation arrangement agreed for victims of the Ali Enterprise factory fire in Pakistan', *International Labour organisation (ILO),* 10 September 2016 https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_521510/lang--en/index.htm (accessed 8 May 2020).

[49] 'Time Line of the Ali Enterprises Case', *Clean Clothes Campaign,* 11 September 2012, p. 9.

[50] ECCHR, 'Case report: Pakistan', p. 3.

2.2.1 Proceeding in Pakistan

The legal proceeding in Pakistan started in 2012. Two days after the fire took place, Pakistani authorities opened a criminal investigation into the owner of the factory and his son-in-law, both of them were temporarily taken into custody, accused of criminal negligence that cost the death of 260 people working in the factory. However, the proceeding was eventually discontented in 2016. The reason is that from this year there is an open investigation on whether the fire was caused by a terrorist attack which provoked a deceleration in the resolution of the process.

Nevertheless, the claimants insist that the cause of the fire is not related to the obligation of the factory (and KiK) to provide an adequate environment in the workplace and comply with the safety and health requirements. In this regards, there are yet a number of complains awaiting to be addressed by this Court "against the Pakistani regulatory and law enforcement authorities on the basis of negligence in the investigations into the causes of the fire". [51]

In this ongoing proceeding it is relevant to highlight that the ECCHR was granted permission to provide a Legal Opinion to serve as an expert evidence to ensure that the investigation take into consideration the actions and responsibility of external actors such as KiK and RINA.[52]

2.2.2 Proceeding in Italy

The legal proceeding in Italy started in 2014. The victims were represented by Stefano Bertone and Marco Bona, ECCHR partner lawyer. Bertone and Bona submitted a report on the factory fire indicating the role of RINA to the Court in Turin. A criminal investigation was opened and, in early 2016, the case was transferred to the Court in Genoa, where RINA had its headquarters located[53].

Nowadays the Italian Court did not issue a resolution on the case. ECCHR sent a letter to the prosecutor's offices that suggests to take into consideration the liability of RINA for issuing a certificate about safety conditions of the factory that did not coincide with the reality of the building. This letter gives a call to take into account the Italian State's duty to protect human rights.[54]

Parallel to this judicial proceeding, an OECD complaint against RINA was submitted in 2018 by ECCHR together with an international coalition of human rights which included the Affectees Association (AEFFA) and other labour and consumer organisations before the OECD National Contact Point (NCP) at the Ministry for Economic Development in Rome[55], as Italy is a Member State of the OECD and therefore it is obliged to observe the OECD Guidelines for Multinational Enterprises. ECCHR claimed that "RINA's clear failure to detect and act upon safety and labour violations in the Ali Enterprises factory once more shows that the social auditing system is inherently flawed and that without transparency and accountability to workers the system is due to fail again and again"[56]

[51] Ibid., p. 2
[52] Ibid., p. 3
[53] ECCHR, 'After Factory Fire in Pakistan: Proceedings against auditor in Italy. The Case' [website] https://www.ecchr.eu/en/case/after-factory-fire-in-pakistan-proceedings-against-auditor-in-italy/#case_case
[54] ECCHR, "Case report: RINA', p. 2.
[55] Ibid.
[56] 'Complaint filed against Italian auditor', *Clean Clothes Campaign*.

2.2.3 Proceeding in Germany

In 2015, a civil suit was submitted by four Pakistani survivors and relatives of the victims represented by the German lawyer Remo Klinger against KiK.[57] In 2016, Following private international law standards, this civil proceeding was filed in Germany in application of Brussels I[58] where the District Court of Dortmund declared its jurisdiction and granted legal aimed to the claimants covering the costs.

The applicable law was Pakistani Law as general rule according to article 4 of Rome II[59]. However, the applicable law was a point of discussion regarding the time-barred matter. The defendant claimed that the complaints were statute barred under Pakistani Law, nevertheless the claimants argued that German law was applicable in this regard as in 2014 KiK agreed to waive any possible statutory limitation[60] and according to German law the legal complains were not clearly statute barred.

Regarding the merits of the case;

The Claimants' argument was based on the negligent conduct of KiK derived from the failure to comply with its duty of care, causing a breach of this duty and the causation. Therefore, the claimants try to demonstrate the negligent liability of KiK by demonstrating that KiK owed to the victims a duty of care, that KiK's act of omission triggered a breach of the duty and a causal connection between the act of omission and the harm suffered by the victims. The arguments are developed as follows[61]:

- KiK had the duty of care towards Ali Enterprises because KiK assumed responsibility to ensure a safe and healthy environment in the workplace of the factory. According to the common law precedents[62], to demonstrate whether KiK assumed such responsibility it is required that the harm produced was foreseeable, that there was a sufficient proximity in the relationship between KiK and Ali Enterprise and that is just, fair and reasonable to impose this duty.
  The claimants defended that the harm is foreseeable because the code of KiK incorporated safety and health conditions as a requirement for suppliers and other parties, including the decision to verify these requirements by inquiring the expert opinion of an auditing company such as RINA. By doing so, KiK committed to introduce these conditions in its contracts as a legal prerequisite before signing any trade agreement with third parties. KiK was assuming responsibility regarding the health and safety conditions of the work environment.

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[57] A. Marx, C. Bright and others, *Access to legal remedies for victims of corporate human rights abuses in third countries*, Belgium, 2019, p. 62 https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf (accessed 8 May 2020).

[58] Regulation n°1215 2012 (EU) , art. 4 establishes that the competent Court is from the MS where the defendant is domiciled, and art. 63, the domiciliation of a company is determined by its statutory seat, central administration or principal place of business.

[59] Regulation n° 864 2007 (EC), art. 4 establishes that the law applicable shall be the law of the country in which the damage occurs.

[60] ECCHR, "Paying the price for disasters: The Baldia factory fire and the role of German clothing retailer KiK" January 2019, p. 4

[61] C. Terwindt, S. Leader, A. Yilmaz-Vastardis, J. Wright, 'Supply chain liability: pushing the boundaries of the common law?', *Journal of European Tort Law*, vol. 8, 2018, p.13.

[62] Caparo Industries plc v Dickman, 2 AC 605, 1990 (UK)

The proximity of the relationship between KiK and the factory is fulfilled by the control KiK exercised over the working environment as the German company purchased around the 75% of the annual production of the factory, and intervenes in the factory´s operations by monitoring and directing the safety management[63]. In addition, this control is even recognised by KiK in *KiK Sustainability Report 2010*[64].

- The Breach of the duty is determined by the failure to improve safety conditions of the factory. KiK would have met its obligations derived from its duty of care, for example, by providing adequate emergency exist, fire alarms, safety trainings, etc., and eventually by building a safe and healthy working environment, thus preventing from any potential risk that employees could suffer.
- The causal link between the act of omission and the harm suffered is fulfilled since it is demonstrated that the claimants would have not suffered injuries if the defendant had performed the adequate actions derived from its duty of care. The claimants argued that the main obstacles for workers trying to save their lives were the lack of adequate safety and health arrangements in the factory as it is expressed in the fire report. Hence, this harm could have been avoided by the establishment of proper safety measures.[65]

The defendant responded to this accusation by arguing that KiK code was not sufficient to demonstrate the assumption of responsibility because this code is not legally binding, but it is based on voluntary and not enforceable principles. Furthermore, KiK held that Ali Enterprise was an independent business, and that the relationship with KiK was not close enough to claim a duty of care. The defendant also argued that KiK was not aware of the safety defects in the factory, as the Italian auditing company RINA had verified the compliance with the safety and health requirements. Finally, the representative of KiK in the Court also mentioned the arson cause of the fire, and therefore it could not be argued that the fire and subsequent deaths were caused by the lack of fire safety measures.[66]

In order to decide over this question, the German Court requested a legal opinion to a Professor from the University of Bristol in order to clarify some points of Pakistani law, these related to the scope of liability of the defendant, the statutory limitations and which party had the burden of the proof.[67]

[63] P. Wesche, M. Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK', *Human Rights Law Review*, n° 2, vol.16, 2016, p. 373, https://www.deepdyve.com/lp/oxford-university-press/holding-companies-liable-for-human-rights-abuses-related-to-foreign-g0cItIFSwi (accessed 11 May 2020).

[64] KiK Sustainability Report, 2010, p 13. "We are responsible for more than 20,000 employees in Europe, people who we employ directly, as well as those workers involved in producing goods ordered by us in their respective countries. [...] It is therefore logical and economically prudent […] to define social and ecological standards, and adhere to them, and also to assume social responsibility above and beyond our core business activities", http://www.kik-textilien.com/unternehmen/fileadmin/user_upload_de/Tschechien/NHB_E_online.pdf (accessed 11 May 2020).

[65] C. Terwindt, S. Leader, A. Yilmaz-Vastardis, J. Wright, 'Supply chain liability', p. 21.

[66] A. Marx, C. Bright and others, *Access to legal remedies*, p. 63.

[67] LG Dortmund, Beschluss vom, 7 O 95/15, 29 August 2016.

Finally, the Regional Court of Dortmund decided not to investigate the facts and not to decide over the merits of the case. The lawsuit was rejected because the Court considered that the legal complaint was statute-barred under Pakistani law and that the waiver was void.[68]

3. Shell vs Nigerian communities

3.1 Factual Background

The Royal Dutch Shell (Shell) is a transnational energy company that exports, produces, refines and markets oil and natural gas all around the world. It has its headquarters in The Hague, The Netherlands[69] as well as a registered office in the United Kingdom.[70] Shell exploits Nigerian oil since 1958, and today it is the dominant company in the exploitation of oil resources in this country. Especially in the area of Niger Delta, Shell operates through its subsidiary Shell Petroleum Development Company of Nigeria (SPDC).[71] SPDC is registered in Nigeria and is subject to Nigerian legislation. In addition, SPDC is the operator of a joint venture whose members are the Nigeria National Petroleum Corporation, Total Exploration and Production Nigeria Ldt, Nigeria Agip Oil Company Ldt and SPDC itself. However, Shell is not part of the joint venture.[72]

SPDC has been exploiting this area for many years, causing oil spills from its more than 6000 kilometres of pipelines, which were reported to be frequent since 1950, and have provoked widespread pollution oil in the surrounding areas of the Niger Delta, affecting the livelihood and drinking water of the communities settled around.[73] Specifically, in 2004, people from the Goi village, most of them farmers and fishermen had to move out from their lands because they became uninhabitable.[74] The UN Environmental Programme published an in-depth assessment of this case in 2011, related to the environmental harm suffered in the Niger Delta, specifically in Ogoniland region. In the summary of findings this assessment concluded that "oil contamination in Ogoniland is widespread and severely impacting many components of the environment. Even though the oil industry is no longer active in Ogoniland, oil spills continue to occur with alarming regularity. The Ogoni people live with this pollution every day." The report also concludes that the soil in Ogoniland is affected by petroleum hydrocarbons and that two-third of the contaminated land sites are close to the oil industries facilities. Also, vegetation

[68] ECCHR and others, Regional Court in Dortmund dismisses Pakistanis' complaint against KiK', *KiK evades its legal responsability for Factory fire*, 10 January 2019. https://www.ecchr.eu/fileadmin/Pressemitteilungen_englisch/PR_KiK_Pakistan_Dortmund_judgment_20190110.pdf (accessed 15 May 2020).

[69] Royal Dutch Shell, 'Who we are' [website] https://www.shell.com/about-us/who-we-are.html

[70] His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, EWHC 89, 2017 (TCC), para. 4, https://www.casemine.com/judgement/uk/5a8ff77260d03e7f57eac85e (accessed 15 May 2020).

[71] Royal Dutch Shell, 'SPDC – The Shell Petroleum Development Company of Nigeria' [website] https://www.shell.com.ng/about-us/what-we-do/spdc.html (accessed 15 May 2020).

[72] His Royal Highness Emere Godwin and Others v Shell, para. 4.

[73] A. Marx, C. Bright and others, *Access to legal remedies*, p. 74.

[74] J. Vidal, 'Shell verdict will determine whether other firms could be tried for oil spills', *The Guardian*, 29 January 2013, https://www.theguardian.com/environment/blog/2013/jan/29/shell-oil-spills-niger-delta (accessed 30 May 2020).

and water in this area was severely harmed.[75] Finally, the reports reveals that exposure to pollution caused serious risk to human health.[76]

3.2 Proceedings before National Courts

According to a report published by Amnesty International in 2018, Shell is facing different judicial investigations in several countries. Every year victims of contaminating environmental impacts launch legal claims against this company all around the world. Lawsuits have been raised in the US, Italy, Philippines, Nigeria and the Netherlands in the last years.[77] Specifically, for the environmental harm suffered in the Niger Delta, judicial proceedings have been opened in Nigeria, the Netherlands and United Kingdom.

3.2.1 Proceedings in Nigeria

Many cases have been opened in Nigeria, as many victims have alleged violations of human rights committed by SPDC before Nigerian courts. Some of these cases are *Anaro and others v. SPDC* in 2015, *Arthur John and others v. SPDC* in 2011, *Oruambo v. SPDC and others* in 2011, *Edamkue v. SPDC* in 2009, etc.[78] In most of the cases victims did not find proper access to justice, as it is held that the Nigerian judicial system is ineffective, under-developed and non-independent.[79] In fact, communities in Nigeria recognised that Nigerian courts are unfit to hear cases against SPDC.[80]

This case is especially sensitive from a political perspective given the contribution of this Joint venture in the export earnings in Nigeria. Approximately 90% of the earnings are accounted by this industry.[81] Therefore, real independence of judiciary is required in order to resolve the case impartially and effectively. Nevertheless, this seems impossible to achieve in Nigerian courts, hence many claimants have sought justice in the Netherlands and United Kingdom, arguing the nationality of the parent company and its duty of care as a connection with the case.

