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SCHOLARLY ARTICLE

Decentring Narratives around Business and Human Rights Instruments: An Example of the French *Devoir de Vigilance* Law

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Abstract

There has been tremendous momentum in adoption of business and human rights regulations, specifically national legislation that mandate human rights due diligence. While these laws have been heralded as the torchbearers of progress, this article approaches national legislation on business and human rights by placing them in context of a North–South divide through a Third World Approaches to International Law (TWAIL) lens. It looks at the form of regulation of transnational corporations (national/international) – not the substance – and illustrates the neo-colonial flavour of these laws by diving into the narrative behind the adoption of the French *devoir de vigilance* law. It illustrates that the French law can also be read as an attempt to universalise European values while reinforcing power hierarchies. The claim of this article is that national legislation cannot be a substitute for a treaty but only a path towards one, because national legislation structurally lacks means to take the Global South participation seriously.

Keywords: Business and human rights treaty; Decolonisation; Duty of vigilance; Human rights due diligence; TWAIL

I. Introduction

The European Commission, in February 2022, put forth a proposal for a Corporate Sustainability Due Diligence Directive that includes mandatory human rights due diligence (mHRDD).[1] France, a member state of the European Union (EU), already has a law on mHRDD in place since 2017 and was the first state to do so,[2] with the Netherlands,[3] Switzerland,[4] Germany[5] and Norway[6] following suit. All these initiatives seek to rectify the fact that transnational corporations (TNCs) are rarely ever accountable for their human

[1] Proposal for a Directive of the European Parliament and Council on Corporate Sustainability Due Diligence and amending Directive 2019/1937 (COM/2022/71) (European Union) (CSDDD).

[2] LOI no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre 2017 (France) (French law).

[3] Wet zorgplicht kinderarbeid 2019 (The Netherlands).

[4] Indirect Counter-Proposal to the Popular Initiative 'For responsible businesses – protecting human rights and the environment' 2020 (Switzerland).

[5] German Federal Ministry of Labour and Social Affairs, 'Act on Corporate Due Diligence in Supply Chains', https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html (accessed 7 November 2021).

[6] Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven) 2021 (Norway).

rights impacts abroad.[7] Nevertheless, how does such a (seemingly) international problem get solved by France or the EU adopting a Directive?

International law on business and human rights is yet to produce binding legal obligations,[8] although soft law is present in the form of the United Nations Guiding Principles on Business and Human Rights (UNGPs).[9] The consequences that may flow from national law can undoubtedly advance the cause of justice, but one still has to ask the question: why should France or Germany, or any other state that promulgates this kind of legislation, be the saviour of the Global South, the damsel in distress?

The fact that an international legal system imposes no legal obligations on TNCs for human rights stands in contrast to the network of international investment treaties where TNCs are directly able to claim rights.[10] This article understands and uses the term 'national law' as national law with extraterritorial effects since regulations of *trans*national corporations cannot but be done extraterritorially. National laws that claim application for the 'whole world' are the focus of this article, due to their unilateral nature, not *national* laws *per se.*[11] The article is primarily focused on the regulation of TNCs in the *form* of a unilaterally enacted national law and is much less concerned about the substance of the law in question.

The modest assertion of this article is that while celebration over the adoption of national laws is warranted, a cautious optimism over such laws is equally necessary due to neo-colonialism tendencies, specifically regarding the exclusion of Global South voices in the adoption of such laws. The regulations of TNCs by way of a patchwork of discrete national mHRDD laws without an international *substantive* treaty must be understood in the context of its history. As such, national laws should not be a substitute for capacity building in the Global South and a binding international law developed with extensive consultations. When read in isolation, like the dominant narrative, these national laws seem like a new era of progressive norms on business and human rights. However, these mHRDD laws lack the legitimacy of a multilateral treaty because they are structurally deficient for not including input from the Global South, their intended beneficiary. The slogan 'nothing about us, without us', used by the UN in the context of disability rights, reflects this necessity of participation.[12]

[7] For example, think of the Rana Plaza garment factory building in Bangladesh, housing suppliers for known Western brands like Benetton and KiK, which collapsed and killed over a thousand workers and injured over 2,500. See Clean Clothes Campaign, 'Rana Plaza', https://cleanclothes.org/campaigns/past/rana-plaza (accessed 3 September 2022); International Labour Organization, 'The Rana Plaza Accident and its Aftermath' (21 December 2017), http://www.ilo.org/global/topics/geip/WCMS_614394/lang–en/index.htm (accessed 3 September 2022).

[8] There have been previous attempts to elaborate international obligations of TNCs, and a current treaty process has been underway since 2014. See Office of the High Commissioner for Human Rights, 'Intergovernmental Working Group on TNCs and Human Rights', https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx (accessed 22 November 2019).

[9] Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie', A/HRC/17/31 (21 March 2011), endorsed by Human Rights Council, 'Human rights and transnational corporations and other business enterprises', A/HRC/RES/17/4 (6 July 2011) (UNGPs).

[10] UN Conference on Trade and Development, 'International Investment Agreements Navigator: UNCTAD Investment Policy Hub', https://investmentpolicy.unctad.org/international-investment-agreements (accessed 27 March 2020).

[11] Assemblée Nationale, General discussion on the Report No. 3582 by Mr Dominique Potier, made on behalf of the Law Committee, tabled on 16 March 2016, statement of Dominique Potier.

[12] Economic and Social Council, Disability Department, 'Nothing About Us, Without Us: International Day of Disabled Persons 2004' (3 December 2004), https://www.un.org/development/desa/disabilities/international-day-of-persons-with-disabilities-3-december/international-day-of-disabled-persons-2004-nothing-about-us-without-us.html (accessed 7 November 2021).

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The core claim of the article is that unilateralism inherent in national laws make them a worse alternative to an international treaty that necessitates, at the very least, participation from Global South states, if not people. The pitfalls of this unilateralism are illustrated through the French *devoir de vigilance* law at the end of the article. There has been extensive literature in international law on the history of the effects of corporate activities on human rights; it is in that context that the proliferation of national mHRDD laws should be read. National laws and a multilateral treaty are not mutually exclusive – but the former without the latter must come from the Global North out of compulsion, not by choice, of the Global South.

This claim sets the stage for a Third World Approaches to International Law (TWAIL) analysis of (the context of) current business and human rights instruments. TWAIL is, at its core, an unpacking of colonial legacies of international law and decolonisation of material realities of people in the Global South.[13] Its aim is to present viewpoints systematically under-represented in the mainstream.[14] While this article places emphasis on Global South *states*, it is because of the minimalist assumption that a treaty mandates *at least* states to participate in its norm negotiations, a feature that national laws lack on a structural basis – let alone the participation of Global South peoples. It is the innate characteristic of TWAIL to be a counter-hegemonic call for full representation of subaltern people – 'particularly those non-state, nongovernmental, rural and urban poor who constitute the majority' which entails full democratisation of Global South states.[15]

A TWAIL-informed treaty would thus have Global South participation at its core which is difficult to achieve with national laws of the Global North. TWAIL, in its origin, is aimed at representation of the unrepresented 'peoples', including indigenous people and other marginalised groups;[16] even the voices of the past.[17] A TWAIL informed law would thus place the participation of Global South at its centre, which can most practically be done through a multilateral treaty as opposed to a national law, even if the former is not fully representative. It should also be pointed out at the outset that simplification by way of the terms Global North and Global South results in a loss of nuance for a plurality of interests. However, for our purposes it is a good enough grouping to depict two majorly distinct interests of regulation of TNCs through national law and international law that are somewhat temporally sticky.[18]

The technical analyses of European mHRDD laws do not reveal the flaw inherent in unilateral legislation from the Global North that excludes Global South voices and reaffirms power hierarchies. It would be impossible to discuss the context of domestic laws without discussing why and how international law has failed to regulate the activities of TNCs in a binding manner.[19] Section II briefly touches on the North–South divide concerning the form of regulation of TNCs with many failed attempts eventually leading up to the UNGPs.

[13] Sujith Xavier et al, 'Placing TWAIL Scholarship and Praxis: Introduction to the Special Issue of the Windsor Yearbook of Access to Justice' (2016) 33 *Windsor Yearbook of Access to Justice* v.

[14] Usha Natarajan et al, 'Introduction: TWAIL – on Praxis and the Intellectual' (2016) 37 *Third World Quarterly* 1946.

[15] Makau Mutua, 'What is TWAIL?' (2000) 94 *Proceedings of the ASIL Annual Meeting* 31, 37.

[16] Karin Mickelson, 'Taking Stock of TWAIL Histories' (2008) 10 *International Community Law Review* 355, 360.

[17] George RB Galindo, 'Splitting TWAIL' (2016) 33 *Windsor Yearbook of Access to Justice* 37, 55.

[18] Xavier et al, note 13, vii; the term Global South, as a loose grouping, does acknowledge '[that] the possibilities of having a north in the South, a south in the South, and a south in the North are worth considering, even as these occidental orientations collapse under the complexity of peoples' lived realities'. For a critique of 'Global South' as a terminology being outdated and Westphalian, see Ama Ruth Francis, 'Global Southerners in the North Essays' (2020–2021) 93 *Temple Law Review* 689.

[19] Caroline Omari Lichuma, '(Laws) Made in the "First World": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' (2021) 81 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*Heidelberg Journal of International Law*) 497, 516.

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Section III demonstrates the impacts of this history on the treaty currently under negotiation and explains the emphasis of the French law as the first mHRDD law, especially as France voted against the establishment of the treaty process. Section IV presents both sides of the coin on why an argument can be made on neo-colonialism for states not adopting national legislation as well as for states adopting such legislation. This section then analyses parliamentary debates preceding the enactment of the French law as an illustration of the general argument on neo-colonial flavouring of mHRDD laws, demonstrating how it can be read as an endeavour to universalise European values. The section also discusses the hope that international law and multilateralism gives for regulation of TNCs. The article then concludes in section V.

The justification of why the French law is chosen as an illustration precedes the discussion on the law, but some important points are flagged here at the outset. This article does not analyse the substance of the law but rather its narrative of adoption (through the legislative debate) as the trendsetter of national mHRDD laws. While subsequent legislative attempts to enact mHRDD legislation have the benefit of the French predecessor, France enjoyed no such advantage or impetus, and it had the first-mover norm-setting privilege for adoption of a national mHRDD law shortly after a negative vote from the Global North on the establishment of an intergovernmental working group for treaty negotiations in 2014. The French law and the treaty are indeed an important manifestation of the national–international dichotomy on regulation of TNCs. It represents both a critique of national mHRDD laws and the importance of a multilateral treaty.

II. The National–International Debate

TNCs and International Law

Questions regarding the regulation of TNCs came to be tied with discussions regarding foreign investment, decolonisation and development of the Global South,[20] with a North–South divide.[21] This North–South divide was visible throughout various occasions such as at the 1972 United Nations Conference on Trade and Development (UNCTAD), where the Global North insisted that the activities of TNCs in the host state were subject to the regulatory sovereignty of the host state by way of its national legislation.[22] States like Sri Lanka (erstwhile Ceylon), Chile and India objected to such an assertion, stating that national legislation had already proved to be ineffective.[23]

This ineffectiveness was because insistence on (host state) sovereignty only works when 'sovereignty' enjoyed by home and host states is the same; it is not so in reality. Seck calls this an 'impoverished sovereignty' of Global South states continuously being 'denied the ability to govern in the economic realm'.[24] This is *because* of the particular way the international legal

[20] For a more detailed history on the tying of discussion of TNCs with foreign investment, decolonization and development, since the era of the League of Nations to the present time, see Tagi Sagafi-nejad and John H Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Bloomington: Indiana University Press, 2008).

[21] A TWAIL analysis is presented by Sundhya Pahuja and Anna Saunders, 'Rival Worlds and the Place of the Corporation in International Law' in Jochen von Bernstorff and Philipp Dann (eds.), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford: Oxford University Press, 2019), 141; Amal Azem Gealfow and Ivana Machonova Schellongova, 'Draft Legally Binding Instrument on Business and Human Rights – is UN Stepping Twice into the Same River?' (2022) 22 *International and Comparative Law Review* 149.

[22] Pahuja and Saunders, ibid, 157.

[23] Ibid, 156–157.

[24] Sara L Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance' (2008) 46 *Osgoode Hall Law Journal* 565, 582.

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order is designed, not despite it,[25] and calls for a just international order cannot be answered by relegating the questions to national policy – it is set up to fail (to the detriment of host states).

Unilateral *home* state regulation, like the French law, is problematic by its character of unilateralism without regard for Global South voices in its adoption – this reifies the colonial hierarchy.[26] Multilateral international law is the least problematic of the options due to its modicum of inclusivity of voices.

The UN Instruments

At the UN, negotiations for a multilateral Code of Conduct for TNCs started around 1976.[27] Shortly afterwards, the Organisation for Economic Co-operation and Development (OECD) adopted the Guidelines for Multinational Enterprises in 1976 and in 1977, the International Labour Organization (ILO) adopted the Tripartite Declaration for Multinational Enterprises,[28] both of which were voluntary in nature.[29] These were 'pre-emptive strikes' against the negotiations of the UN Code of Conduct, neutralising the demand for its existence by the adoption of only non-binding loose standards at the international level.[30] The draft Code of Conduct was never adopted by the UN.[31] There was a second failure in the attempt for international regulation of TNCs by way of the UN Norms on the Responsibilities of Transnational Corporations when the UN Human Rights Commission observed that the Draft UN Norms had 'no legal standing' and were never requested.[32] This was, *inter alia*, largely because the content of the Draft UN Norms had leaped too far to impose obligations on TNCs similar to that of states.[33]

After the failure of the Draft UN Norms, the UNGPs, which introduced a three-pillar structure, were unanimously endorsed by the UN Human Rights Council.[34] The approach of the UNGPs led to the interweaving of binding obligations of states with voluntary social expectations of companies into one comprehensive normative output.[35] Existing legal

[25] Ibid.

[26] Ibid, 583.

[27] Economic and Social Council, 'Commission on Transnational Corporations: Report on the 2nd session (1–12 March 1976) Supplement no. 5', E/5782 and E/C.10/16 (1–2 March 1976), paras 47–51 endorsed by Economic and Social Council, 'Report of the Commission on Transnational Corporations on its Second Session', E/RES/180(LXI) (5 August 1976).

[28] International Labour Organization (ILO), *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (Geneva: ILO, 1977).

[29] Karl P Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16 *Journal of World Investment & Trade* 11, 28–29.

[30] Ibid, 30–31.

[31] It was pushed forth by many resolutions, including *inter alia*, Economic and Social Council, 'Code of Conduct on Transnational Corporations', E/RES/1989/24 (24 May 1989); Economic and Social Council, 'Code of Conduct on Transnational Corporations', E/RES/1987/57 (28 May 1987); UN General Assembly, 'Code of Conduct on Transnational Corporations', A/RES/45/186 (21 December 1990). The negotiations as late as 1991–1992 remained inconclusive: UN General Assembly, 'Report from the Economic and Social Council: Code of Conduct on Transnational Corporations: Note from the Secretary General', A/46/558 (16 October 1991).

[32] UN Commission on Human Rights, 'Responsibilities of transnational corporations and related business enterprises with regard to human rights' Resolution 2004/116 confirmed by Economic and Social Council, 'Responsibilities of transnational corporations and related business enterprises with regard to human rights' Resolution 2004/41, available in Economic and Social Council, 'Commission on Human Rights: Report on the Sixtieth Session (15 March-23 April 2004) Supplement no 3', E/CN.4/2004/127 (15 March to 23 April 2004).

[33] Pini Pavel Miretski and Sascha-Dominik Bachmann, 'The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: A Requiem' (2012) 17 *Deakin Law Review* 5, 30–34.

[34] UNGPs; Human Rights Council, note 9.

[35] John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: WW Norton, 2013), s 4.

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standards were thus cloaked (or obscured depending on how one may look at it) in the form of policy rationales that appealed to all parties alike; the aim was to achieve a document that was 'politically authoritative' but not legally binding, the latter of which was left for future developments.[36] Somehow, the progress (of adopting an instrument) was that no progress was achieved at all, because the *status quo* of no substantive binding obligations on TNCs in international law remained. However, Ruggie concluded that 'multilateral measures are likely to be seen as more acceptable than unilateral measures'.[37] The authoritativeness of the UNGPs arose from its extensive consultations with stakeholders – something a unilateral measure will certainty lack in comparison with a multilateral one.[38]

III. The Draft Treaty and the French Law

Only non-binding soft law instruments were ever adopted at the UN level. However, there was renewed interest in international regulation of TNCs when the UN Human Rights Council formed an intergovernmental group in 2014 whose mandate is to elaborate an international legally binding instrument concerning TNCs and human rights.[39]

Ecuador and South Africa were the co-sponsors of the draft resolution[40] and the Global North voted against the establishment of the group.[41] Although the Global South cannot be termed as a homogenous group that unanimously supported the treaty process without reservation, the negotiation process indeed looked like a flashback from the 1970s debate on the New Economic World Order.[42] Even when the Global South continuously pushed for stronger regulation at the international level, a narrative that went along with this is that the Global North states were the ones pushing forward human rights protections by adopting National Action Plans under the UNGPs.[43]

The intergovernmental group was simply dealt a bad hand of cards with past decades reinforcing the primacy of national law. For example, a French member of parliament stated in the treaty process that the most effective way towards a treaty is by way of national and European initiatives.[44] What else can we see in the treaty process, what does the treaty say and where does the French *devoir de vigilance* law come into the picture? These three questions are discussed below.