3.2.2 Proceedings in the Netherlands

Four farmers of the villages Goi, Oruma and Ikot Ada Udo located in the Niger Delta presented a lawsuit before the Dutch civil courts in 2008 against Shell for the pollution generated in this area by the activity of its subsidiary SPDC. The claimants sought for a compensation based on Shell and SPDC did not comply with their duty to protect the farmers from environmental harm, which provoked serious economic loss and soil and water contamination in their

[75] United Nations Environment Programme (UNEP), *'Environmental Assessment of Ogoniland'*, 2011, p. 9 and 10, https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf (accessed 30 May 2020)
[76] Ibid.
[77] Amnesty International, 'Seeking justice, the rising tide of court cases against Shell', May 2018, p. 1 and 2 https://storage.googleapis.com/planet4-netherlands-stateless/2018/06/Investor-Briefing-Seeking-justice-the-rising-tide-of-court-cases-against-Shell.pdf (accessed 30 May 2020).
[78] Ibid., p. 3, footnote 6.
[79] A. Marx, C. Bright and others, *Access to legal remedies*, p. 75.
[80] K. Schaps and L. George, 'Shell battles Nigerian Communities in high-stakes London lawsuit', *Reuters*, 6 January 2017, https://www.reuters.com/article/us-shell-nigeria-lawsuit-idUSKBN14Q1BR (accessed 30 May 2020).
[81] D. Blackburn, International Centre for Trade Union Rights (ICTUR), *Removing Barriers to Justice: How a treaty on business and human rights could improve access to remedy for victims*, Amsterdam, SOMO, 2017, p. 22. https://www.somo.nl/wp-content/uploads/2017/08/Removing-barriers-web.pdf (accessed 30 May 2020).

villages.[82] In addition, the victims requested the disclosure of documents from Shell regarding the conditions of the oil pipelines, internal policies and operational practices of the company.[83]

The cases were filled before Dutch Courts in application of Brussels I Regulation, whose territorial jurisdiction is limited to EU MS according to article 2(1) and 60(1), and the Dutch nationality of the parent company Shell met this requirement.

The statutory seat of SPDC is located in Nigeria, out of Brussels I jurisdiction. However, the claimants alleged that under Dutch law, applicable law in this matter, the article 7(1) of the Dutch Code of Civil Procedure recognises jurisdiction of the Court over a defendant that is called to the same proceeding given a connection with other defendants to the extent that reasons of efficiency justify a joint treatment.[84] Throughout the parent-subsidiary connection, the claimants argued that SPDC committed a tort of negligence as it failed to protect them from the oil spillage, consequently suffering environmental harm and economic loss.[85]

On 30 December 2009, the Court in The Hague dismissed the attempts of Shell to contest jurisdiction.[86] This is a very relevant case because it is the first time that a Dutch multinational company is sued before a Dutch court for human rights violations committed in third countries.[87]

The applicable law to decide over corporate liability in this case was Nigerian law according to Brussels I, art. 4. On 30 January 2013 the District Court in the Hague dismissed the claims holding that the oil spills were caused by acts of sabotage by third parties, related to bunkering and similar practices whereby thieves tap into pipelines to siphon off some of the oil for themselves,[88] rather than poor maintenance attributable to Shell or SPDC negligence. Thus, the court did not recognise breach of duty to care under Nigerian law in four out of five cases brought to this Court. Nevertheless, in the case of oil spills in the village of Ikot Ada Udo, this Court found SPDC liable under tort of negligence. Despite the sabotage performed by third victims, SPDC owed a duty of care to the claimants that was breached due to the lack of prevention and remedial action. The Court ordered the Nigerian subsidiarity to pay a compensation to the victims for the harm and loss suffered. By contrast, the claims against the parent company were dismissed on grounds that Nigerian law does not recognise the figure of duty of care for the parent company.[89]

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[82] Ibid.

[83] G. Skinner, R. McCorquodale and O. De Schutter, *The Third Pillar, Access to Judicial Remedies for Human Rights Violations by Transnational Business*, The International Corporate Accountability Roundtable (ICAR) 2013, p. 44 https://corporatejustice.org/documents/publications/eccj/the_third_pillar_access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf (accessed 5 June 2020)

[84] Art. 7(1) Dutch Code of Civil Procedure. A. Marx, C. Bright and others, *Access to legal remedies* p. 76.

[85] M.T. Kamminga, 'Transnational Human Rights Litigation against Multinational Corporations Post-Kiobel' in C. Ryngaert, E.J. Molenaar and S.L.H. Nouwel (eds.) *What's Wrong with International Law*, Brill Nijhoff, 2015, p. 158.

[86] D. Blackburn, *Removing Barriers to Justice*, p. 23

[87] A. Marx, C. Bright and others, *Access to legal remedies, p.* 75

[88] J. Kaufman, 'Shell May Have to Compensate Villagers for Oil Damage from Sabotage or Theft', *Earthrights International*, 27 June 2014, https://earthrights.org/blog/shell-may-have-to-compensate-villagers-for-oil-damage-from-sabotage-or-theft/ (accessed 5 June 2020)

[89] D. Blackburn, *Removing Barriers to Justice*, p. 23

Some of the claimants whose cases had been dismissed appealed before the Dutch Court of Appeal asserting the application of a direct parent company duty and placing additional demands on Shell. This proceeding is also relevant due to the consideration of the Court over the parent company liability which seemed to overturn the previous judicial resolution.[90] The following arguments were raised by both parties:

The claimants argued that the oil spill and environmental damage were foreseeable caused by a corrosion problem which was consequence of systematic maintenance failures committed by SPDC. The claimants also insisted on the parent duty of care, holding that it was aware, or it should have been aware about the systemic maintenance failures of its Nigerian subsidiary, as a potential environmental harm was foreseeable consequence of such failure, thus it could have been prevented. Shell was negligent because it owed a duty of care to Nigerian farmers and fishermen settled in the Niger Delta. Shell failed to adequately monitor and supervise the maintenance of the pipelines and the clean-up of oil spills in Nigeria.[91]

The defendants, specifically SPDC, held that the claimants had abused of procedural law by presenting a claim before Dutch Courts against Shell that was bounded to fail, which was merely used as a means to bring the claim against SPDC throughout the art. 7(1) of the Dutch Code of Civil Procedure.[92] Regarding the applicable law, a consensus between the parties agreed on Nigerian law, and Shell held that Nigerian judicial precedents do not recognise liability of a parent companies for damages caused by its subsidiary, hence no legal basis are provided to assume a violation of duty of care by the parent company in this context.[93]

The Court of Appeal rendered an interim judgement on 18 December 2015, pronouncing over procedural aspects and the international jurisdiction of the Court, however the substantive matters will be assessed in the next appeal stage. The Appeal Court considered that the burden of proof to demonstrate that the strict liability does not apply, because they were third parties who caused the oil spill by sabotage, falls on Shell.[94]

Important premises for the next substantive stage of appeal are also relevant in this judgement. The Court of Appeal indicated that it could not be excluded that the parent company may be expected to take an interest in the oil spills. [95] This Court also rejected the argument about the inexistence of the duty of care figure in the parent company under Nigerian law, given the fact that common law principles underlie Nigerian law, thus English case-law is a relevant source of Nigerian law.[96] Neither this Court accepted Shell`s lack of knowledge related to the spillage

[90] Ibid.
[91] A. Marx, C. Bright and others, *Access to legal remedies, p.* 77.
[92] C. Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of its Subsidiary: The Example of the Dutch Shell in the UK and in the Netherlands', in A. Bonfanti (ed.) *Business and Human Rights in Europe: International Law Challenges*, Routledge, 2018, p. 212.
[93] Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others, 200.126.843, 200.126.848, 2015, (NL), para 3.2. https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015:3586 (accessed 5 June 2020)
[94] Prakken d'Oliveira Human Rights Lawyers, 'Statement of Appeal Regarding the Dismissal of the Motion to Produce Documents by Virtue of Section 834a DCCP', Court of Appeal of The Hague, Case numbers: 200.126.834, 200.126.804, 200.126.843, 200.126.848, 200.126.849, 200.127.813 Para 218.
[95] Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others, para. 3.2
[96] C. Bright, 'Le devoir de diligence de la société mère dans la jurisprudence anglaise', *The Duty of Due Diligence of the Parent Company in English Case-Law*, Droit Social, no 10, 2017, p. 828, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156264 (accessed 5 June 2020).

and maintenance failures as an argument to prove its defence.[97] Therefore, this Court supports the existence of a duty of care in between the parent company and the claimants. Finally, the Court of Appeal also recognises the legitimate interest on the inspection of some internal documents that belong to Shell under certain privacy conditions.[98]

3.2.3 Proceedings in United Kingdom

Two parallel cases must be distinguished related to Nigerian communities' vs Shell before British Courts due to the environmental harm suffered in the Niger Delta. Brussels I was the regulation applied to bring both cases before national courts in the UK.

On 23 March 2012, approximately 15,000 Nigerians, specifically from the Bodo community, sought for compensation against Shell for causing oil spills in 2008 in their region after failing to provide adequate maintenance and adopt preventive measures.[99] Likewise the case before Dutch Courts, in this case Shell alleged that the oil spills had been caused by the sabotage of third parties rejecting any type of negligence.[100] But the decision of the British Court took a different direction. On 20 June 2014, the Court held that Shell could be held liable if it did not take preventive measures to protect the claimants from its subsidiary's failure or from external parties' intervention. Finally, and before the full trial took place, Shell agreed to provide a £55 million compensation to the victims out of the court settlement. This claim was filed against Shell and SPDC joined the case on voluntary basis. [101]

The Bodo settlement is considered as a long-awaited victory for the thousands of people who lost their livelihoods through the corporate failings of Shell.[102]

On 14 October and 22 December 2015, the Ogale and Bille communities filed claims against Shell and the Nigerian subsidiarity before the UK High Court. This claim was filed on behalf of 42,500 residents of Nigeria who also sought for a compensation for extensive oil pollution that affected their livelihoods and environment in this region, holding that Shell and SPDC failed to adequately prevent oil spills.[103] In this case, English procedural law was applied to establish the jurisdiction of the British court over SPDC.[104] On 26 January, the High Court held that there was not sufficient evidence to declare the high degree of oversight, control or direction of Shell over SPDC, hence the parent company could not be held legally liable for the pollution generated by its Nigerian subsidiary. The claimants appealed this decision, however on 14 February 2018, the British Court of Appeal upheld the High Court's decision, confirming that Shell did not hold a duty of care towards the claimants.[105]

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[97] Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others, para. 6.8.
[98] Ibid., para 8.
[99] The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd, EWHC 1973, 2014, (TCC)
[100] D. Blackburn, *Removing Barriers to Justice*, p. 23
[101] Ibid.
[102] Amnesty International, 'Shell's Growing Liabilities in the Niger Delta: Lessons from the Bodo court case', 2015, p. 5. https://www.amnesty.org.uk/files/amnesty_international_briefing_on_shell_for_investors.pdf (accessed 6 June 2020).
[103] Business and Human Rights Resource Centre, 'Shell lawsuit (re oil spills & Ogale & Bille communities in Nigeria - Okpabi v Shell)', https://www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-ogale-bille-communities-in-nigeria-okpabi-v-shell (accessed 5 June 2020).
[104] A. Marx, C. Bright and others, *Access to legal remedies*, p. 79
[105] Business and Human Rights Resource Centre 'Shell lawsuit'

This decision is not compatible with modern approaches to corporate social responsibility and due diligence. The consideration of parent companies as independent companies, that owes no duty of care to locals for human rights violations committed by their subsidiaries, allows them to pay no or minimal attention to the way of performing of its subsidiaries and towards its entire supply chain. This resolution sets an especially dangerous precedent.

On 12 May 2020, claimants filed an appeal before the UK Supreme Court. Over 40 UK and international human rights, development and environmental NGOs had submitted a letter supporting the application of appeal on April 2018. On July 2019, the Supreme Court had granted legal permission. The claimants argued that Shell owed them a duty of care related to the extensive oil pollution, environmental and livelihoods harmed caused by their business activities. In addition, the International Commission of Jurists, the Corporate Responsibility Coalition Limited, and Corner House Research submitted written requests to the Supreme Court to intervene in the case.[106]

4. European Defence Industry vs ECCHR and other partner organisations

4.1 Factual Background

The civil war in Yemen began in 2014 when Houthi insurgents took control of the capital of Yemen and Sana, the largest city, by force. They demanded lower fuel prices and a change of government. The leading president at that moment, Hadi, and his government resigned and Hadi eventually fled to Saudi Arabia. The rebels seized the presidential palace in January 2015.[107]

In the beginning of March 2015, a coalition was formed by Saudi Arabia, the UAE, Bahrain, Kuwait, Egypt, Morocco, Sudan and Qatar, whose leaders were Saudi Arabia and UAE. They launched a campaign against the Houthi insurgents consisting in economic isolation and air strikes. In 2019, the UN declared that the humanitarian crisis in Yemen remained as the worst in the world. Civilians faced serious risks to their safety, well-being and basic rights. After five years of conflict, tens of thousands of people have been killed or injured, and at least 17,700 are civilians as verified by the UN.[108] There are evidences that prove the coalition leaded by Saudi Arabia and UAE committed serious violations of humanitarian law. In a communication submitted to the ICC on 11 December 2019 by EECHR and Mwatana together with other partner organisations 26 incidents are reported about airstrikes that were conducted by the coalition which resulted in indiscriminate and disproportionate attacks that led to civilian deaths and injuries.[109]

The involvement of corporations in this conflict arises with the fact that European companies provided all types of arms supplies to the coalition members. Not only the European businesses in question, but also States have indirectly contributed to the provision of arms to the war in

[106] Ibid.