[36] Ibid.

[37] Ibid, 141.

[38] Ibid, 55.

[39] Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (14 July 2014).

[40] Ibid, draft resolution, A/HRC/26/L.22/Rev.1.

[41] Human Rights Council, note 39.

[42] Brigitte Hamm, 'The Struggle for Legitimacy in Business and Human Rights Regulation: A Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty' (2022) 23 *Human Rights Review* 103, 118 citing Surya Deva, 'Connecting the Dots: How to Capitalize on the Current High Tide for a Business and Human Rights Treaty' in David Bilchitz and Surya Deva (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge: Cambridge University Press, 2017) 472, 478–479.

[43] Janne Mende, 'Norm Convergence and Collision in Regime Overlaps. Business and Human Rights in the UN and the EU' (2022) 19 *Globalizations* 725, 735.

[44] Danielle Auroi, 'Statement by Danielle Auroi, Member of Parliament, France in Session 2, Panel V Subtheme 1' (second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Geneva, 24–28 October 2016) 9, https://previous.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVSubtheme1/DanielleAuroi.docx (accessed 14 April 2021); ibid, 735.

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The Treaty Negotiations at the UN

When the voting for the 2014 resolution on the establishment of the intergovernmental working group was underway, it became apparent that there were similarities and divisions in the state positions along the lines of Global North and Global South with the former favouring national regulation and the latter international.[45] The USA was 'extremely disappointed [...] by the decision to table [the] resolution [to establish the intergovernmental working group]',[46] calling it an 'ill-considered treaty drafting exercise' the next day when voting on a competing resolution that established the primacy of national efforts to implement the UNGPs.[47] The European Union stated that 'no international mechanism will be able to replace robust domestic legislation and mechanism[s]'.[48] The UK voiced its concerns against establishing the group, emphasising that 'fundamentally, this issue is one of the rule of law, the *national* rule of law, within individual states'.[49]

In contrast, India stated that:

> when states are unable to enforce national laws with respect to gross violations committed by businesses, and hold them accountable due to the sheer size and clout of the transnational corporations, the international community must come together to seek justice for the victims of the violations committed by transnational corporations.[50]

Ecuador, in its introduction of the resolution, emphasised that 'while [TNCs] enjoy binding international norms to guarantee their activity and profit, victims, however, of harmful corporate activities have no legal protection'.[51] The essence of this contrast is that an opposition to international law meant that national law would have no procedural harmony or safeguards to hear the people of the Global South while adopting a law about them. In the last few years, the outright opposition to international law has moved on to a more principled objection to the current form or substance of the treaty, while somewhat accepting the role an international treaty process can play.[52] However, some states, like the USA, still insist on the issue being confined to national law.[53]

[45] Human Rights Council, note 39. Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, UK and USA voted against the resolution, while Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela and Viet Nam voted for.

[46] Human Rights Council, 'A/HRC/26/L.22/Rev.1 Vote Item:3 - 37th Meeting 26th Regular Session Human Rights Council' (26 June 2014), https://media.un.org/en/asset/k1n/k1n0dedrr4 (accessed 31 January 2023) (statement of Mr Steven Townley, representative of the United States of America).

[47] Human Rights Council, 'A/HRC/26/L.1 Vote Item:3 - 39th Meeting 26th Regular Session Human Rights Council' (27 June 2014), https://media.un.org/en/asset/k13/k133cf5et9 (accessed 31 January 2023) (statement of Mr Steven Townley, representative of the United States of America).

[48] Human Rights Council, note 46 (statement by Mr Maurizio Enrico Serra, representative of Italy speaking on behalf of the European Union).

[49] Ibid (statement of Ms Karen Pierce, representative of the United Kingdom of Great Britain and Northern Ireland) (emphasis supplied).

[50] Ibid (statement by Ms Gloria Gangte, representative of the Republic of India).

[51] Ibid (statement by the representative of Ecuador, Mr Luis Gallegos Chiriboga, on the introduction and tabling of the resolution).

[52] European Union, 'Statement by the European Union - 8th Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' 3, https://www.ohchr.org/sites/default/files/documents/issues/transcorporations/session8/submissions/2022-10-27/stm-IGWG-session8-igo-eu.pdf (accessed 23 January 2023).

[53] Business & Human Rights Resource Centre, 'Daily Updates on the 8th Session of the UN Intergovernmental Working Group on a Proposed Treaty on Business and Human Rights - Day 1: Monday 24 October 2022', https://www.business-humanrights.org/en/latest-news/day-1-monday-24-october-2022/ (accessed 24 January 2023).

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Nonetheless, differences are apparent from a political schism as well, where the EU, the UK and the USA all reiterated that there will be a difficulty in garnering political support from states hosting a large number of TNCs, if the treaty goes beyond the 'consensual' UNGPs framework,[54] a typical Global North rally against the treaty in its current form.[55] However, the 'consensus' in endorsing the UNGPs is not synonymous with unanimity as states departing from this consensus were encouraged not to call for a vote.[56]

The mismatch of narratives is also visible if one compares the statements of the EU and the UK in the fifth and sixth sessions with the position of Ecuador, one of the co-sponsors of the original 2014 resolution establishing the intergovernmental working group. In the fifth session, the EU representative said:

> [I]t is essential for any proposal to reach the necessary traction amongst UN member states. It is clear that a number of States are not in the room, and that others are not ready to engage in negotiations in the current format or on the basis of the current draft.[57]

Contrast this to what Ecuador's representative stated:

> We wish to highlight that the issue of the creation of a binding instrument has been gaining increasing support at the international level, which is reflected in the large presence of State representatives in the sessions of the Working Group …[58]

Similarly, in the sixth session, the UK observed: '[Y]ear after year, fewer and fewer delegations appear here, in this negotiation room. This absence signifies not apathy for this important topic, but lack of faith in the text before us'.[59] On the other hand, Ecuador noted that it is 'particularly pleased to see that the number of States and actors participating … is increasing. This undoubtedly demonstrates the interest in the issue, reflecting unprecedented numbers'.[60] The USA participated in the treaty negotiation process for the first time in the seventh session only to reiterate its continued opposition to the process and that it would rather consider alternative paths like a framework agreement instead of a treaty that read like the published drafts.[61] While this participation might not be in bad faith,

[54] Office of the High Commissioner for Human Rights, 'Annex to the Report on the Seventh Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (A/HRC/49/65)' (29 December 2021).

[55] Deva, note 42, 478.

[56] Carlos López, 'The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?' in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 58, 71.

[57] European Union, 'Oral Statement of the European Union at the 5th Session of the Intergovernmental Working Group', https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/IO/EU_General.docx (accessed 14 April 2021).

[58] Ecuador, 'Oral Statement of Ecuador at the 5th Session of the Intergovernmental Working Group', https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/States/Ecuador_General.docx (accessed 14 April 2021).

[59] United Kingdom of Great Britain and Northern Ireland, 'Oral Statement of the United Kingdom at the 6th Session of the Intergovernmental Working Group', https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/GeneralStatements/States/UK_general_statement.docx (accessed 20 September 2022).

[60] Ecuador, 'Oral Statement of Ecuador at the 6th Session of the Intergovernmental Working Group', https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/GeneralStatements/States/Ecuador_General_Statement.doc (accessed 20 September 2022).

[61] See oral statement of the United States of America at High Commissioner for Human Rights, note 54.

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Van Ho outlines that it might cause a considerable barrier in bringing a key player like the USA onboard, and might result in watering down the provisions of a business and human rights treaty that it will not ratify.[62]

Nonetheless, the intergovernmental working group has published four iterations of the text of the proposed treaty, the latest of which is the 2021 Third Revised Draft, which will be in focus in this section.[63] In continuation of this international law *déjà vu*, the preamble of the draft treaty ties TNCs and development exactly as has been done since before the UNCTAD was established.[64] The EU and Switzerland in their statements to the intergovernmental working group have reaffirmed their commitment to the treaty but stated that national laws implementing the UNGPs must play a leading role so as not to deviate from the *status quo*.[65] In fact, Switzerland, even when continuing to reiterate that it does not participate in the negotiations,[66] has held the position that national initiatives are the most crucial for the UNGPs,[67] and the 'polarisation' and legal issues caused by the treaty process can 'hamper efforts to implement the Guidelines'.[68]

Furthermore, in the fifth session, Switzerland expressed regret that existing national binding legislation is not taken into account in the treaty process.[69] This was also the case for the French position in the fourth session, which stated: 'The European Union has one of the highest standards in the area of respect for human rights in companies, which should be taken as a model'.[70] At the time of these statements, the French *devoir de vigilance* law was the only national mHRDD law in force.