[107] Council Foreign Relations, 'Global Conflict Tracker' *War In Yemen*, [website] https://www.cfr.org/global-conflict-tracker/conflict/war-yemen (accessed 10 June 2020).

[108] United Nations Yemen, *2019 Humanitarian Needs Overview*, 2019 https://yemen.un.org/en/11690-yemen-2019-humanitarian-needs-overview (accessed 10 June 2020).

[109] ECCHR, 'Case Report: Made in Europe, bombed in Yemen', February 2020, p. 2, https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf (accessed 10 June 2020).

Yemen by issuing export licenses. For air warfare manufacturing, the EU MS involved are Germany, Spain, France and Italy throughout two joint ventures named Typhoon and Tornado fighter jets, which are made up of the following European Transnational companies: Airbus Defence and Space GmbH (Germany), Airbus Defence and Space S.A. (Spain), and Leonardo for the Typhoon, as well as Leonardo, BAE, Airbus, and Panavia Gmbh (Germany) for the Tornado.[110] For bombs and missiles provisions, the MS in question are France, UK and Italy throughout the companies MBDA, Raytheon UK and RWM Italia or Thales.[111] The European companies and political actors involved had access to information that revealed that the coalition had directly committed humanitarian abuses, and still decided to proceed with supply operations, thus this awareness make them accomplice and partially responsible for humanitarian and human rights violations in Yemen.

4.2 Proceeding before the International Criminal Court

The communication mentioned previously was submitted to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) by ECCHR, Mwatana (Yemen), Rete Disarmo (Italy), Centre Delàs (Spain), the Campaign Against Arms Trade (UK) and Amnesty International Secretariat to the call upon the ICC to investigate the corporate legal responsibility and political responsibility of governments from Germany, France, Italy, Spain and the UK. The defendant companies are Airbus Defence and Space GmbH, BAE Systems Plc., Dassault Aviation S.A., Leonardo S.p.A. and Rheinmetall AG.

This issue has not been addressed by any national law enforcement agencies nor by the ICC hitherto. ECCHR, Mwatana and its partners decided to bring the case before the ICC rather than National courts given the complexity of investigating these crimes at a domestic level. First, the armaments industry is especially opaque, with complex business structures. Second, there is a lack of willingness and ability to investigate companies, and finally, the fact that the main crimes are alleged to have been committed in Yemen.[112]

Nevertheless, it is foreseeable that this communication will also face challenges at ICC level. After opening a preliminary investigation, it remains to be seen whether the OTP will consider that there is a reasonable basis to proceed with the investigations, given procedural and material barriers could prevent this communication from succeed. By contrast, this may also be a pioneer case, a historic step towards the recognition of international criminal liability of corporate actors in the context of a war conflict and the defence industry.

The communication alleges that fighter jets and other military equipment supplied by these companies were used in indiscriminate attacks against civilian objects since March 2015 which may have violated Articles 8(2)(c)(i), and 8(2)(e)(i), (ii), (iii), and (iv) of the Rome Statute of the ICC.[113] In order for this communication to trigger a judicial investigation and an eventual

[110] Ibid., p. 5
[111] Ibid.
[112] ECCHR, 'Accountability for alleged war crimes in Yemen – European arms exporters' responsibility is a case for the International Criminal Court', January 2020, p. 7. https://www.ecchr.eu/fileadmin/Q_As/QA_ICC_arms_Yemen_ECCHR_CAAT_Mwatana_Amnesty_Delas_Rete.pdf (accessed 10 June 2020).
[113] M. Aksenova, 'Extraterritorial Obligations of Arms Exporting Corporations: New Communication to the IC' *Opinio Juris*, 2020, http://opiniojuris.org/2020/01/14/extraterritorial-obligations-of-arms-exporting-corporations-new-communication-to-the-icc/ (accessed 10 June 2020).

judicial resolution that declares corporate legal responsibility and political responsibility, the following jurisdictional challenges must be favourably considered.

4.2.1 Admissibility criteria: Jurisdiction ratione personae challenges

The admissibility criteria refers to procedural requirements related to jurisdiction and competence that an application to the ICC shall meet in order to subsequently open an investigation on the merits of the case. The merits of this case are related to the decision on whether there is a violation of art. 8 of Rome Statute or not, i.e. to decide upon the commission of war crimes in Yemen. However, only the admissibility criteria will be hereunder discussed, as the most important barriers for the recognition of corporate liability are found in this phase of the proceeding.

A key question of admissibility criteria in this case is ICC jurisdiction ratione personae to declare criminal responsibility of business enterprises. According to the article 25 of Roma Statute, the jurisdiction ratione personae is based on the principle of individual criminal responsibility. The 25 (1) establishes that the Court shall have jurisdiction over natural persons pursuant to this Statute, and there is no provision that mentions its jurisdiction over legal persons or corporations. However, the ICC has jurisdiction over individuals acting in their corporate capacity, such as managers or executives.[114] Hence, this communication contains the accusation against managers and executives of the business enterprises previously mentioned, and the political personalities that issued the export licenses.

In this regards, a noteworthy jurisdictional ratione personae challenge may appear in this case related to the nature of responsibility of these individuals (corporate actors) within the European defence companies for crimes committed against civilians in Yemen. There must be sufficient evidences to consider that they indirectly participated in the crimes, otherwise the jurisdictional criteria may not be sufficiently met.

The article 28 of Rome Statute establishes the responsibility of commanders and other superiors, especially those involved in military operations that exercise authority and control. On the contrary, in the context of corporative actors, the causal link with the crime commission is more difficult to prove, given the goal of business executives and managers may not be directly to engage militarily or support one of the warring parties, but to conduct successful business operations that increase their profit with a side-effect of facilitating criminality.[115] Very seldomly companies commits international crimes directly. Thus, for business people to be found complicit of war crimes and indirectly responsible, the ICC has to consider the aiding and abetting as a mode of criminal participation that managers and executives carried out in order to establish the connection between the accused and the criminal facts.

Some ad hoc International Criminal Tribunals, such as the Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCL) and the Tribunal for Yugoslavia (ICTY), considered that companies aided and abetted the perpetrator if the conduct (actus reus) and mental (mens rea) elements are identified in their actions. [116] The actus reus consists of "acts directed to assist, encourage or lend moral support to the perpetration of a crime. The assistance must have a

[114] Ibid.

[115] M. Aksenova 'Extraterritorial Obligations'.

[116] C. Schliemann, L. Bryk, *Arms Trade and Corporate Responsibility*, Friedrich-Ebert-Stiftung, 2019, p. 13 http://library.fes.de/pdf-files/iez/15850.pdf (accessed 12 June 2020).

«substantial effect» on the commission of the crime"[117] and by mens rea, it was considered sufficient the knowledge that their acts would assist the commission of the crime.[118] If this interpretation is thereby followed by the ICC in the case of Yemen, corporate actors that represent the European defence companies may be declared liable.

However, the position of the ICC in this matter may imply the establishment of a higher threshold for the mental element, therefore its interpretation of the aiding and abetting requirement could be more restrictive than ad hoc tribunals.[119]

The article 25 (c) of Rome Statute establishes that a person shall be criminally responsible within the jurisdiction of the ICC if that person "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission"[120].

The requirement of a «purpose» of facilitating the commission of a crime may imply that it is not sufficient that the company simply is aware, or has the knowledge about its assisting acts to be declared responsible. Under this line of reasoning, it may be concluded that the purpose of the company is in line with its corporate goals, and that the accused did not act with criminal purpose, even though the side-effect was a crime assistance. Nevertheless, it is not clear that this is the position of the ICC towards this matter, as there is only one judgment, Bemba case, where the ICC rejected the mens rea standards developed by ad hoc tribunals. Furthermore, this was a different case, as it was not judged for the commission of international crimes, but for an offence against the administration of justice.[121]

To sum up, challenges related to jurisdictional ratione personae may arise in this proceeding, or could even prevent the ICC from opening a judicial investigation in the preliminary phase, but this is only the worst case scenario. By contrast, the ICC could rule a precedent that could pave the way towards recognition of criminal corporate liability in a very opaque sector as it is the armaments industry, which would be a triumph in the fight against impunity of humanitarian law and human rights abuses.

[117] Ibid.
[118] Ibid., p. 14.
[119] M. Aksenova 'Extraterritorial Obligations'.
[120] Art. 25, Rome Statute of the International Criminal law, 1998, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf (accessed 10 June 2020).
[121] C. Schliemann, L. Bryk, *Arms Trade*, p. 14.

❖ CHAPTER THREE: *Analysis of Inconsistencies between Theory and Practice* based on EU theoretical and normative framework and the three case studies.

The determination of the main compliance challenges of UNGPs implementation in practice is essential to the subsequent elaboration of efficient policies and legislation. On the contrary, if EU strategies and action plans do not reflect them, no legal or political initiatives established will truly resolve the serious issues of human rights protection in the world business arena. What is more, these initiatives will be at stake to fall into incoherence with EU core of values and EU commitment on the implementation of UNGPs. The considerable number of policies, strategies and legislation adopted hitherto implies already a risk of getting lost on bureaucracies, general and non-legally binding objectives with no real implementation.

Therefore, the aim of this chapter is to point out concrete in-practice barriers and compliance challenges presented in the textile, petroleum and defence sectors represented by the cases discussed above. This analysis will consist on the identification of the main legal and procedural obstacles, the analysis of specific breaches of UNGPs and eventually drawing conclusions on how these challenges are being effectively addressed by Member States NAPs.

Where no mandatory human rights due diligence exists, NAPs stay as the main point for business responsibilities in compliance with the UNGPs, as they are developed by States to meet the clear expectation that their national businesses respect human rights, even when the operate transnationally. Therefore, for those EU MS that have not enforced legal due diligence requirements on businesses yet –most of them–, they are expected to establish actions especially effective within their NAPs to prevent corporate human rights abuses.

1. Case Mapping: Overview of the main compliance challenges & NAPs contributions and limitations

Economic Sector and Case Study	Specific Legal and Procedural Barriers	Additional breaches of UNGPs	Actions within NAPs to tackle the challenges	NAPs limitations
Textile Sector (*KiK, RINA and Ali Enterprise vs Jabir and others*)	▪ Short statutory limitation periods in tort actions ▪ Strong burden of proof for victims ▪ Impossibility of filling a collective claim in Germany ▪ Private International Law limitations ▪ Difficult attribution of legal responsibility to retailers.	▪ Low and inefficient Pakistan's compliance with its State duty to protect ▪ Ineffective OECD complaints system ▪ KiK lack of compliance with its code of conduct and ethics commitment ▪ Procedural barriers for access to remedy	*Germany* ▪ Partnership for Suitable Textile between Europe and Central Asia leaded by Germany and the project "Social and labour standards in the textile and garment sector in Asia" ▪ CSR Award ▪ Certification mark legally required to verify the compliance of all businesses *Italy* ▪ Legally rating tool ▪ New figure of direct legal liability ▪ Improvement of OECD complaints system	*Germany* ▪ Voluntary membership, not legally binding objectives or real transparency within the supply chain have been effectively achieved. ▪ No action planned to impose mandatory due diligence for businesses ▪ No actions to tackle the judicial barriers identified and to improve access to remedy for victims *Italy* ▪ Impartiality of the certifying body is not guaranteed ▪ No actions to encourage promptness in judiciary ▪ No actions to increase effectiveness of OECD recommendations
Petroleum Sector (*Shell vs Nigerian Communities*)	▪ Private International law limitations ▪ Difficult attribution of shared legal responsibility to parent companies ▪ No defined duty of care figure in the applicable Nigerian law	▪ Weak Nigerian State duty to protect: No judiciary independence ▪ Absence of extraterritorial regulation in home States. And legal uncertainty on the control of parent companies over subsidiaries ▪ Shell lack of compliance with its code of conduct	*The Netherlands* ▪ Voluntary CSR agreements on sectors selected by the Sector Risk Analysis project *United Kingdom* ▪ Nairobi Process to promote UNGPs compliance in extracting processes in Kenya ▪ International mechanism to monitor businesses compliance with their codes	*The Netherlands* ▪ No legal requirements, only voluntary commitments of due diligence and information disclosure. *United Kingdom* ▪ No establish of mandatory due diligence or legislation that attributes obligations to British multinationals. ▪ No action related to British parent companies responsibility over their subsidiaries
Defence Sector (*European Defence Industry vs ECCHR and others*)	▪ Absence of jurisdiction over corporations in criminal international law ▪ High standards of means rea to consider the complicity of corporate actors ▪ Hiding corporate responsibility behind government authorisations	▪ No mandatory due diligence requirements for arms manufacturer ▪ Reverse effect of License mechanism ▪ Businesses non-compliance with their codes ▪ Difficult identification of victims ▪ National and International obstacles for access to justice	*Germany, France, Italy, Spain and the UK* ▪ Concrete mention to the export license system in the British Nap ▪ Corporate Duty of Vigilance Law that provides for mandatory human rights due diligence in the French NAP	*Germany, France, Italy, Spain and the UK* ▪ Total absence of objectives and actions tackling defence sector issues ▪ Ineffectiveness of export license system ▪ Poor implementation of the French Law

2. Textile Sector: KiK, RINA Ali Enterprise vs Jabir and Others

KiK case is not an isolated incident of corporate abuses within the textile sector. The well-known case of Rana Plaza textile factory in Bangladesh, in which 1134 people died due to a structure failure of the building in 2013, [122] is a similar example of human rights gross violations committed by European multinationals that remain unpunished. Indeed, many European textile companies outsource their production seeking for a reduction of costs, expanding their supply chain network, especially in South Asian countries. This industry is thereby characterised by its complex business structure and contractual relations, full of suppliers, subsidiaries and subcontractors all over the world. This jeopardises the recognition of legal liability of corporations for the commission of human rights abuses, worsen by the fact that the absence of real transparency within these companies is also a serious issue.

Since the UNGPs were elaborated, and the EU committed to implement them, MS have developed certain initiatives to confront human rights issues along the supply chain and the textile sector. However, the most important obstacles surrounding this industry, almost ten years later, have not been effectively addressed; there is a considerable lack of coordination among EU MS on how to face these issues; the EU has not enacted a legal framework on due diligence obligations for supply chains in the garment sector, nor it does ensure transparency within their business structures; and there are still serious judicial and legal barriers for victims to access to remedy.

The following analysis of KiK case identifies these and other relevant human rights issues embedded within this sector, and emphasises EU MS recent initiatives developed to tackle them, which seem not to be sufficiently ambitious.

2.1 Legal and Procedural Barriers

Judicial proceedings of this nature become especially complex since there is neither specific international legally binding treaty nor European framework that regulate corporate human rights obligations and foresee defined rules of Court jurisdiction in this matter. Thus, these cases are based on Private International rules and national legislation of the States in question. Three parallel proceeding were opened at national level, with different prosecutors and different procedural and substantive applicable laws. Important legal and procedural barriers thereby appear in the achievement of justice against KiK, RINA and Ali Enterprise, which can be considered separately as follows:

Short Statutory limitation periods in tort actions: The German Regional Court decided to reject KiK case due to the legal complaint was statute-barred under Pakistani law. Subsequently, merits of the case cannot be heard by the judge. Civil actions have generally a very short limitation period, in between one and three years, which is especially hard to hold for cases where international elements are present and actors from different nationalities are involved. In these cases, victims may find additional difficulties to access the Court that are not taken into account, such as language, culture, geographical distance, unknown applicable law and other procedural complications.

[122] See 'Rana Plaza', *Clean Clothes Campaign*, https://cleanclothes.org/campaigns/past/rana-plaza (accessed 14 June 2020).

Strong Burden of Proof for Victims: To find evidences is particularly hard for claimants in cases of this nature. The international element implies that collecting evidences require long-distance displacement and inaccessible sources. Arguments in favour of confidentiality can be raised hence information may not be provided. In RINA case, this company refused to reveal certain information in order to comply with its confidential obligations[123]. Furthermore, the demonstration of the close relationship between independent companies and its suppliers is especially hard, when they are legal separate businesses but in practice, the corporative control exercised by the retailer is more than evident.

Impossibility of filling a collective claim in Germany: Collective actions are not available in German Procedural law and therefore the lawsuit has to be filled individually. As a result, this case is addressed on behalf of four individual claimants and many other victims are not represented[124]. Also this fact implies high procedural costs and time consuming tasks.

Private International Law Limitations: This case is addressed by rules of Private International Law, and different regulations are applied depending on the material and territorial jurisdiction. This implies the impossibility of filing the case against Ali Enterprises before the German Court, as Brussels I has its territorial jurisdiction limited to EU MS, hence the case can only be filed against KiK. Moreover, the applicable law with regards the statutory limitation is Pakistani law, which complicate the case from a procedural perspective, and is eventually the reason to dismiss this case. These complexities are time consuming and become obstacles to actually address the merits of the case and truly acknowledge the liability of the company.

Attribution of shared legal responsibility of retailers: The attribution of legal direct liability is hard to achieve in this case, as well as building arguments related to due diligence of supply chain companies and the retailer duty of care. Claimants have to demonstrate the assumption of responsibility by KiK and a strong and close relation between both of them, sufficient to exercise control, with vague legislation or judicial precedents to hold their arguments.

Notwithstanding the considerable limitations for victims to achieve justice in this case, a glimpse of progress should be also highlighted, represented by the granted legal aid provided to Pakistani claimants to access the German Court, as first case of this nature in Germany, and Private International law contributions related to the provision of legal avenues for victims to bring the case before European Courts. Although not sufficiently, these small achievements contribute to mitigate the uncertainty over jurisdiction and applicable law in these type of cases, and pave the way towards a future international legally binding treaty that effectively address business and human rights issues.

2.2 Breaches of UNGPs

The legal and procedural barriers described above also imply breaches of UNGPs compliance, given the fact that their root causes are mainly due to States non-compliance with their duty to protect, which additionally breach the access to remedy pillar. But these are not the only breaches of UNGPs that could be identified in this case. There are also important considerations

[123] A. Marx, C. Bright and others, *Access to legal remedies, p*. 64.
[124] C. Müller- Hoff and C. Terwindt 'Anyone can make claims – Is the KiK case proof of access to remedy against corporate human rights violations?', *Oxford Human Rights Hub*, 26 February 2018, http://ohrh.law.ox.ac.uk/anyone-can-make-claims-is-the-kik-case-proof-of-access-to-remedy-against-corporate-human-rights-violations/ (accessed 12 June 2020).

related to the second pillar compliance, weaknesses on CSR of KiK, RINA and Ali Enterprise or deficiencies in non-judicial grievances mechanisms that must be analysed.

In this case there are three States involved; Germany, Italy and Pakistan, two of them Member States. And three companies, two of which European Transnational companies, RINA and KiK. Being KiK practically the only retailer of the company Ali Enterprise, and RINA directly involved in the issuing of a false certificate. This means that the State duty to protect needs to be covered by the EU and both Member States (Pakistan will also be included), that there is a shared corporate social responsibility to respect human rights and that three parallel judicial proceedings plus a NCP complaint were opened for this case.

2.2.1 First Pillar: EU and Pakistan duty to protect

Regarding the State duty to protect, the first UNGP refers to the duty to protect against human rights abuses within the territory or jurisdiction of the State. This principle includes to take the appropriate steps to prevent, investigate, punish and redress such abuse through policies, legislation and adjudications. In this regards, Pakistan's compliance with its State duty to protect is very superficial and inefficient. National legislation on labour conditions is characterised by being inadequate and disrespected. The presence of trade unions is really low. Working and economic conditions are generally negotiated throughout informal arrangements, being contracts non-existent in most of the cases. This means that the lack of law enforcement leaves workers unprotected and that violations of worker rights are frequently unidentified.[125] In fact, as already mentioned, most of the workers in Ali Enterprise were employed without contracts.

A glimpse of compliance with this principle could be identified in this case as a criminal investigation was opened since the first day after the fire. The judicial proceeding was opened against the factory, and the owners were immediately taken into custody. Nonetheless, this proceeding is also characterised by serious judicial negligence, such as the decision of discontenting the case with no sufficient justification. The State of Pakistan did not take any preventive measure to ensure the adequate safety and health conditions of Ali Enterprise workers and failed to protect victims' rights.

According to the second UNGP, States should set out the expectation that their national companies respect human rights. This does not include the obligation of the State to regulate extraterritorial activities for business, but neither does exclude it. This principle makes reference to the importance of adopting policies to ensure predictability for businesses to respect human rights, that may incorporate extraterritorial implications in some cases, for example by obtaining membership of multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the OECD. This Guideline is present in the proceedings in Italy against RINA, given the fact that Italy is a State Member of the OECD. By this membership, it was possible that an OECD complaint was submitted by Pakistani claimants who suffered violation of human rights in Pakistan before the Italian NCP, because they claimed that an Italian Company had shared responsibility for failing to detect and act upon safety and labour violations in the Ali Enterprises factory, being the Italian business specialised in social auditing.

[125] Ethical Trading Initiative, 'Human Rights Due Diligence in Pakistan', 16 January 2018, p. 8. https://www.ethicaltrade.org/sites/default/files/shared_resources/human_rights_due_diligence_in_pakistan.pdf (accessed 12 June 2020).

However, the OECD complaints find generally many obstacles to be successfully resolved, this is because of the lack of companies cooperation, lack of political will, lack of enforcement powers and lack of accountability[126]. Also, the German NCP addressed a number of recommendations on how KiK could implement its duty of care[127], however these recommendations cannot be considered sufficient as they merely formulate a suggestion rather than effectively address the question of shared responsibility, and these recommendations were not taken into consideration by the German Company. Therefore, to gain membership from an international organisation such as OECD could be adequate but not sufficient, and will also need that the State adopts complementary measures as the enforcement of laws that require business to respect human rights internationally, adoption of policies to ensure businesses do not constrain but enable respect for human rights and other avenues to encourage business to be respectful with human rights standards.

2.2.2 Second Pillar: The Corporate Responsibility to respect Human Rights

The foundational principles of the Corporate Responsibility (11 to 15) make reference to the responsibility of businesses to respect human rights, to avoid causing adverse human rights impact and to adopt measures and policies to prevent potentials risks.

In principle, the main purpose of KiK's code of conduct coincide with the content of these principles, as the code expressed; "We commit ourselves to this Code of Conduct and make it the basic principle for all our business relations. We are convinced that it is our social responsibility to base all our business relationships on human rights and internationally accepted norms of employment"[128]. KiK committed to comply with certain standards for employment, transparency, cooperation and development. In addition, in its supply chain relation with Ali Enterprises, KiK decided to require RINA's services to verify through a social auditing certificate that the factory met all the safety and healthy requirements. These facts were an attempt to comply with UNGPs and the due diligence expected from companies that operate internationally.

In compliance with the operational principles (16 to 23) KiK's code is the statement in which the company assumes responsibility and establishes the minimum standards that had to be respected, committing to perform analysis of potential harms, and specific operations to address human rights adverse impacts. This code includes Health and Safety conditions required in the workplace.

Still, notwithstanding the exemplary KiK's code and the work of a social auditing company that verified the compliance of Ali Enterprise with this code, around 260 workers died in this factory in a fire whose evidences demonstrate that many deaths could have been avoided with the adequate safety measures. This irrefutably means that this code was neither being respected nor implemented, and that the decision of hiring the services of a social auditing was more part

[126] S. Khoury and D. Whyte, 'Sidelining corporate human rights violations: The failure of the OECD's regulatory consensus', *Journal of Human Rights*, vol. 18, no 4, p.369.

[127] ECCHR, 'The OECD procedures regarding surveillance technology against Gamma and Trovicor and regarding working conditions in Asia against KiK, C&Aand Karl Rieke', March 2015, p.9 https://www.businesshumanrights.org/sites/default/files/documents/OECD%20procedures_Evaluation_2015_03_10_0.pdf (accessed 12 June 2020).

[128] KiK Code of Conduct, 2015, p.1 http://www.kiktextilien.com/unternehmen/fileadmin/media/blaetterkataloge/COC_EN/blaetterkatalog/pdf/complete.pdf (accessed 12 June 2020).

of the problem than the solution. KiK committed itself to take the adequate preventive actions to avoid any harmful impact coming from their businesses activities, and RINA's purpose was to execute this preventive action, however both of them failed. According to UNGP, when violations of human rights are derived from the activity of a company, this company should provide remediation and assume its responsibility. Otherwise, what is the purpose of establishing a code of conduct statement in the first place? The validity of this code is strongly put into question if in case of breach the company refuses any responsibility on the basis of its non-legally binding nature.

During all the negotiation previous to the judicial proceedings, KiK continued avoiding to assume any responsibility or payment of psychological and moral damages. It only agreed to compensate material damages when ILO coordinated these negotiations. KiK held in all the proceedings that they had no duty of care, that the code is not legally binding, and that the relationship with the factory is not close enough to assume liability. Hence, this case discloses that codes of conduct are not sufficient when there is not a real and honest commitment from the company, hence real assumption of responsibility. To adopt a code of conduct must be more than a marketing campaign, it must entrust honest willingness to comply with human rights standards.

Regarding the Italian company, this type of social auditing firm is normally hired to issue a certificate that provide a high level of trust but low legal risk. KiK thereby could comply somehow with its responsibility of taking preventive actions, given the fact that these auditing firms are considered an effective tool to monitor working conditions and not taking any further action. However, in many occasions, economic interests and the lack of more effective and complementary preventive actions, make social audits part of the barriers rather than contributions towards recognition of shared liability and respect for human rights.

2.2.3 Third Pillar: Access to remedy

Principles 25 to 31 make reference to the proper access to remedy for victims of corporate human rights abuses. Judicial and non-judicial mechanisms must be provided by host and home States. Grievance mechanisms should also be provided by non-state-based actors, such as group of enterprises and stakeholders.

In this particular case, access to justice have been repeatedly mentioned; proceedings in Pakistan, Germany and Italy, addressing the responsibility of Ali Enterprise, KiK and RINA. Also, failures and lack of judicial guarantees have been previously mentioned, which contributes to breach third-pillar principles, as no efficient remediation is finally fulfilled. Specific procedural barriers are identified, such us long extension of proceedings, short statutory limitation periods in tort actions or strong burden of proof for victims. Not only judicial remedies, but NCP complaint mechanism in charge of monitoring OECD Guideline compliance also fails to provide effective solutions to the victims.

Therefore, and to conclude, there is yet a lack of effective remedies that needs to be addressed. The complexity of cases of this nature implies that time consuming and economic barriers will be raised and will become an obstacle for victims to achieve real justice. Private international law standards have become the alternative legal avenue as no international legally binding treaty on business and human rights is in place yet, however there are many obstacles that Private International rules cannot tackle. In addition, cooperation is urgently needed among

States and Companies to enforce effective and just laws, adopt adequate policies and create effective mechanisms for victims to access to remedy.