As regards the Global South, in the seventh session, South Africa was the only state that explicitly acknowledged the national mHRDD laws like that of France and the EU proposal; however, it did this to emphasise that it has the potential to bring the international community closer to a common ground to realise the *current treaty*.[71] *European* national legislation clearly charted itself a path as precursors to the proposed treaty. While the support for national mHRDD initiatives among developing states is not clear, the support for the treaty is easier to distil.

[62] Tara Van Ho, 'Oops! They Did it Again: The USA's Counter-Diplomacy in Promoting the Framework Convention', *Völkerrechtsblog* (22 June 2022), https://voelkerrechtsblog.org/oops-they-did-it-again/ (accessed 3 September 2022).

[63] Office of the High Commissioner for Human Rights, 'Third Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (2021), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf (accessed 20 September 2022) (Third Revised Draft).

[64] Ibid, preamble.

[65] Statements of the European Union, Switzerland and other countries can be seen at Office of the High Commissioner for Human Rights, 'Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises', https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx (accessed 14 April 2020).

[66] Office of the High Commissioner for Human Rights, note 54.

[67] Switzerland, 'Oral Statement of Switzerland at the 4th Session of the Intergovernmental Working Group', https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/Suisse_-15Oct.docx (accessed 14 April 2020).

[68] Ibid.

[69] Switzerland, 'Oral Statement of Switzerland at the 5th Session of the Intergovernmental Working Group', https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/States/Switzerland_General.docx (accessed 14 April 2020).

[70] France, 'Oral Statement of France at the 4th Session of the Intergovernmental Working Group', https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/France-15_oct.docx (accessed 14 April 2020).

[71] See statement of South Africa at Office of the High Commissioner for Human Rights, note 54.

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The Text of the Draft Treaty under Negotiation

As elaborated below, the draft reflects an emphasis on national law (e.g., article 6); it falls short of creating new international obligations or mechanisms. The purpose of the treaty is to 'clarify and facilitate … obligation of States'[72] and to 'facilitate and strengthen … international cooperation', which suggests that this treaty intends to harmonise national legislation.[73] The draft treaty mandates *national* courts to adjudicate corporate responsibility based on *national* obligations of corporations. National initiatives are not peripheral to the fulfilment of obligations under this treaty or a mere 'implementation' – they are a core necessity for being the substantive basis of corporate obligations in articles 6 and 8. Even the change from TNCs 'have a *responsibility* to respect human rights' to TNCs 'have the *obligation* to respect internationally recognised human rights' in the preambles of the resolution establishing the treaty process and the Third Revised Draft, respectively, is essentially an elaboration of the obligations of states, and not that of TNCs, under international law.[74]

In fact, the draft treaty provides no system of liability in itself. A system of liability under *national law* would have to be established under article 8 which should be a 'comprehensive and adequate system of liability.'[75] This is an important but often overlooked distinction and one that is significant – it reifies the fact that there are no international legal obligations for corporations,[76] akin more to the UNGPs narrative than previous attempts like the Draft UN Norms. The USA observed this during the eighth session of the treaty process as well.[77]

Article 7 would enable litigation in the home state in their *domestic courts.*[78] It is also interesting to note that until the Third Revised Draft, 'all matters of substance and procedure' were to be governed under national law, including private international law.[79] In the Third Revised Draft, article 11 was revised to read 'all matters of procedure' are to be governed by domestic law,[80] and 'all matters of substance which are not specifically regulated by [the treaty]' can be governed by domestic law of choice of the victim; the choice exists between the law of the state where the action produced effects, or the law of the state where the defendant is domiciled.[81] As there is hardly any substance that the treaty governs regarding corporate obligations, it is unclear as to what would practically change if a person were to (hypothetically) apply the Third Revised Draft over the Second Revised

[72] Third Revised Draft, note 63, art 2.1(a).

[73] Ibid, art 2.1(e).

[74] Ibid, preamble; Human Rights Council, note 39, preamble.

[75] Third Revised Draft, note 63, art 8.1.

[76] This position is becoming increasingly difficult to sustain, as even international investment tribunals have started taking cognisance of international law responsibilities and obligations of investors. See Kevin Crow and Lina Lorenzoni-Escobar, 'From Traction to Treaty-Bound: Jus Cogens, Erga Omnes and Corporate Subjectivity in International Investment Arbitration' (2022) 13 *Journal of International Dispute Settlement* 121.

[77] United States of America, 'United States' Interventions on the Suggested Chair's Proposals - 8th Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' 2, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/wgtranscorp/session8/submissions/2023-01-19/preamble-art3-IGWG-session8-state-usa.docx (accessed 23 January 2023).

[78] Third Revised Draft, note 63, art 7.1.

[79] Office of the High Commissioner for Human Rights, 'Second Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', art 11(1), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (accessed 14 April 2020).

[80] Third Revised Draft, note 63, art 11.1.

[81] Ibid, art 11.2. The Second Revised Draft contained a similar provision in art 11(2) but did not contain the exception to substantive law not regulated by the treaty.

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Draft.[82] Corporate responsibility would still flow from national law. For example, if there was a hypothetical international court for TNCs today, what substantive law would the court apply? Not treaty law but national law, and perhaps one adopted without consultation of those who would have approached the court.

The draft treaty enables claims to be undertaken in the courts of the home state. The question is, is that the end goal? This is a corollary of 'delocalised justice' as some authors would call it,[83] referring to the detachment process of the delivery of justice from the local contexts of the wrongs suffered, e.g., when harm suffered in Africa makes calls for justice in European or American institutions necessary.[84] Imperialist histories can be a strong explanation for why transnational litigation in the Global North may be expedient as a means of justice. This is discussed further in the next section.

The draft treaty's Preamble states '*Upholding* the principles of sovereign equality, ... maintenance of territorial integrity and political independence of states'.[85] Furthermore, article 14.1 mandates state parties to fulfil their obligations 'in a manner consistent with the principles of *sovereign equality* and *territorial integrity* of States'.[86] Article 14.2 thereafter bars exercise of jurisdiction by one state in another state (but can be interpreted as prohibiting only executive jurisdiction, not legislative or judicial).[87] In a treaty which mandates extraterritoriality, the inclusion of such language signals a particular conception of sovereignty and territorial integrity. As stated in the previous section, insistence on sovereign equality masks unequal sovereignty, i.e., the unequal capacity of states to regulate the detrimental effects of transnational corporate activity.[88] Exercise of sovereignty can only be protected by cooperation of states to regulate TNCs rather than an insistence on sovereignty masquerading as non-regulation (further discussed in the next section). In fact, even when there is a co-operation provision, there is no requirement in the treaty to engage multilaterally with other (Global South) states in designing of national laws or systems of liability, a prime requirement for normative fairness for TWAIL, as noted earlier.[89] The French *devoir de vigilance* law, as adopted by the French parliament with French considerations in mind, would be a perfectly valid national 'implementation' of the treaty in that sense.

That said, this treaty also envisages a situation where domestic law trumps treaty obligations if the national provisions provide better access to justice even for transnational situations.[90] National law is, as one can visualise, taken very seriously in the treaty. Nonetheless, mere acceptance of jurisdiction in the home state by a treaty would reduce the question to who *enforces* (national) human rights law where and who has the normative authority to develop jurisprudence on corporate liability for human rights impacts. Implementation is not the consideration here, norm-making is. International law, even in the form of this draft treaty, therefore, would still perpetuate the problem unless it defines substantive obligations as a result of multilateral or multistakeholder negotiations with actual participation from Global South people. Alternatively, at the very

[82] One could argue that there is 'substance' as regards procedural rights for victims under article 4 but it does not change the fact that the 'substance' of *corporate responsibility* has to come from national law. Ibid, art 4.

[83] Antoine Duval and Misha Plagis, 'Delocalized Justice: The Delocalization of Corporate Accountability for Human Rights Violations Originating in Africa', *Afronomicslaw* (4 October 2021), https://www.afronomicslaw.org/index.php/category/analysis/delocalized-justice-delocalization-corporate-accountability-human-rights (accessed 1 May 2022).

[84] Ibid.

[85] Third Revised Draft, note 63, preamble (PP9).

[86] Ibid, art 14.1 (emphasis supplied).

[87] Ibid, art 14.2.

[88] Seck, note 24, 582.

[89] Lichuma, note 19, 520–524.

[90] Third Revised Draft, note 63, art 14.3.