2.3 Analysis of NAPs effectiveness: Actions embedded in NAPs to tackle the challenges

As discussed in the first chapter, the EU and EU MS have recently developed new Action Plans to implement the UNGPs, recognising that previous strategies had not been successful. National Action Plans (NAPs) have been adopted by EU MS in different periods since 2014, and still most of them have not completed their implementation. These new strategies thereby aim to tackle the weaknesses of previous strategies towards a more effective UNGPs implementation.

In this direction, the last part of the theory-practice inconsistencies analysis will apply the novelties provided by the relevant NAPs to address compliance challenges previously identified in order to conclude whether these action plans are being either effective or not sufficiently ambitious.

It must be taken into account that the German and Italian NAPs were both adopted in 2016 with an estimated implementation period of 4 and 5 years respectively. The fire in Ali Enterprise garment took place in 2012, and the judicial proceedings have been extended until 2019 for the German Company, and have not been concluded yet for the Italian. Therefore, the NAPs have been adopted after the commission of human rights violations. Nevertheless, the judicial proceedings have been held simultaneously to these NAPs, at a point where EU duty to protect and access to remedy pillars must play a very important role.

2.3.1 German National Action Plan for Business and Human Rights

The German NAP is structured following the UNGPs three pillars model, nonetheless the three pillars are not equally emphasized. The first and second pillars are especially developed, giving a separate paragraph – not included in the three-pillar-related paragraph – to define the expectations of Germany regarding corporate due diligence in respecting human rights. In this regards, it is relevant for the KiK case to analyse certain key actions embedded within the German NAP towards the accomplishment of CSR.

As a first action, this NAP contemplates the Partnership for Suitable Textile between Europe and Central Asia leaded by Germany. It is described as a "multi-stakeholder initiative combining voluntary and compulsory elements"[129] to strengthening due diligence and sustainability all along the textile supply chain. In addition, Germany supports the application of these standards in host countries, an example is the project "Social and labour standards in the textile and garment sector in Asia" developed in Bangladesh, Cambodia and Pakistan.[130]

The specific establishment of a Partnership in the textile sector and related to supply chain relations is not a coincidence. Under both circumstances human rights violations are more likely to occur, thus there is a considerable number of initiatives being adopted in this regards. However, the German NAP does not provide enough protection. Initiatives such as the social

[129] The German Federal Government, 'National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights', 2016-2020, p. 20 https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf (accessed 15 June 2020).
[130] Ibid.

project on labour standards in Asia consists on exercising influence over States with low standards to increase human rights due diligence. This must be, at least, accompanied by exemplary compliance of German companies when operating in their territories. Pakistani business enterprises that are part of this project would experience a profound lack of credibility when States as Germany try to introduce labour standards in their companies, but German companies such as KiK do not respect their own codes of conduct and use their non-legally binding nature as argument to avoid responsibility. Hence, accountability of German retailers must be a priority matter.

In this regards, the Partnership for Suitable Textile aims to raise transparency, social, economic and environmental concerns along the supply chain, including German retailers. Nonetheless, this Partnership was considered as "Zero Progress" category on a report made by Transparency Pledge coalition in 2019 related to the achievement of transparency along the supply chain. According to this report, a survey was conducted among its 75 members, asking them whether they would be willing to publish information about their supply chain. Only 17 out of 62 respondent companies confirmed that they were willing to disclose supply chain data. 26 were not willing to publish altogether and 19 were willing to publish only internally within the Partnership.[131]

No real transparency is thereby being achieved. The main issue is that transparency as a general objective will not be effectively implemented if the actions to accomplish such objective are not mandatory. Despite the novelties on mandatory periodical reports and risk analysis that have been imposed over Partnership members[132], this information will not be reliable if it cannot be ensured that information about supply chain suppliers involved in their business activity is included in such reports.

In addition, the membership for the Partnership is voluntary. There is no guarantee that all German companies are part of it. The aim established in the NAP was to reach "the 75 % of the German textile and clothing market signed up to the Textile Partnership by 2018", but nowadays only the 50% are members of the Partnership.[133]

The main challenges identified in the KiK case are not addressed in the German NAP, although it was released four years after the fire took place. According to KiK code of conduct and its self-evaluation criteria, KiK complied with all safety and health requirements, also possessing an external certification thereof. The German NAP does not contain any action attempting to elaborate legally binding instruments CSR-related for companies that operate transnationally. This means that today, as happened in 2012, code of conducts adopted by transnational companies on voluntary basis may not be transparent and still neither illegal. There is no legal obligation to monitor the real implementation of codes' commitment. There is no legal obligation to prevent human rights abuses.

Actions such as the "CSR Award" which "recognises exemplary enterprises for their contributions to sustainability" and "an additional special prize for responsible supply chain

[131] Transparency Pledge Industry coalition 'Fashion's Next Trend: Accelerating Supply Chain Transparency in the Garment and Footwear', 2019, p. 4 and 5. https://www.workersrights.org/wpcontent/uploads/2020/01/garment_industry_brochure_dec_2019.pdf (accessed 15 June 2020).
[132] Partnership for Sustainable Textile, 'Members' [website] https://www.textilbuendnis.com/en/
[133] Ibid. 'Review Process'.

management"[134] may be effective as incentives but not sufficient if they are not accompanied by legal minimum requirements of CSR for all German transnational companies.

Another action that the German NAP proposes to achieve transparency is the same tool that KiK used and still could not prevent 260 deaths. The German government considered the introduction of a certification mark legally required to verify the compliance of all businesses along the supply chain with human rights standards. For this action to be effective, it must be ensured that the certifying body is independent and impartial and that does not belong to the private sector, as RINA did. However, this is not mentioned in the German NAP, only that "the responsibility for verification would rest with the certifying body"[135] but, as disclosed in KiK and RINA case study, there are ways of avoiding such responsibility.

Finally, the German NAP addresses the *Access to Remedy* pillar very superficially, and many barriers were identified in the KiK case that affect this pillar. The NPA contemplates facilitating access to German civil courts by providing legal aid, also to non-nationals, from which Pakistani victims could benefit in the German proceeding. Nevertheless, it does not contain any action towards the extension of statutory limitation periods in civil law or balancing the demanding burden of proof for victims to demonstrate corporate liability.

2.3.2 Italian National Action Plan for Business and Human Rights

The actions that appear relevant for RINA case within the Italian NAP, that could potentially address the prevention of corporate human rights abuses and combat the impunity thereof committed by Italian transnational companies are, in the first place, related to the "legally rating" tool. Secondly, actions planned to ease avenues of access to remedy, such as the new figure of direct legal liability. And finally, actions related to the improvement of OECD guideline compliance and NCP effectiveness.

The "legally rating"[136] was introduced for the first time in 2012, similar to the "certification mark" proposed by the German NAP. It consists on issuing certificates to verify that business enterprises – either Italian, non-Italians that operates in Italy, or non-Italians that have contractual relations with Italian transnational companies – comply with Italian domestic law and human rights standards, hence transparency is achieved. However, in this case is precisely demonstrated that a certificate system may not be an effective solution for ensuring human rights standards compliance if there is not a real commitment from the entities in charge of issuing and if there is not an effective monitoring procedure over businesses under investigation. In order to achieve so, it is necessary, as proposed in the Italian NAP, that is a public institution "The Italian Competition Authority (ICA)" the competent to elaborate this certificate. Nonetheless, the Italian NAP does not limit it to this institution, since it mentions the ICA "among others",[137] which does not guarantee that failures on human rights abuses prevention will not be repeated. This type of certificates must be released either by public, impartial and independent institutions only. The inclusion of the private sector should be possible only if an effective monitoring procedure guaranteed these companies' transparency.

[134] German NAP, p. 23
[135] Ibid., p. 21
[136] Italian National Action Plan on Business and Human Rights, 2016-2021, p. 15 https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/10/NAP-Italy.pdf
[137] Ibid.

There is a new figure of liability that facilitates the recognition of legal corporate responsibility, which is introduced by the Decree n° 231. It establishes sanctions for concrete offences committed by corporate personnel. The speciality of this liability is given by its administrative nature but needs to be declared by a judge following criminal law procedures.[138] On the other hand, the introduction of this legal figure must have been accompanied by the establishment of provisions that accelerate judicial proceedings and promote promptness in justice. This is precisely the main issue in RINA case, that after 6 years, no judicial resolution has been issued. The Italian NAP makes a non-detailed and brief reference to this issue by stating that the establishment of "remedies against the excessive length of civil proceedings" is a priority.[139]

Finally, the Italian NAP pays particular attention to the OECD promotion and the NCP remediation mechanism. The Italian NAP focuses on the importance of the NCP in the context of supply chain human rights violations, mentioning the case of Bangladesh as an example of significant recommendations issued by the Italian NCP. These express the necessity of adopting preventive measures to achieve real human rights protection.[140] The NAP also states that is necessary to "improve the visibility and the knowledge of interested parties about the existence of the NCP's "specific instances" procedures".[141] Indeed, it is important to raise awareness and inform victims about this grievance mechanism, but it is also necessary to work in its effectiveness. As already mentioned, the lack of companies' cooperation, lack of political will, lack of enforcement powers and lack of accountability are the main challenges of compliance for NCP recommendations. In RINA case the NCP recommendations were not implemented efficiently, but were considered as a suggestion eventually ignored. The Italian NAP does not present ambitious proposal in this regard. It remarks the importance of its role and encourages its visibility as a grievance mechanism, but it does not plan any action to mitigate its ineffectiveness.

3. Oil and Petroleum Sector: Shell vs Nigerian Communities

Oil, gas and petroleum sector requires international businesses within this sector to dislocate their extractive operations to the place where the raw material can be found, as this is a limited resource that cannot be artificially produced. This sector is especially hazardous for human rights as the consequences of incorrect executions of extracting activities may provoke massive environmental harm, damage in the land use, resettlement, cultural heritage, security, and affect the access to basic services such as water and sanitation.

This type of extractive projects are frequently managed by joint ventures, as happened in Shell case. Ideally, all members of a joint venture, that have different backgrounds and cultures, would complement the project and undertake the most sustainable and human rights respectful approach. Moreover, the increase of corporate global accountability achieved that, nowadays, members of a joint venture, including old members, are exposed to criticism and reputation loss if the execution of the project cause human rights abuses.[142]

[138] Ibid., p. 12.
[139] Ibid., p. 28.
[140] Ibid., p. 17.
[141] Ibid., p. 29.
[142] M. Wachenfeld and M. Hodge, 'State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships', *Institute for Human Rights and Business*, 2012, p. 74.

Businesses in oil industry are characterised by long-term investment agreements, from 40 to 50 years. The issue is that these agreements may affect to the ability of the State to protect human rights and may also affect companies' ability to develop an effective human rights policy. For example, a company may decide (or not) to establish consultations and dialogue with communities settled in the territory that will be exploited, or set common sustainability expectations among all members of the joint venture on the implementation of a project before is launched.[143]

On the other hand, a relevant issue at corporate level appears in Shell case, related to the difficulties to achieve liability recognition of the parent company for corporate abuses committed by its subsidiaries, especially when they have foreign nationality. Once again, the complex business structure within European multinationals is used to avoid responsibility, taking advantage of the independent legal personality and the diffuse connection in between the subsidiary and the parent company. The following analysis of the Shell case contains this and other UNGPs compliance issues and the analysis of actions taken by UK and the Netherlands to confront such issues.

3.1 Legal and Procedural Barriers

Private international law barriers: Brussels I is the applicable regulation that allows to bring these cases before European courts, establishing the connection with the parent company's EU nationality. However, there are no provisions in this regulation regarding the jurisdiction over foreign subsidiaries, thus their addition to the judicial proceeding depends on national laws, consequently there is not guarantee that the subsidiary will be judged, therefore the parent company may allege not sufficient causal connection with the damage. In fact, in the British proceeding for the Bodo community, SPDC joined the case on voluntary basis.

Furthermore, the applicable law according to Brussels I is the national law of the place where the facts occurred. In this type of cases, corporate human rights abuses are committed in countries whose legislation do not provide sufficient protection. Nigerian domestic law did not recognise the figure of duty of care of the parent companies for activities developed by their subsidiaries.

Attribution of shared legal responsibility of parent companies: There is a legal uncertainty surrounding the attribution of legal responsibility towards parent companies for the activity performed by their subsidiaries. The fact that both companies are legally independent according to the principle of separate legal personality entails that they will also respond separately for the impact of their business activities. However, as it is demonstrated in this case, courts may provide different considerations with regards to their duty of care. Parent companies and subsidiaries take advantages of the low legal standards of national legislation in developing countries in order to avoid assumption of responsibility. The uncertainty, and sometimes the impossibility to declare shared responsibility of parent companies triggers serious challenges for the achievement of justice in these cases. First, the corporate veil allows the parent companies to make the decision of adopting preventive measures on voluntary basis. Second,

https://www.ihrb.org/uploads/reports/201212%2C_Report%2C_State_of_Play__Human_Rights_in_Business_Relationships_-_Ch._5_Joint_Ventures.pdf (accessed 12 June 2020).

[143] Institute for Human Rights and Business, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights', 6 July 2012, p. 9. https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/oil_and_gas.pdf

it establishes no legal obligation to compensate or to restore the corporate harm caused by its subsidiary. And third, it reduces the avenues of access to remedies for victims.

Nonetheless, despite the many obstacles identified in this case within the judicial proceedings, contributions should also be highlighted, such as the Dutch Court of Appeal consideration over codes of conduct as a basis to establish a duty of care on the parent company,[144] reinforcing the corporate legal responsibility and the legal value of code of conducts. In addition, the British court in the Bodo case also emphasises the duty of care figure of the parent company. Given the lack of legal international or national provisions on corporate legal responsibility within internal business relations, the establishment of judicial precedents that recognise such liability is crucial, especially in common law legal systems.