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least, it needs to have an obligation to consult Global South people in the adoption of national laws. Of course, the former is preferred as multilateralism is one of the few practical ways of ensuring the most voices get heard.[91] Such discussions are preferred over unilateral legislations from the Global North states, despite their good intentions, without international procedural safeguards to take Global South voices seriously, which would again require binding international law.[92]

The draft treaty harmonises principles of a good national legislation and maintains the *status quo* by not imposing any new obligations on companies, i.e., the treaty does not create a self-standing legal regime by itself and would rely on national mHRDD laws for its substance of corporate obligations. This makes it more akin to a treaty from the Hague Conference on Private International Law harmonising national initiatives rather than fleshing out any international substantive norms for the prevention and mitigation of human rights impacts from businesses. The treaty puts the cart before the horse as to corporate liability by essentially reducing questions of corporate respect of human rights into only enforcement questions. The danger in that is that substantive bases of liability of corporations (that address the question of why and how corporations should respect human rights) would be effectively decided by (European) national normative preferences.

The French Picture

Even considering the picture demonstrated in the previous sub-section, there has been considerable progress by way of national legislation in France which adopted a law to further the UNGPs in the form of their *devoir de vigilance* law in 2017.[93] Even though this article critiques the law, there is no doubt that it added *an* avenue of justice that is available to those wronged. This article focuses on the French law for its analysis as a conscious choice informed by a few considerations. First, the French law was the first national mHRDD law adopted by any state and could be construed as an affirmation of their principled objection to the 2014 treaty making process as can be gathered from the French parliamentary proceedings below. The *devoir de vigilance* law became a trendsetter for laws adopted in the years to come (and still under the process of adoption) like the 2021 Norwegian Åpenhetsloven (Transparency Act),[94] the 2021 German Sorgfaltspflichtengesetz (Due Diligence Law)[95] and the 2022 EU draft Directive on Corporate Sustainability Due Diligence.[96] Second, this article analyses the spark, not the fire itself: or rather the spark of the spark. The spark is the motivation for the French law (with the fire being the enacted law), while the enacted law is also itself a spark (with the fire being similar legislation in different jurisdictions).

After the negative vote on the resolution against the establishment of the intergovernmental working group in 2014, the French law was introduced under debate in the *Assemblée Nationale* of France in 2015. In the parliamentary discussions on the law, there was a statement on this negative vote over the establishment of the intergovernmental working group, which enables insight into (part of) the motivation behind the law.

[91] Phoebe Okowa, 'The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation' (2020) 69 *International & Comparative Law Quarterly* 685, 688.

[92] Lichuma, note 19, 518.

[93] French Law, note 2.

[94] Åpenhetsloven, note 6.

[95] Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten 2021 (Germany).

[96] CSDDD, note 1.

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The report of French MP Dominique Potier, as part of the French Economic Affairs Committee,[97] made it clear that France voted in the negative for the resolution establishing the intergovernmental working group for the binding treaty in 2014 because France believed that the appropriate domain of regulation was that of the national legal order, not international.[98] It was stated that, '*France, which voted against the proposal, justified its position by a preference for normative action by States within their domestic legal order*'.[99] It further stated that the UNGPs support the adoption of national law to bind corporations in home states to respect human rights throughout their operations.[100] The French saw the adoption of such law as necessary, as in absence of such law, the report states that international law only serves as aspiration.[101] Recall the fact that this principled objection to international law meant that national law could be adopted without restrictions for an international issue – this was perhaps important to France because it could do so.

However, to not acknowledge the incredible efforts of French civil society organisations towards adopting a law when none was there, would be presenting an incomplete picture.[102] That said, even with the Rana Plaza disaster, one of the impetuses towards the adoption of the law,[103] the French position that TNCs are to be governed by national law, not international law, remained unchanged while France adopted this historic legislation.

IV. Two Sides of the Same Coin

This section elaborates the two sides of the same coin: how the current focus on national law can enable developing states to assert their sovereignty effectively by treating the national laws as assistance; the other side of the coin is how the same national laws, when viewed through a TWAIL lens, can be conceived as neo-colonial instruments. It then leaves with some observations from the parliamentary debates on the French law to explain the hope implicit in international law. This section is thus the portrayal of the constitutive elements of the cautious optimism approach that should be borne in mind when thinking of how far we have come since the 1970s on business and human rights issues.

Heads: Not Having mHRDD Laws is Neo-Colonial

One can make an argument that the protection of sovereignty of host states is *furthered* by adoption of national mHRDD laws rather than being an interference with it.[104] This is explored in this sub-section. The *absence* of home state law, especially in absence of international law, may itself perpetrate neo-colonialism.

The necessity of national mHRDD laws springs from the inability of Global South states to enforce human rights in their territory in the wake of negative impacts that TNCs may have. To Lafont, the assumption that all states are in complete control of implementation of

[97] Assemblée Nationale, Rapport No. 2628 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre par Dominique Potier, §1.A.I.

[98] Ibid.

[99] Ibid.

[100] Ibid.

[101] Ibid.

[102] Guillaume Delalieux, 'Corporate Duty of Vigilance in France: The Path of an Improbable Statute, The Transnational Corporations' Duty of Vigilance' (2020) 106 *Droit et Societe* 649.

[103] Ibid.

[104] Olivier De Schutter, 'Sovereignty-Plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations' (2010), *SSRN Scholarly Paper*, https://papers.ssrn.com/abstract=2448107 (accessed 20 March 2020).

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human rights within their territory is a wrong assumption.[105] This assumption leads to a 'veil of ignorance' for the Global North states that refuse to even acknowledge (let alone address) negative impacts caused in third states by TNCs domiciled in their territory.[106] This 'veil of ignorance' gives rise to a 'veil of sovereignty' to insist that host states are solely responsible for maintaining human rights within their territory, even when their ability to do so is constantly being eroded by powerful economic actors like TNCs.[107]

If one were to consider home state law, it would necessitate extraterritoriality to tackle a transnational problem (which is why the entire debate revolves around sovereignty of host states). Often, the alternative to extraterritoriality is presented as, as with the discussion above, a rigid territorial assertion of jurisdiction.[108] The extraterritorial–territorial dichotomy somewhat pre-supposes a framework of regulation through a patchwork of national laws rather than an international instrument.

Whether a state can actually discharge its responsibility of protecting and promoting human rights must be taken into account in a global economic order. By enabling access to civil claims in the Global North, national mHRDD laws may seem to serve the purpose of strengthening sovereignty of the Global South.[109] Insisting on state sovereignty as absolute autonomy 'serves a merely ideological function' and is a 'perfect excuse for continuing [the] predatory behaviour [of powerful states] while hiding behind a veil of "respect for sovereignty"'.[110]

As such, a claim that national mHRDD laws are neo-colonial could be opposed as being a neo-colonial argument in itself, since it facilitates the domination of the Global South by the Global North through a hands-off approach on TNCs. Chambers has a valid point that while host state sovereignty is already eroded, it can still be impinged upon and requires, not less, but special protection from home states given their historical relationship of imperialism.[111] She states that host states would be less concerned with sovereignty when the trade-off is evasion of accountability by TNCs.[112] Chambers, citing Nwapi, embarks on a line of argumentation similar to Lafont that an assertion of the erosion of sovereignty serves home states as an enabler to ignore human rights violations elsewhere.[113]

Chambers argues that infringement-of-sovereignty arguments are, and will be, present in a discussion on all instruments, including the discussion on the business and human rights treaty where the Global South would prefer domestic corporations out of its purview as protection of state sovereignty.[114] She posits that home state regulation is justifiable when host states fail to take measures to act upon infringement of human rights which also puts them in non-compliance of the International Bill of Human Rights.[115]

[105] Cristina Lafont, 'Sovereignty and the International Protection of Human Rights' (2016) 24 *Journal of Political Philosophy* 427, 437.

[106] Ibid, 438.

[107] Ibid, 437.

[108] Rachel Chambers, 'An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional Dilemma Raised/Created by the Use of the Extraterritorial Techniques' (2018) 14 *Utrecht Law Review* 22, 23.

[109] Lafont, note 105, 436.

[110] Ibid, 433.

[111] Chambers, note 108, 27.

[112] Ibid.

[113] Ibid, 28, citing Chilenye Nwapi, 'Litigating Extraterritorial Corporate Crimes in Canadian Courts' (Doctoral Thesis, University of British Columbia, 2012), https://www.bac-lac.gc.ca/eng/services/theses/Pages/item.aspx?idNumber=1032980459 (accessed 6 May 2022).

[114] Chambers, note 108, 33; Carlos Lopez and Ben Shea, 'Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session' (2016) 1 *Business and Human Rights Journal* 111, 113.

[115] Chambers, note 108, 35.

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More importantly, Chambers notes that it is difficult to know the view of host states on extraterritorial laws, except on a general level when they contribute to multilateral negotiations.[116] India, for example, deleted a provision on home state civil liability for TNCs from its Model Investment Treaty before its adoption.[117] Even in light of the Bhopal litigation in the courts of the USA where the Indian government was a plaintiff,[118] conclusive determinations can hardly be made as to India's specific position on the French *devoir de vigilance* law or other extraterritorial business and human rights laws.