3.2 Breaches of UNGPs

The State duty to protect in these circumstances needed to be covered by the EU, UK and the Netherlands, as home States of Shell, parent company in question, as well as Nigeria. Corporate Social Responsibility should have been covered by SPDC but also by Shell, and here it comes the critical debate: the close relationship among parent company/subsidiary, likewise retailer/supplier connection within KiK case.

UNGPs are not legally binding, therefore the breach of these principles is not discussed before national courts. However, the relevance of these principles, as previously discussed, is out of question, hence, so it is the analysis of the specific breaches thereof given in this case. According to these principles, there are certain expectations on how Nigeria, UK, Netherlands, Shell and SPDC should proceed, however their actions seem not to follow such expectations.

3.2.1 First Pillar: EU and Nigerian duty to protect

The first UNGP would refer to Nigerian State duty to protect against human rights abuses within its territory or jurisdiction. The Nigerian Constitution does not contain a Bill of rights, but it recognises a number of socio-economic rights, such as the right to property, however it does not make any specific reference to business and human rights. [145] Furthermore, there are not legal instruments at national level that establish human rights provisions in the corporate sphere. The Companies and Allied Matters Act, 1990 (CAMA) is the only legal document that regulates corporations in Nigeria. It establishes the duty of care that Directors of a company owe to their shareholders, and that they should act in utmost good faith. However, there is not specific legal provision for duty of care towards local communities' rights. It does not recognise any legal corporate responsibility, and in case of human rights violations, it is only the company that can sue to penalise itself. It does not seem very realistic to think that real justice will be achieved if the perpetrator also become the prosecutor.[146] Only little progress have been made in this field throughout judicial practice.[147]

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[144] Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others, para 6.9.

[145] O. Abe 'The feasibility of implementing the United Nations guiding principles on business and human rights in the extractive industry in Nigeria', *Journal of Sustainable Development Law and Policy*, vol. 7, no. 1, 2016, p. 152. https://static1.squarespace.com/static/5324bf63e4b05fc1fc6ea99d/t/5e6748aba9122a6eba1e7280/1583827118631/Article+2016+7b.pdf (accessed 20 June 2020).

[146] Ibid.

[147] Ibid.

The second UNGP, related to the expectation that States should set out about their national companies respecting human rights, in this case makes reference to legislation and policies that The Netherlands and UK have adopted to ensure their national corporations respect human rights, specifically, that they respect human rights in Nigeria. The issue is precisely the lack of extraterritorial legal provisions from the countries where Shell is national. The complex legal question regarding the independent legal personalities between the parent company and its subsidiaries, that weaken the judicial recognition of legal corporate responsibility of the parent company for subsidiaries' acts, also affects the development of national legislation and policies that pursues the same objective. There are no specific national legal obligations for parent companies to exercise certain level of control over their foreign subsidiaries, even if it is to monitor that they respect human rights, as this is a question that belongs to high level decision-makers at corporate level. [148]

In other words, the main issue that States find to elaborate extraterritorial legislation rests over two intersectional points. On the one hand, the fact that business activities are being developed in host States by subsidiaries with host nationality, so that they apply the principle of legal independence from their parent company. On the other hand, the fact that corporations are reluctant to cede high-level corporate decisions related to the independence degree of their subsidiaries to State regulation competencies, hence they ensure these decisions are not transformed in legal obligations.

3.2.2 Second Pillar: Corporate Responsibility to respect Human Rights

Shell code of conduct is applied to "every employee, director and officer in every Shell company. Contractors and consultants who are agents of, or working on behalf of, or in the name of a Shell company (through outsourcing of services, processes or any business activity), are required to act consistently with the Code when acting on our behalf."[149] Concretely, Shell code states that "where a Shell company has formally been designated the operator of a Joint Venture, that Shell company must apply the Code to the operation of the Joint Venture."[150] It must be reminded that SPDC was the operator of the joint venture in the Niger Delta.

In this code, there is a section for "Health, Safety, Security, Environment and Social Performance" and another one for "Human Rights". It holds that "Every Shell company, contractor and joint venture under Shell operational control is required to have a systematic approach to the management of Health, Safety, Security, the Environment and Social Performance (HSSE&SP)"[151] and it also states that "We comply with the United Nations Universal Declaration of Human Rights and core conventions of the International Labour Organisation. We also regularly engage with our external stakeholders to contribute to the general wellbeing of the communities in which we operate."[152]

Therefore, this code is designed to avoid situations as suffered in Nigerian communities, however they continue to happen. And still no consequences are established for not complying

[148] R. Mares, 'Liability within corporates groups: Parent company's accountability for subsidiary human rights abuses', in S. Deva (ed.), *Research Handbook on Human Rights and Business, Edward Elgar,* 2019.
[149] Shell, 'Our Code of Conduct', p. 4 https://coc.shell.com/en_gb/code-of-conduct/_jcr_content/par/textimage.stream/1519787681925/5003138fa511f112398bd8832f85523d89dd206c/codeofconduct-english-2015.pd (accessed 25 June 2020).
[150] Ibid.
[151] Ibid., p. 10.
[152] Ibid., p. 11.

with code provisions. This code is presented more as a guideline that provide advice and suggestions to directors and employees on how to perform their work, but it shows no real commitment whatsoever. And this is far from being sufficient to effective protection of human rights. Hence, the validity of this code is strongly put into question, when it defends principles of transparency and disclosure of information, but it makes efforts to decouple itself from gross violation of human rights committed in Nigeria and other cases in which have also been involved.

On the other hand, Shell did not provide any compensation or remediation to the locals affected by the environmental harm, or has adopted measures to restore the polluted areas. The company only acceded to pay £55 million in the Bodo community case after the London High Court ruled that Shell failed to ensure adequate protection to locals of this community, to avoid a full hearing which was intended to declare a breach of duty of care that Shell owed to the claimants.

3.2.3 Third Pillar: Access to Remedy

Breaches of third pillar UNGPs are presented in this case with regards to judicial mechanism for access to remedy, in relation to legal and judicial barriers previously mentioned. In the first place, Nigerian judicial system seems not to be independent and efficient to resolve this case. The amount of earnings that this joint venture provides to the State of Nigeria influence local judges when issuing any resolution, then impartiality is not guaranteed. In addition, Nigerian legislation does not contemplate the duty of care in the parent company, thus Nigerian courts will not declare any responsibility on Shell.

Regarding to the application of Brussels I, it may be concluded that this regulation brings many advantages to access to remedy for victims, but it has many other limitations. The main challenge may be that the applicable law, according to this regulation, is Nigerian law, and as explained above this legislation does not contained sufficient protection for business and human rights issues. Consequently, this worsen the uncertain interpretation surrounding the duty of care that Shell owes to Nigerian farmers and fishermen. Hence, it also increases the possibility of corporate abuses remain unpunished.

3.3 Analysis of NAPs effectiveness: Actions embedded in NAPs to tackle the challenges

The Netherlands launched its NAP in 2014. United Kingdom published its last updated version in 2016. Pollution issues provoked by SPDC activity has been presented in Nigeria since many years in the past, and judicial claims have been raised since then. Nowadays there are still judicial proceedings pending, as the one before the UK Supreme Court. As a result, improvements in legislation and judiciary are expected during the last years, otherwise it would mean these NAPs are not tackling these issues effectively.

3.3.1 Dutch National Action Plan for Business and Human Rights

The Dutch NAP is one of the oldest released among the EU MS, reason why is also lacking key recent actions that have been included in modern NAPs. Indeed, the Dutch NAP mostly contains results of consultations and surveys filled by the business community, civil society organisations and implementing organisations, including government responses.[153] It compiles

[153] National Action Plan for Business and Human Rights of Netherlands. 2014, p. 13 https://www.business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf (accessed 26 June 2020).

their positions and opinions about issues presented along the three pillars, and barely proposes any action or measure to mitigate those challenges. Only at the end, there are two pages out of forty-four dedicated to enumerating actions to achieve policy coherence, clarifying due diligence, transparency and reporting and access to remedy. Actions that are not very ambitious in addressing business and human rights issues.

The most relevant consultations that identify issues presented in the Shell case are related to the scope of remedy and extraterritorial legislation.

Related to access to remedy, the jurisdictional challenge on bringing Dutch parent companies before National courts from the place where the abuses occurred is superficially discussed. It is mentioned that "each legal person [the parent company and its foreign subsidiary] is liable for any harm that may be caused by its actions. Under the rules of private international law, a dispute about harm is judged on the basis of the law of the country in which it has occurred".[154] Therefore, it recognises that their independent legal personalities permits that they respond separately for their own acts, but private international law enable both parent company and subsidiaries to be judged applying the national law of the foreign subsidiary country. However, the Dutch NAP does not mention further complexities or compliance challenge in this regards. Under the scope of access to remedy, the NAP does not identify limitations of private international law rules, deficiencies of host States national courts, uncertainty regarding the duty of care of the parent company or the disproportionate burden of proof for victims to demonstrate the parent company connection with the facts and subsequent liability. The opinion of people consulted is to increase the level of transparency in parent companies about the control they exercise over their subsidiaries and the impact of their operations on human rights.

In this sense, actions proposed by the Dutch NAP to achieve transparency are vague and inefficient: voluntary CSR agreements on sectors selected by the Sector Risk Analysis project, based on a dialogue with stakeholders and monitoring of agreements.[155] More rigorous actions are needed to truly achieve transparency on parent company-subsidiary relation. Voluntary disclosure of information from businesses is not sufficient to guarantee transparency on the degree of control and dependency between both companies. Transparency must be addressed by establishing legal requirements, rather than voluntary agreements, of information disclosure.

With regards to the option of enforcing legislation with extraterritorial effects, this NAP contains the question forwarded to businesses and organisations consulted on "whether the Dutch court system should be open to civil or criminal law proceedings against Dutch companies in the event of alleged human rights abuses on the part of their foreign subsidiaries". As previously discussed, this is a key issue in the case of Shell. The territorial jurisdiction as a procedural requirement is a big challenge for victims to access justice. It is considerably complicated in this case to achieve that both parent company and subsidiary are judged before the same court. And once this happens, other procedural barriers come up such as the applicable law.

[154] Ibid., p. 33.
[155] Ibid., p. 29.

To answer this question, some respondents defended an international agreement with extraterritorial application, and others stated that that decision would mean to locate Dutch legal system above the legal system of the country where the abuses took place. The government upheld this last position, and added that there is still little support for an international legally binding instrument.[156] This is an unacceptable approach nowadays. The adoption of an international legally binding instrument will not locate any national legal system above another, but it will be elaborated at international level. Negotiations for an international treaty on business and human rights are now advanced; a zero draft has been elaborated and reviewed. Given the amount of legal and judicial barriers still unresolved that have been identified in the past years, in cases such as Shell, there urgently needs to be an international legally binding treaty.

As a result, it must be concluded that the Dutch NAP has not presented effective solutions that could progressively tackle the challenges identified in the case of Shell, and that it must be updated with efficient actions that are compatible with the current approaches on business and human rights, such as enforcement of legislation and establishment of more meticulous actions to achieve due diligence in business enterprises.

3.3.2 British National Action Plan for Business and Human Rights

The UK was the first State to produce such a National Action Plan in 2011, and it was also the first to produce an updated version in 2016. This NAP provides an overview of the advances in business and human rights already established within the UK legal and political framework, and subsequently it foresees the actions planned and government commitments to implement them in the future.

However, the UK NAP, likewise the Dutch NAP, does not provide references to actions that could tacked issues of compliance previously discussed. Regarding actions or measures to prevent human rights violations in the context of the extracting sector, it only mentions an initiative that is being developed in Kenya, called the Nairobi Process. It is leaded by the Human Rights and Democracy Programme to promote UNGPs compliance in the extracting processes developed in Kenya.[157] Other than this, the UK NAP does not mention any specific action to widespread UNGPs compliance in other countries, nor initiatives related to the parent company and subsidiaries relationship. The UK NAP leaves untouched a very urgent matter; the recognition of legal responsibility of the parent company for human rights violations committed by its foreign subsidiaries.

The UK NAP also fails in committing to establish mandatory due diligence and enforcing legislation that attributes legal obligations to British multinationals. However, it does propose an initiative consisting on an international mechanism whose aim is to monitor businesses compliance with their own codes. The UK government would work together with the civil society members of the International Code of Conduct Association and this will take the form of a certification against the Code, a monitoring by the Association, and a complaints

[156] Ibid., p. 38.

[157] HM Government, 'Good Business Implementing the UN Guiding Principles on Business and Human Rights', May 2016, p. 8, para. 12, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522868/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_print_version.PDF (accessed 26 June 2020).

process.[158] This initiative could be seemed as positive, nonetheless it enforces neither legal obligations for companies to be subject to this control, nor legal consequence in case the company in question does not comply with its code. Therefore, it will not achieve effectiveness in this field.

Regarding the actions planned in the UK NAP to improve access to remedy, the UK NAP does not foresee the legal and procedural challenges discussed before for victims to access to remediation, to mitigate their strong burden of proof to demonstrate the connection between the parent company and its subsidiaries and the issues upon the forum selection applicable laws. Notwithstanding UK courts have never found a parent company liable for a breach of its duty of care towards human rights violations committed by its foreign subsidiarity because of the many procedural challenges found, yet the UK government have not committed to intervene or take action to provide effective access to remedy.

To sum up, the actions embedded in the UK NAP cannot be considered as effective or sufficient since they do not address the issue of the corporate vail in the extracting sector. They neither address the urgent necessity of enforcing legal obligations for British parent companies towards their foreign subsidiaries actions that have an adverse impact on human rights, among other important compliance challenges in the field of business and human rights.