It is not being argued here that national mHRDD laws are unhelpful. However, if India supported national mHRDD laws, was she consulted before their enactment? The characteristics of helpfulness and neo-colonialism need not be mutually exclusive. As such, when it is necessary for the Global North to legislate for the Global South, it is but evident that decolonisation itself would be (neo-)colonised as well. A negotiation on multilateral instruments seems to be a more practical way of approaching regulation of TNCs than individual parliaments enacting legislation on their own accord (and perhaps even holding consultations every single time a law is adopted).

Palombo offers a line of reasoning similar to Lafont and Chambers. She invokes the *Bhopal* case to counter an anti-imperialist critique that more often than not the Global South prefers transnational litigation in the home state because it serves as an alternative to TNCs exploiting the absence of law – it is not something that the North forced on the South.[119] Yet, she says victims would not accept extraterritoriality unless compelled to.[120] Her argument is primarily a utilitarian one against 'utopian' international lawyers: national laws are currently the only avenue for justice.[121] Even though such litigation may be imperialist, as she states, what matters is whether the actual people, the indigenous communities and others, accept this level of imperialism.[122]

However, even with its flaws, multilateral law presents a better avenue where principled engagement is necessary.[123] The Global South people have more voice in a treaty than a French law. The fact that Global North litigation is the only avenue for justice precisely depicts the need for greater capacity building and participation of the Global South in international regulation of TNCs; it cannot be an argument for relegating these questions into domestic policy of the North.

Transnational litigation, while important, has not been particularly a crown jewel of the business and human rights regime with its high rate of dismissals. In fact, in an empirical study on all USA Alien Tort Statute cases on business and human rights until June 2021, it was found that despite rejections, cases are filed because their primary aim is raising awareness on human rights issues – not remedy.[124] Transnational litigation primarily aims to inject Global South voices into Global North political discourse. Even if transnational litigation were hugely successful, the claim that the end-goal should be to adjudicate disputes in Global North courts due to their ability to dispense better justice seems inequitable: the Global South judiciary can step up when given an opportunity is

[116] Ibid, 36.
[117] Ibid.
[118] *In Re Union Carbide Corp Gas Plant Disaster* 634 F Supp 842 (1986).
[119] Dalia Palombo, 'Transnational Business and Human Rights Litigation: An Imperialist Project?' (2022) 22 *Human Rights Law Review* 1, 6 and 9–10.
[120] Ibid, 24.
[121] Ibid, 12.
[122] Ibid, 24.
[123] Karen J Alter, 'From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation' (2021) 19 *International Journal of Constitutional Law* 798.
[124] Oona A Hathaway, Christopher Ewell and Ellen Nohle, 'Has the Alien Tort Statute Made a Difference? A Historical, Empirical, and Normative Assessment' (2022) 107 *Cornell Law Review* 1205.

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evident from the rising trend of climate cases (that remain peripheral in literature) in the South.[125]

Furthermore, Global North litigation may result in 'delocalisation' as was stated when discussing the draft treaty in the previous section. Assogba, for example, underlines the relation of France to its former African colonies where even when the convergence of interests of TNCs and the coloniser was apparent, the problem was formulated in France as one of corruption in African states as a cultural fact, not corporate irresponsibility.[126] This is also evident in the viewing of discontinuity between France and territories where TNCs operate, pre-supposing the differential treatment of individuals in France and the places of operation of these companies, marred by colonial undertones.[127] This is not a particularly French problem either, as judgments from the UK employ the same undertones.[128] Muinzer sums up this problem with home state litigation in a lucid manner:

> [I]t is difficult to see how a Nigerian farmer whose land has been negatively impacted by oil can feel a close personal affinity with a convoluted technical legal argument playing out in a courtroom on the other side of the world. It takes place far from where the impact occurred. And far from the realm of typical daily lived experience.
>
> In such circumstances, then, the globalised legal system takes a very immediate, local circumstance, and repackages it as something remote, technocratic, and distant.[129]

'Delocalisation' results in justice being impersonal, as can be expected, thus tainting the process by denying the actual wronged persons the opportunity to participate openly in receiving justice, bringing us back to the same non-inclusivity problem.[130] In the context of the quote above, Nigerian farmers are not equal participant of justice, they are a recipient of justice in the manner of being an object of charity. The essence of human rights is, on the other hand, that they are *rights* as entitlements, not bestowed upon by grace, as Ruggie himself puts it.[131]

Tails: Having mHRDD Laws is Neo-Colonial

An argument could be made that the enactment and implementation of national mHRDD laws by the Global North states is a neo-colonial enterprise.[132] In some ways, merely relying

[125] Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 *Transnational Environmental Law* 77; César Rodríguez-Garavito (ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge: Cambridge University Press, 2022).

[126] Bamidaye Assogba, 'Le PCN Français: Un Dispositif de Contrôle des Territoires d'Afrique Noire Francophone', *Afronomicslaw* (5 October 2021), https://www.afronomicslaw.org/index.php/category/analysis/le-pcn-francais-un-dispositif-de-controle-des-territoires-dafrique-noire (accessed 1 May 2022).

[127] Ibid.

[128] Michael Elliot, 'Reproducing Violence and Oppression through Law: An Analysis of the Trial Judgment in Kalma v African Minerals Ltd', *Afronomicslaw* (13 October 2021), https://www.afronomicslaw.org/index.php/category/analysis/reproducing-violence-and-oppression-through-law-analysis-trial-judgment-kalma-v (accessed 1 May 2022).

[129] Thomas L Muinzer, 'The Global South and Systemic Imbalances in International Energy Law', *Afronomicslaw* (29 April 2022), https://www.afronomicslaw.org/category/analysis/global-south-and-systemic-imbalances-international-energy-law (accessed 1 May 2022).

[130] Ibid.

[131] Ruggie, note 35, xxviii.

[132] Lichuma, note 19; Caroline Lichuma, 'Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South', *Völkerrechtsblog* (16 January 2023), https://voelkerrechtsblog.org/centering-europe-and-othering-the-rest/ (accessed 23 January 2023).

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on the charity of the Global North states through domestic laws simultaneously solves a problem of corporate responsibility and yet reinforces power hierarchies, as Lichuma posits.[133] She analyses the substance of national mHRDD laws from a TWAIL perspective to advocate for self-awareness in the Global North.[134] She contends that greater Global South participation is necessary, in line with this article.[135]

In some ways, dependency begets dependency. The argument that national mHRDD laws assist in exercise of sovereignty presents a Catch-22 situation for the developing states: only by surrendering (part of) their sovereignty can they gain (part of) their sovereignty. The loss of jurisdiction that came as a consequence of decolonisation has been long sought to be regained by the colonising powers, and extraterritorial measures have been but one facet of the same.[136] Such an expression of markets and power is also, in effect, an attempt to universalise principles that come from one state's domestic process and interests thereby imposed upon other states in the international community as a universal norm for an 'international' goal.[137] Somehow, given the inability of the Global South to assert a regulatory influence, the Global North's monopoly over the enforcement of human rights seems inevitable – which is why national mHRDD laws may be necessary now.

Consider, for example, a hypothetical case of extraterritorial laws enacted by the USA and Nigeria. The former can be enforced in the latter's territory but the latter's enforcement in the former's territory is a dubious claim: extraterritoriality cannot but reinforce existing hierarchies and can erode the modicum of diversity of interests that are advanced on the international plane (compared with a national one). The power asymmetry between states means that the Global South states cannot adopt unilateral laws for the Global North to abide by, even for international legal concerns, while the converse is common.[138]

National mHRDD laws can also be critiqued on the basis that they bypass the democratic processes in the Global South states that have to abide by these norms set by Global North states.[139] Furthermore, the Global North states will not accept constraints on their exercise of power to advance and universalise their norms.[140] This paramountcy of national legislation, the most important of which are going to be from the Global North, is also now being hard coded into the proposed treaty as a legitimate exercise of power *post facto*.[141] The lack of Global South perspectives in the legal process of formation of norms that will now dominate the liability regime of corporations is fatal because this process centres the West and 'others' the Rest.[142] It is not a mere random chance that the first national law happened to come from a state that routinely shunned the idea of a multilateral law on TNCs.[143]

It would also not be surprising that these laws re-centre Europe as the axis of knowledge production on business and human rights norms; French and European authors are

[133] Lichuma, note 19, 513.
[134] Ibid.
[135] Ibid, 515–524.
[136] Bhupinder Singh Chimni, 'An Outline of a Marxist Course on Public International Law' (2004) 17 *Leiden Journal of International Law* 1, 18.
[137] Ibid, 19.
[138] Bhupinder Singh Chimni, 'WTO and Environment: Legitimisation of Unilateral Trade Sanctions' (2002) 37 *Economic and Political Weekly* 133, 138.
[139] Ibid, 133.
[140] Ibid, 137.
[141] Third Revised Draft, note 63, arts 6–11 (sets national legislation as the basis of corporate obligations and the treaty also includes domestic corporations).
[142] Sara L Seck, 'Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations' (2011) 3 *Trade, Law and Development* 164, 191.
[143] See sections II and III.