4. Defence Sector: European Defence Industry vs ECCHR and other partner organisations

European arms manufacturers produce a considerable amount of the total global arm trade, most of it being exported to third countries. Notwithstanding the specific national export regulations and license systems that many States adopt, the exported arms are frequently used by warring parties in the commission of human rights and international humanitarian law abuses. This proves that export regulations in place are deficient, and there needs to establish effective national and international legal frameworks that prevent such arms from being exported, and from a remediation perspective, that criminal liability is recognised for corporations and political members involved.

Nowadays, the recognition of criminal liability is very difficult to achieve, as legal persons are not subject to international criminal liability, and defence businesses frequently hide behind export licenses granted by governments to avoid responsibility. This is against UNGPs and their obligation to respect human rights. At the same time, States are failing to comply with their duty to protect, and EU MS NAPs barely contain actions to combat human rights issues within the defence sector.

The case of the armed conflict in Yemen is a flagrant example of this, whereby ECCHR and other organisations have recorded evidenced of war crimes for which European companies may respond as liable by complicity. This case, that will be heard by the International Criminal law, may set a precedent of great significance for human rights protection in this sector.

4.1 Legal and Procedural Barriers

Absence of jurisdiction over corporations in criminal international law: The Nuremberg trials set the basis for the establishment of individual criminal liability under international criminal

[158] Ibid., p.10.

law, however its Chapter of International Military Tribunal did not foresee responsibility for corporations. It only provided instructions in formulating individual criminal responsibility for the representative of the corporations, those acting in corporate capacity.[159] Nowadays, the Rome Statute does not foresee criminal liability of corporations, nor ad hoc International Criminal Tribunal created hitherto. France proposed the introduction of liability for private corporations in the Rome conference in 1998 for the establishment of the ICC, but this attempt was not successful.[160] Notwithstanding there are new attempts pushing forwards the creation of this legal figure, such as the Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights adopted on 27 June 2014, it has not been achieved yet. This undoubtedly conduct to a perpetuation of impunity for the commission of human rights and humanitarian law abuses by companies. It creates an environment of ambiguity, where corporations have no legal obligations to respect human rights. Furthermore, it reduces the possibilities of recognising criminal responsibility only upon managers and executives, which brings considerable obstacles to demonstrate such responsibility, as it is to prove the existence of the conduct and mental elements in the acts of these individuals.

High standards of means rea to consider the complicity of corporate actors: The ICC has already put into question low standards on the mental element required in the acts of managers and executives in order to consider that there is a causal link between the accused and the criminal facts. The article 25 (c) established the necessity of the criminal "purpose" when performing actions, and the ICC has interpreted thereby that the awareness is not sufficient, but the intention, the purpose must be to commit the crime. This is a very strict interpretation of the article that has been strongly criticised. Under this line of reasoning, corporate actors will never be declared responsible since the purpose of corporations, and hence corporate representatives, will always be to increase profit or decrease expenses, but this must never exclude them from their obligation to respect human rights. The lack of recognition of criminal corporate responsibility not only from the legal person perspective, but also for individuals within the entity is an unacceptable approach that urgently require legal and jurisprudence changes.

Hiding corporate responsibility behind government authorisations: The defence industry frequently rejects its own responsibility to carry out a risk assessment on the impact of their business activities on the basis that the government issued an authorisation allowing the arms exports. However, Criminal Courts are not bound by administrative decisions that are in charge of issuing such licenses.[161] Furthermore, this excuse must not be serve as an exemption of responsibility for three reasons: First, the decision of granting an export license by governments may be a crime in itself. Second, the license does not release businesses from their obligations to respect human rights and third, the license allows the companies to export but does not oblige them to do it.[162] Business enterprises, following due diligence principles, must develop independent analysis of impact of their own activities and refrain from acting when there is a risk that they may be assisting the commission of an international crime.

[159] Ibid., p. 14.
[160] A. De Tommaso, 'Corporate criminal liability under international law', Kingsley Napley, 2018, https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/guest-blog-corporate-criminal-liability-under-international-law (accessed 29 June 2020).
[161] C. Schliemann, L. Bryk. *Arms Trade,* p. 18.
[162] ECCHR, *Accountability for alleged,* p. 3.

Difficulties for the recognition of corporate criminal liability at national level: Domestic criminal law cases against defence companies for international provision of arms whereby committing international crimes are rare.[163] And when they occur, the charge of criminal liability in the form of aiding and abetting the crimes related to the exported weapons are not taken into consideration.[164] Especially in this sector, National Courts are not being effective on recognising corporate liability. In the context of an armed conflict, evidences on the use of a specific arm in the conflict are difficult to find, which worsen if the facts occurred abroad. Besides, in this case there are other political elements that make the relevant information more inaccessible. As ECCHR recognises in its reports "Investigating the crimes alleged in the Communication at a domestic level is complicated due to the transnational character of the corporations involved, their complex structures, the overall opaqueness of data on arms exports, a lack of willingness and ability to investigate companies, and the fact that the main crimes are alleged to have been committed in Yemen."[165]

On the other hand, Ad hoc International Tribunal such as the ICTR, SCSL and ICTY have set precedents that make important contributions to the achievement of human rights protection in this industry, which may influence the ICC in the Yemen proceeding. They used for the first time the «aiding and abetting» as a mode of criminal participation, as the basis to determine criminal liability.[166] They recognised individual criminal liability of corporate representatives of arms manufacturers establishing a low threshold in relation to the mental element requires to consider them liable. The awareness of the assisting action they were carrying out for the commission of the crime was considered sufficient.

4.2 Breaches of UNGPs

Airbus Defence and Space GmbH, BAE Systems Plc., Dassault Aviation S.A., Leonardo S.p.A. and Rheinmetall AG have corporate responsibility to respect human rights when performing their business activities, and Germany, France, Italy, Spain and the UK have the duty to protect human rights from corporate harm caused by their defence national companies. Violations of human rights and humanitarian law in this case were triggered undoubtably by breaches of UNGPs, taking into account that in conflict areas the host State is particularly weak to protect human rights from business activity, hence home State duty to protect should be especially reinforced.

4.2.1 First Pillar: EU duty to protect

Regarding the breaches of first pillar principles, principle 7 must be specifically considered, related to the State duty to support business respect for human rights in conflict-affected areas. As it is referred in this principle, the host State may be unable to protect human rights adequately due to lack of effective control.[167] Therefore, home States whose transnational companies operate in affected areas have to play a specific role in assisting these businesses and supporting host States to ensure these businesses does not get involved in human rights abuses. The Host State duty to protect becomes thereby even more imperative. As an attempt

[163] C. Schliemann, L. Bryk. *Arms Trade*, p. 18.
[164] E.g. the Heckler & Koch case in Germany, where the proceedings focused only on the criminal liability for violations of export control laws.
[165] ECCHR, *Accountability for alleged, p.* 7.
[166] C. Schliemann, L. Bryk. *Arms Trade*, p. 13.
[167] UN OHCHR, Guiding Principles on Business and Human Rights, 2011, p. 10. https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 29 June 2020).

of compliance, it is noteworthy that all the States involved in this case are States parties of the Arms Trade Treaty, a "legally binding treaty that regulates the international trade in conventional arms by establishing the highest international standards governing arms transfers and seeking to prevent and eradicate illicit trade and diversion of conventional arms."[168]

Nevertheless, either Germany, France, Italy, Spain or the UK Member States fail on enforcing legislation and mandatory due diligence into the arms export laws as it is established in the principle 7: "States should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business." The only mechanism of control that States are using is the export license system that enables companies to export armaments after a risk assessment have been elaborated by the government. This mechanism has been mentioned all along this case, and its ineffectiveness is the reason why also members of the government are accused of individual criminal responsibility before the ICC.

As an example, the British NAP establishes that all export licence applications are assessed according to consolidated EU and National criteria that analyse the possible human rights impact. For instance, the export license would not be approved if the government finds there is a clear risk that it might be used for committing international humanitarian law and human rights violations.[169] However, this case represents the failure of this mechanism. The existing legislations and regulations are too vague to achieve an effective export control that prevent its use from the commission of human rights and humanitarian abuses. In addition, the risk assessment made by governments are not always correctly made.[170] Furthermore, this mechanism is used as an argument for companies to avoid responsibility and reduces its willingness to develop their own risk assessment.

To sum up, there are important points where first pillar principles are not being respected. On the one hand, laws and mandatory due diligence requirements to reinforce the control over arms manufacturer are not being adopted or implemented. On the other hand, the license mechanism is not preventing human rights violations. On the contrary, in many occasions it has been used by arms manufacturers to avoid corporate responsibility to respect human rights.

4.2.2 Second Pillar: Corporate Responsibility to respect Human Rights

All arms manufacturers and defence companies in Europe are associated in the Aero Space and Defence Industries Association of Europe (ASD). Part of this defence industry started to develop common standards on ethics and due diligence principles which triggered the creation of the International Forum on Business Ethical Conduct for Aerospace and Defence Industry (IFBEC) in 2010.[171] This forum, despite its main focus on anti-corruption and anti-bribery objectives, specifically contains a short section on human rights, mentioning its commitment to comply with ILO Conventions.[172] In addition, the ASD also committed to adopt policy ethics and adopting measures to prevent arms trade for its use in violations of international

[168] Arms Trade Treaty, 2014, https://thearmstradetreaty.org/ (accessed 29 June 2020).
[169] HM Government, 'Good Business Implementing', p. 8.
[170] C. Schliemann, L. Bryk. *Arms Trade*, p. 25.
[171] The International Forum on Business Ethical Conduct (IFBEC), [website] https://ifbec.info/about/ (accessed 30 June 2020).
[172] IFBEC, "Model supplier code of conduct, II Human Rights", 2015, p. 3, https://ifbec.info/wp-content/uploads/2018/04/Final-IFBEC-Model-Supplier-Code.pdf (accessed 3 July 2020).

humanitarian and human rights law, when supported the adoption of the Arm Trade Treaty in 2014.[173]

The European companies involved in this case, Airbus Defence and Space GmbH, BAE Systems Plc., Dassault Aviation S.A., Leonardo S.p.A. and Rheinmetall AG, are members of the ASD and the IFBEC. These companies developed their own code of conduct or Ethics Chapters whereby they committed to respect human rights among other priorities and core of values.[174]

With regards to these ethics policies and commitments, Amnesty International interviewed 22 defence companies in 2018. They were asked about their human rights due diligence policies and process developed to assess and monitor risks of adverse human rights impact or other actions implemented. [175] This survey shows the lackness of effective and real due diligence actions adopted by the industry to combat the arms trade for illicit use. The conflict in Yemen is particularly mentioned in their questions, with no satisfactory answer.

Only 8 companies responded, and neither they answered all the questions nor provided details. As this report mentioned, Airbus and Bae systems (among other two) provided very general and vague responses about commitment with human rights. Leonardo gave a more extensive answer and referred to its Trade Compliance Program, and its regular risk analysis and constant monitoring studies. Dassault did not respond to the survey whatsoever and Rheinmetall was not selected for the interview.

On a second round, Amnesty international raised specific questions related to whether the companies considered the risk assessment about the use of their equipment by the customer, as part of their responsibility, separate from government licensing processes. Only BAE system answered referring to the "Product Trading Policy" which "requires employees to assess risks associated with the type of product and its intended use". Nevertheless, on the specific issue of its military equipment trade with Saudi Arabia, BAE Systems responded that its "activities in Saudi Arabia are subject to UK government approval and oversight."[176] Also related to Saudi Arabia, in another occasion Sir Roger Carr; Chairman BAE Systems, told to activists shareholders in 2016 "We will stop doing it when they [the UK government] tell us to stop

[173] ASD Group, 'ASD Supports the Role of Industry in the U.N. Arms Trade Treaty Process', 12 September 2017, https://www.asd-europe.org/asd-supports-the-role-of-industry-in-the-un-arms-trade-treaty-process (accessed 29 June 2020).

[174] Airbus, 'Code of Conduct' https://www.airbus.com/company/ethics-compliance.html, Dassault Aviation, 'Ethical Charter' https://www.dassault-aviation.com/wp-content/blogs.dir/2/files/2016/09/Ethical-charter-_english-translation-29-09-16_bd.pdf, Leonardo, 'Code of Ethics' https://www.leonardocompany.com/en/about-us/our-company/ethics-compliance/code-of-ethics, Rheinmentall Group, 'Code of conduct' https://www.rheinmetall.com/media/editor_media/rheinmetallag/group/corporategovernance/codeofconduct/Rheinmetall_AG_Code_of_conduct_en.pdf, Bae Systems, 'Code of conduct' https://www.baesystems.com/en/our-company/sustainability/ethics-and-anti-corruption/global-standards/code-of-conduct (accessed 5 July 2020).

[175] Amnesty International, 'Outsourcing Responsibility Human Rights Policies in the Defence Sector', September 2019, p. 25 https://www.amnesty.org/download/Documents/ACT3008932019ENGLISH.PDF (accessed 5 July 2020).