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overwhelmingly represented in the literature surrounding the French law.[144] This would be the case for any other law as well, but the problem is particularly acute in an already Eurocentric legal regime. This entails that the interpretive community that is established on national mHRDD laws (as legislative analyses and doctrinal argumentation on the application and effects of the law) is inevitably European with lived experience confined to the closed circle of lawyers with the 'know how' or expertise – this expertise is the source of authority within the community.[145] It certainly matters *who* is advancing an argument for the interpretive practice of (international) law – semantic authority decides the possibility of an interpretation being accepted as valid.[146] Authority, while constituted by various factors, certainly includes expertise as an important one.[147] It would certainly be naïve to presume that, within the interpretive community, there will be perceived epistemological equivalency between a French lawyer and a Fijian lawyer when presenting arguments on the *devoir de vigilance* law.

The resistance of an internationalisation of business and human rights instruments not only disadvantages the Global South, but also skews the playing field against knowledge production on legal norms in such states. This ends in a vicious cycle of legitimising the norms of the Global North as universal ones while simultaneously 'othering' the scholars of the Global South into a niche TWAIL take on business and human rights norms, much like this article might be perceived.

There is thus a grave concern about hijacking the resistance of the Global South into creating new forms of domination that appear to be advancing the global interests. The perception of certain use of human rights language as a civilising mission is not new.[148] In this particular context, it is the process legitimacy that is the core of the cautiousness, because while TWAIL is wary of imposition of norms on people without their participation or consent, it is generally accepting of the avenue in foreign courts to bring TNCs to justice – the line between empowerment and domination is a thin but important line.[149]

The French Law Revisited

Without a primary role for Global South peoples' participation, national laws subsume the voice of the dominated into a discussion of European domestic interests. If one dives into the debates behind the adoption of the French law, one finds little discussion about taking seriously the voices of the Global South, supposedly the target beneficiaries of the law. Instead, the primary criticism levelled against the adoption of the law was that it would make France less competitive, and companies would relocate elsewhere to release

[144] Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317; Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4 *Business and Human Rights Journal* 265; Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' (2021) 6 *Business and Human Rights Journal* 141; Stéphane Brabant and Elsa Savourey, 'Loi Relative au Devoir de Vigilance, Des Sanctions pour Prévenir et Réparer [A Closer Look at the Penalties Faced by Companies]' (2017) *Revue Internationale de la Compliance et de l'Éthique des Affaires*, http://www.bhrinlaw.org/frenchcorporatedutylaw_articles.pdf (accessed 31 January 2023).

[145] Michael Barnett, Raymond Duvall and Ian Johnstone (eds.), 'The Power of Interpretive Communities', *Power in Global Governance* (Cambridge: Cambridge University Press, 2004), 191.

[146] Ingo Venzke, 'The Practice of Interpretation: A Theoretical Perspective' in Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2014) 16, 63–64.

[147] Ibid, 64.

[148] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007), 269.

[149] Chimni, 'An Outline of a Marxist Course on Public International Law', note 136, 20.

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regulatory burdens.[150] When colonialism is mentioned, it is in context of the abolishing of slavery as a success story that occurred without the requirement of international law.[151]

The narrative on the liberating nature of French prohibition on slavery has been noted to be of a limited nature of preventing new enslavement.[152] The French, in their civilisational mission, certainly did assist in the annihilation of this abhorrent institution – that is not in doubt.[153] However, the language of generosity and universalism rhetoric was integral to the conduct of the French Third Republic as regards its colonies.[154] France took it upon itself to liberate people from barbarianism for the 'cause of civilisation and humanity' with 'cannibalism to suppress, slavery to destroy, [and] awful tyranny … to repress.'[155] This also meant that there was a veiled exclusion by a spuriously equal alternative, e.g., with the exclusion of women suffrage in France by the 'equal' alternative of the political role of construction of a state through reproduction and domestic work.[156] The exclusion is apparent from the *devoir de vigilance* law through absence of Global South voices, but the equal alternative is that it generously opens the doors of the French courts to advance a promise of justice for 'deserving' people – France decides the norms on who is eligible for justice.

Slavery, and its abolition, were inherently tied with the standard of civilisation in international law,[157] where there was a clear demarcation of cultural differences to trivialise the non-Western other into a lesser position in the hierarchy.[158] Europeans were essentially saviours with the 'intention of fulfilling their sentimental narcissism'.[159] Today, the same saviour enables and encourages TNCs to extract profit through exploitation of the Global South, while also projecting itself as the great humanist.[160]

In the first reading of the *devoir de vigilance* law, a member of the National Assembly noticed the similarity of the current law with the abolition of slavery:

> When I hear that we are penalising France, I am reminded of the motions of the Bordeaux Chamber of Commerce and Industry in 1848 explaining that the abolition of slavery would seriously penalise the country … As [we know] today, it was a question of

[150] See, e.g., Senate Committee on Laws debate on Christophe-André Frassa's report on Bill 376 (2014–2015), adopted by the National Assembly (13 October 2015); Senate Committee on Laws debate on Christophe-André Frassa's report and the text it proposes for Bill 159 (2016–2017), adopted by the National Assembly in new reading (5 October 2016); Assemblée Nationale, Review for the opinion of Mr Bruno Le Roux's proposed law on the duty of vigilance of parent companies and order-giving companies (No. 2578) (11 March 2015).

[151] Assemblée Nationale, Rapport No. 2628, note 97, 16.

[152] Alice L Conklin, 'Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1895–1914' (1998) 103 *The American Historical Review* 419, 425.

[153] Ibid.

[154] Ibid, 433.

[155] Ibid, citing 'Débats parlementaires: Chambre des députés: compte rendu in-extenso 19 Decembre 1912' (19 December 1912), Journal official de la République française, statement of Maurice Violette.

[156] Ibid, 434.

[157] Ntina Tzouvala, 'Civilization' in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Cheltenham: Edward Elgar Publishing, 2019) 83, 97–98.

[158] Ibid, 98.

[159] Bhakti Shringarpure, 'Africa and the Digital Savior Complex' (2020) 32 Journal of African Cultural Studies 178, 185 citing Teju Cole, 'The White-Savior Industrial Complex', *The Atlantic* (21 March 2012), https://www.theatlantic.com/international/archive/2012/03/the-white-savior-industrial-complex/254843/ (accessed 30 April 2022).

[160] Shringarpure, ibid, 185.

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> great humanist principles … The debate is the same, although less intense, since we no longer practice slavery and the proposed [*devoir de vigilance*] law is very measured.[161]

The *devoir de vigilance* law also 'pursues several objectives [and] it is faithful to the humanist values on which [the French] Republic is founded'.[162] This saviour narrative is best understood through the Savage-Victim-Saviour (SVS) metaphor elucidated by Makau Mutua.[163] The savage, he says, is the projection of the barbaric state which fails to guarantee human rights as an operationalisation of the instrument of savagery.[164] As the state is the guarantor of human rights norms, its redemption hinges particularly upon that fact.[165] Then there is the innocent and helpless victim whose human rights are at stake because of the particular situations in the state.[166] Finally, the saviour is the 'victim's bulwark against tyranny',[167] which is a similar construction of words cited in the French slavery abolition debate, stating France had 'awful tyranny … to repress'.[168] The saviour is projected as human rights itself with Western states acting as rescuers, but in reality, those are the cultural norms of Western liberal thought.[169]

The SVS metaphor is apparent in the legislative debates of the French law, for example, that the victims (the people of the Global South) are to be protected from the savage, the despotic Global South states unable to guarantee human rights, by the saviour that is the French Republic (or rather the French and European liberal values). The savage, importantly in this rhetoric, is not the TNC.

Mutua also asserts that the saviour complex is inherently intertwined with the Enlightenment and its universalism with Europe as the centre of the universe.[170] For example, in the general discussion following the tabling of his report, Dominque Potier, a member of the French National Assembly, states, 'it is now a question of protecting the weak in new ways' as is the case where 'most French and European law, inspired by the Enlightenment, aims to protect the individual, through his or her fundamental freedoms, from a despotic and … totalitarian state' and 'of defending to the ends of the Earth what we value. France would be proud to be a pioneer in this field'.[171]

A good question then would be, what does France value? The universal values behind the law were also shared by another member of the National Assembly in the Assembly's second reading, namely, it is 'aimed at affirming the principles on which [the French] Republic is founded: liberty, equality, fraternity – and security, I would add'.[172] The French values are strong, but more importantly universal, as is reminded repeatedly through the legislative

[161] Assemblée Nationale, General discussion on the opinion No. 2627 by Mr Serge Bardy, on behalf of the Committee on Sustainable Development and Regional Planning, tabled on 11 March 2015, statement of Gilles Savary.