[176] Ibid., p. 26.

doing it"[177]. And in an Annual General Meeting in 2019 he repeated that that BAE System was not responsible to investigate the use of its equipment in Yemen.[178]

Parallel to this survey, in an analysis made in "Arms Trade and Corporate Responsibility" by Christian Schliemann and Linde Bryk upon four defence companies, Dassault and Rheinmetall among them, it was concluded that none of the businesses had a clear policy commitment to respect human rights and specifically in assessing the use of its equipment by its customers. Moreover, they did not mention respect for international humanitarian law as an issue to take into account in their risk assessments.[179]

All these declarations and the non-answered questions provide an idea of the opaqueness and the lack of credibility behind the commitments and ethics statements, policies or codes adopted by these companies. In other words, as stated in Amnesty report "the fact that 14 defence and small arms companies contacted by Amnesty International did not even respond to a request for information regarding their human rights policies and procedures shows a lack of interest in any form of communication related to human rights due diligence from some leading companies in the sector."[180] There is not a real assumption of responsibility in this sector towards human rights risk assessments. The defence industry does not consider legal or social responsibility to implement any preventive mechanism. They hold that they do not have separate responsibility from governments on assessing the impact of their business activity. They are not dealing with the gravest humanitarian and human rights risks, which conclude unquestionably in a breach of UNGP second pillar principles.

4.2.3 Third Pillar: Access to Remedy

There are considerable obstacles for access to remedy in the defence sector. The most important barriers of judicial mechanisms, are found especially at national, but also at international level, in administrative proceeding against government licenses and in criminal proceedings against political and corporate personalities.

The first and perhaps main issue is the difficulties to define concrete victims, and to achieve their direct access to Courts, since these violations of human rights are happening in the context of armed conflicts and the causal link between the company and the human rights abuses are more difficult to identify for victims themselves. Normally, they are NGOs and similar organisations who bring the cases before national and international courts. Therefore, the lack of legal standing of NGOs in certain countries is a serious obstacle for achieving justice. Moreover, in those proceedings where only the violation of export control laws is being discussed, individuals as direct affected persons do not have the possibility of intervene.[181]

At international level, many obstacles that were previously discussed are expected to raise in the judicial proceeding before the ICC, if this Court decide to proceed to the judicial investigation. Perhaps the main challenges are the strict interpretation of the art 25 (c) Rome

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[177] M. Payton, 'Britain's biggest arms dealer tells peace activists selling weapons "encourages peace", *The Independent*, 5 May 2016, https://www.independent.co.uk/news/uk/home-news/britains-biggest-arms-dealer-bae-systems-chairman-sir-roger-carr-tells-peace-activists-weapons-sales-a7014436.html (accessed 6 July 2020).

[178] A. Merat, 'Arms supplier BAE denies it has any responsibility to investigate Yemen atrocities', *The Independent*, 24 June, 2019 https://www.independent.co.uk/news/uk/home-news/bae-arms-supplier-yemen-shareholders-saudi-coalition-uk-a8967791.html (accessed 6 July 2020).

[179] C. Schliemann, L. Bryk. *Arms Trade*, p. 20.

[180] Amnesty International, 'Outsourcing Responsibility', p. 42.

[181] C. Schliemann, L. Bryk. *Arms Trade*, p. 27.

Statute and the high threshold of the mental element that the ICC established in previous cases. Big barriers that could impede the recognition of corporate responsibility of the defence companies.

At national level, specific barriers have already been mentioned as well. There are not many judicial precedents, as normally countries does not recognise criminal liability of corporations, and other factors such as the strong political interest, the complex business structure of arms manufacturers or lack of willingness to investigate this industry. Another important barrier is the confidentiality of relevant information, not only at governmental level due to its inherent political nature, but at corporate level due to the lack of transparency. This increases the complexities for the defendant to find evidences to bring into the judicial investigation. Given all the barriers at a national level, ECCHR, Mwatana and others decided to bring this case before the ICC, since no investigation is admissible before the ICC if a proceeding is open at national level.[182] The many obstacles show that Member States are not complying with third pillar principles as they are failing to ensure that direct affected people and NGOs with legitimate interest have access to effective remedy.

4.3 Analysis of NAPs effectiveness: Actions embedded in NAPs to tackle the challenges

Germany, France, Italy, Spain and the UK have developed and implemented NAPs in the past five years whose aim should be, among others, to avoid situations such us the provision of means by national companies specialised in military equipment to be used in the commission of human rights violations in third countries.

As mentioned before, the German and Italian NAPs were adopted in 2016 to be implemented in 4 and 5 years respectively. The French and Spanish NAPs were both adopted in 2017, the latter to be implemented in a period of three years. All of these NAPs will be analysed together, as they do not contain many actions towards the achievement of human rights protection in the defence sector individually.

4.3.1 German, Italian, Spanish, British and French NAPs developments towards the protection of human rights in the Defence sector

The previous analysis of actions embedded in NAPs for the textile and oil sector, in higher or lower degree, NAPs established general objectives focusing on these sectors and business relations related to parent company-subsidiaries and retailer-supplier along the supply chain. However, concerning the protection of human rights in the context of arms exports, there are no specific actions mentioned within the German, Italian, Spanish and French NAPs.[183] They do not foresee this type of human rights violations and do not contain any provision to prevent arms manufacturers from providing military equipment to warring parties at stake to be used for committing violations of human rights and humanitarian law. As an example of this absence and the shortcomings presented in arms export control legislation in Germany, in a hearing of the Committee against Torture on Germany's implementation practice, a question was forwarded by the Co-Rapporteur to this Member State on the issue of arms exports to Saudi Arabia, asking which legislation was in place to face this issue in line with the German human

[182] ECCHR, *Accountability for alleged, p.* 7.
[183] C. Schliemann, L. Bryk. *Arms Trade,* p. 24.

rights policy.[184] And this is not the only monitoring body that makes this type of suggestions to Germany. The Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women has repeatedly recommended to Germany to harmonise its legislation related to arms export control and to elaborate comprehensive and transparent human rights risk assessment to protect women and children rights in this context.[185]

Only in the British NAP, within the section of first pillar implementation, it is mentioned an existing mechanism within the UK legal and policy framework; the export licensing system. Throughout this system, the UK government develops human rights risk assessments before granting any license[186]. However, any further action is planned towards the legal recognition of corporations involve in the provisions of arms and other military technologies. And, as previously discussed, if this initiative undertaken by the government is not accompanied by legal corporate obligations and real ethic commitment from arms manufacturers, the export license system could cause a reverse effect, giving the companies arguments to defend they are not responsible to assess the human rights risk, as this have already been assumed by the government.

A remarkable action planned in the French NAP related to the legal compliance of human rights due diligence in business enterprises, despite it is not specifically focused on the arms sector, is the adoption in 2017 of a Corporate Duty of Vigilance Law that provides for mandatory human rights due diligence, which was appointed in its NAP also adopted in 2017.[187] This is a very important initiative as human rights due diligence is not mandatory yet in the majority of the States. Also in the context of arms export, the establishment of human rights risk assessment as a legal requirement of due diligence for arms manufacturers could be a great start point towards human rights protection in this sector.

Nevertheless, this law has also been criticised for been poorly implemented. A report developed by Amnesty International establishes that this law is based on the adoption of legal obligations of prudent and diligent conduct over French companies, foreign subsidiaries and other businesses involved in the supply chain, but the first issue is that no comprehensive list of

[184] UN OHCHR, 'Summary of the hearing of the Committee against Torture' Geneva, 30 April 2019, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24537&LangID=E (accessed 10 July 2020).

[185] Committee on the Elimination of Discrimination against Women (CEDAW), 'Concluding observations on the combined seventh and eighth periodic reports of Germany', CEDAW/C/DEU/CO/7-8, 3 March 2017, para. 27–28. http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqIW7xsH63TzPVZQc03dkiGujUWnF9h7e%2B3Vb7TPdWri65QtBHIpmM%2FOZR6uNHDv%2Fk%2Fr9lhCzP4viejMPdMzkZn%2FaDumULkjwIcf1H1I%2FF%2F1re4ZLQjIea%2FuQrPGnclvhw%3D%3D And Committee on the Rights of the Child, 'Concluding Observations on the combined third and fourth periodic reports of Germany', CRC/C/DEU/CO/3-4, 25 February 2014, para. 77 http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsrVrBGd0Fukf%2FAkab12UC%2Fbq2Wr4D4NsvjzuQ6STbGhJFsCwIbP0eboEORuvvOVzFsmaxxE1z7KL34se3Pi3sUEBxnKtWOmoPmom82NPKMTx (accessed 10 July 2020).

[186] HM Government, 'Good Business Implementing', p. 8, para. 16.

[187] National Action Plan for the implementation of the United Nations Guiding Principles on Business and Human Rights of France, 2017, p. 24. https://www.ohchr.org/Documents/Issues/Business/NationalPlans/NAP_France_EN.pdf (accessed 11 July 2020).

companies subject to this law has been publish. Thus, there is no legal certainty about legal persons subject to these obligations.[188]

As a result, neither German, Spanish, Italian, French or UK NAPs provides sufficient actions or strategies to tackle the serious challenges of compliance presented throughout the three pillars in the context of the defence sector, therefore it is urgent to give a call to EU MS in order for these to make a revision of their NAPs and establish effective actions that imply the enforcement of legislation to avoid their national companies to provide the means for the commission of international crimes.

5. Conclusions

The European identity has been strongly discussed by scholars of European studies and theories, since Europe is very culturally diverse and to find a political point of union among EU MS have not been easy. Eventually, the consensus was made on democracy, rule of law and human rights promotion as core of EU values. Therefore, it is essential that the EU enhances human rights policies and ensure that EU institutions and EU MS are able to prevent and remedy human rights abuses, otherwise the EU identity itself would fall into incoherence. Moreover, the EU and EU MS have legal human rights obligations and their own judicial mechanisms to condemn human rights violations. Therefore, the EU is accountable to prevent and remedy human rights abuses committed by European natural and legal persons, within and out of the EU borders. Nonetheless, the Achilles heel for EU capability to protect human rights seems to be corporate abuses committed by European Transnational companies in third countries.

The EU has failed on maintaining the commitment to implement UNGPs since no legally binding framework has been established at EU level since 2011. What is more, the EU has failed on adopting a comprehensive and coherent political framework that bound EU internal and external institutions, EU MS and European stakeholders. Notwithstanding the economic dimension of the EU has made great achievements on the creation of a common market and mechanisms to protect corporate interests for European businesses that operate outside and inside the EU, the political dimension of the EU have not been able to ensure human rights protection in the same circumstances. Political and economic interests have been preventing the EU from ambitious strategies and policies, and enforcing legislation towards human rights protection.

No international or EU framework addresses the accountability of European Transnational companies with outsourcing production outside the EU. No real progress has been achieved on the establishment of mandatory due diligence for businesses, hence respect for human rights is still a decision for businesses to make on a voluntary basis, in like manner to comply with their codes of conducts. Ruggie himself stated that the elaboration of the UNGPs were "the end of the beginning" in the protection of human rights from corporate harm. There needs further steps after nine years since UNGPs elaboration. Since then, it has been repeatedly demonstrated

[188] Amnesty International, 'The Law on duty of vigilance of parent and outsourcing companies', February 2019, p. 7, https://amnestyfr.cdn.prismic.io/amnestyfr%2F8fcbc315-bebf-434f-9352-aacc9a0d943f_190614_web_version_anglaise.pdf (accessed 11 July 2020).

that non-legally binding codes of conduct and CSR to respect human rights are not sufficient nor effective.

Legal gaps and uncertainty surrounding business complex structures, such as those established in the supply chain, among retailers and suppliers, parent companies and foreign subsidiaries, is a prominent issue, advantaged by businesses to avoid assumption of responsibility. Soft-law initiatives reaching specific sectors and countries have been developed to confront human rights abuses in this context, however only International or EU hard-law instruments will be able to effectively tackle this issue, instruments that have not been elaborated hitherto.

Furthermore, the EU needs to pay attention to vulnerable economic sectors and provide them with an effective respond. Particularly, the defence industry is a sector characterised by the impunity for the provision of means to warring parties for the commission of international humanitarian law and human rights violations. EU MS NAPs barely address the deficiencies of regulatory arms export control regimes and the challenges at national level to declare these corporations, or their representatives, criminal liable for their acts. On the contrary, EU MS NAPs seem to pay more attention on Textile and Oil sectors, however the actions proposed are limited initiatives that do not resolve far-reaching challenges.

Moreover, unresolved jurisdictional challenges impede the CJEU and National Courts to judge European Transnational companies that commit violations of human rights outside the EU borders. In this regards, considerable legal and political obstacles may have been encountered by the EU to enact extraterritorial regulations or exercise extraterritorial jurisdiction. Thus, the development of an international legally binding treaty is crucial, whereby human rights protection does not depend exclusively on extraterritoriality. Subsequently, the EU must facilitate the ratification of the treaty on business and human rights within the IGWG, and promote EU MS to enforce legal obligations in line with the ones established in the reviewed draft. The latter may be effective solutions to tackle the main challenges of UNGPs compliance: enforcement of legislation on due diligence and define legal obligation of businesses, recognition of the figure of criminal responsibility for corporations and facilitating access to remedy for non-EU national victims of human rights violations committed by European multinationals.

Therefore, the progress made by the EU in the field of business and human rights is still very poor and not sufficient. The Shadow EU action Plan is the most recent and promising strategy, since it foresees the objective of establishing mandatory due diligence for EU businesses, however this Action Plan did not go through the adequate participatory process to be adopted as it was not elaborated in consultation with stakeholders from civil society. Thus, this EU Action Plan very unlikely will be effectively implemented. NAPS at MS national level are the focal point of reference for compliance with UNGPs, however, their effectiveness is still strongly questionable.

Ultimately, there are still many obstacles in the way of legal recognition of corporate liability and effective compliance with UNGPs, especially related to operational activities developed by European multinationals outside EU borders. It is urgent that the EU focuses on the establishment of a more effective action plan that bounds EU institutions, MS and European corporations, and must give a call to EU MS to update their NAPs accordingly and consistently, subject to the real necessities to confront impunity in the field of business and human rights.

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