[162] Sénat, General discussion on Loi no. 2017-399 du 27 mars 2017 (1 February 2017), statement by Christian Eckert.

[163] Makau Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201.

[164] Ibid, 202.

[165] Ibid, 203.

[166] Ibid.

[167] Ibid, 204.

[168] Statement of Maurice Violette, note 155, as cited in Conklin, note 152, 425.

[169] Mutua, note 163, 204.

[170] Ibid, 233.

[171] Assemblée Nationale, General discussion on draft law no. 2578 by Mr Bruno Le Roux, Mr Dominique Potier et al (11 March 2015), statement of Dominique Potier.

[172] Assemblée Nationale, note 11, statement of Anne-Yvonne Le Dain.

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debate, but nothing strikes in particular as this statement on the floor of the National Assembly:

> [T]he bill we are examining today is in keeping with both the recognition of globalisation and a very strong attachment to our Nation, not only as a land, but also as a foundation of values. When I welcome groups of visitors to the National Assembly, I like to pass by the esplanade in the main courtyard. Created in 1989 on the occasion of the bicentenary of the Revolution, it has two very strong symbols: on the one hand, a reminder of the seventeen articles of the Declaration of the Rights of Man and of the Citizen and its preamble, and on the other hand, a monumental sphere made of black granite, the smoothness of which evokes the universal character of human rights. The law that we are proposing today is in the tradition of the French Revolution and the Enlightenment by stating the law in a new world, for the whole world.[173]

A 'law for the whole world' pre-supposes France as the generous liberator of people beyond its national boundaries, who yearn to strive for the same values. In that role for the Republic:

> it is normal for France to draw up a legal text that will apply to everyone. In this way, as a power, [France] fit[s] in well with the international economic dynamic … In developing and emerging countries, human societies aspire to democracy, more wealth, more comfort and more security … The French legislator cannot therefore remain indifferent, [and] pretend not to see it.[174]

Pahuja notes, also in the context of French decolonisation in the Algerian-French war, how the universalism simultaneously 'universalised' European values while also acknowledging the exclusivity of these values with the European nations, that must then cut into the uncivilised others.[175] Predictably, in this human rights narrative, the savages and victims are both non-white and non-Western while the saviours are white.[176] The whites are thus the ones civilising the rest of the world as their means of self-redemption;[177] or as put succinctly by Teju Cole in a famous tweet, 'The white savior supports brutal policies in the morning, founds charities in the afternoon, and receives awards in the evening'.[178] All that is seen are 'hungry mouths' and for food to be put into those mouths as fast as possible; when gazing at need, the saviour 'sees no need to reason out the need for the need'.[179] Cole explains: 'We can participate in the economic destruction of Haiti over long years, but when the earthquake strikes it feels good to send $10 each to the rescue fund.'[180]

France need not wait to act to liberate the less fortunate nations; it could write into national law its aspirations 'according to its own traditions'.[181] The French Republic thus has

[173] Ibid, statement of Dominique Potier.

[174] Assemblée Nationale, General discussion on draft law no. 2578 by Mr Bruno Le Roux, Mr Dominique Potier et al (11 March 2015), statement of Anne-Yvonne Le Dain.

[175] Sundhya Pahuja, 'From Decolonisation to Developmental Nation State' in Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011), 44, 85–86.

[176] Mutua, note 163.

[177] Ibid.

[178] Teju Cole, '2- The White Savior Supports Brutal Policies in the Morning, Founds Charities in the Afternoon, and Receives Awards in the Evening', *Twitter* (3 August 2012), https://perma.cc/7HBW-AH9U (accessed 30 April 2022) quoted in Cole, note 159, cited in Shringarpure, note 159, 185.

[179] Cole, note 159.

[180] Ibid.

[181] Statement of Anne-Yvonne Le Dain, note 174.

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to fight for the universal values it holds dear in these nations where it is incompatible with its own, as much as a moral obligation as in its own economic-political interest.[182] The fate of the Nepalese workers in the Qatar World Cup, the Rana Plaza disaster and even the 1984 Bhopal disaster in India meant that the French Republic had to step up and liberate workers from poor working conditions in other parts of the globe.[183] It was always the less-fortunate Global South people that needed the generosity of France to do for them what their own states failed to do: grant them the privilege of enjoying their universal human rights which generally only the Global North enjoys in full. In that way, decolonisation with the Global North as liberator appropriates Global South struggles into the Western doctrine of liberation as a generic (or perhaps universal) struggle against oppression.[184]

In the discussion of the possible economic disadvantage that would ensue to French corporations from this additional burden of due diligence, it was discussed that 'this is an international problem, [being reduced] to a Franco-French problem'.[185] The reply to that was that the problem was indeed an international one, but France merely extended possibilities and did not want to impose its vision on others.[186]

On this same issue of the appropriate domain of regulation, whether European, international, or French, the positions in the Senate, although quite divided, reflected similar opinions:

> [A suggestion was made that the law] cannot prosper outside a European legal framework without introducing issues of competition that are detrimental to French companies. This is a terrible admission of renunciation of national sovereignty: it means forgetting the old humanist battles fought and won by France. Did we wait for all the nations concerned to agree before abolishing slavery?[187]

This repeated reference to the success of France in abolishing slavery is not only striking because of the narrative but because of its forgetfulness of the French legal superstructure that enabled such wide normative prescriptions over large territories in the colonial era. This stance is unapologetically advanced as an argument for the adoption of the law, e.g., a report during the second reading of the law in the National Assembly stated:

> History reminds us that human and social progress, from the abolition of slavery to the protection of workers against accidents at work, has had its origins in the determined action of one or a few nations which then extended the standards they had imposed on themselves to the rest of the world. This proposed law simply repeats the process.[188]

In the context of the French civilisation mission, this might seem to rest on shaky foundations, especially devoid of any sort of participation from those who are the

[182] Introduction, Opinion No. 2625 by Ms Annick Le Loch, on behalf of the Committee on Economic Affairs, tabled on 10 March 2015; Assemblée Nationale, General discussion on the opinion No. 2627 by Mr Serge Bardy, on behalf of the Committee on Sustainable Development and Regional Planning, tabled on 11 March 2015, statement of Arnaud Leroy.

[183] Ibid, opinion of Ms Annick Le Loch.

[184] Eve Tuck and K Wayne Yang, 'Decolonization is Not a Metaphor' (2012) 1 *Decolonization: Indigeneity, Education & Society* 1, 21.

[185] Assemblée Nationale, General discussion on draft law no. 2578 by Mr Bruno Le Roux, Mr Dominique Potier et. al. (11 March 2015), statement of Phillipe Houillon.

[186] Ibid, statement of Jean-Noël Carpentier.

[187] Sénat, Examination of the committee's report Mr Christophe-André Frassa on Bill No. 376 (2014–2015), adopted by the National Assembly (14 October 2015), statement by Didier Marie.

[188] Report No. 3582 by Mr Dominique Potier, made on behalf of the Law Committee, tabled on 16 March 2016.

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deemed addressees of the law, those whom the French Republic seeks to liberate from the tyranny of oppression. While the French *devoir de vigilance* law does, of course, have noble motives in mind, one cannot but see the parallels between the legislative debate the attempt to universalise European values as a civilising mission.[189]

One has to realise the possibility (or problem) with reading motives from consequences – the historical and material circumstances forming the motives get lost in the study of (good or bad) consequences.[190] French policy making in colonies were, unsurprisingly, guided by the ideals of civilisation that the French republic subscribed to.[191] One was the universalism of basic freedoms for which the French had to take measures, e.g., 'liberating' Africans by abolishing slavery and setting limits on how much coercion could be used abroad, projecting the false image that human rights were truly being respected in the colonies.[192] Disentangling this universalism tendency from colonial or racial thought is hardly possible; both comprised essential facets of justifying the colonies with the constant viewing of Africans as 'others' who were nonetheless qualified for lifting up the image of generous France.[193]

The (Latent) Promise of International Law

In the context of exclusion of Global South voices, the emancipatory potential of international law lies in the fact that it allows communities to be represented better than what discussion over a national legislation in a national parliament can. This is important as norms decided by the parliaments of the Global North would be inescapable for the communities in the Global South who the laws assert to protect. The French legislation thus runs into the problem of discounting the lived experiences of people in the Global South; it victimises such people in lieu of empowering them.

After all, the better guide to solutions of injustice is always first-hand experience than the imagination of legislators.[194] We return to the slogan 'nothing about us, without us' to reflect this in the simplest way.[195] The principle being that people in the Global South, through their (ironically) privileged position as the sufferer of human rights impacts gain knowledge that is inaccessible otherwise to a legislator in Europe: to put simply, considerations of legislation that dwell upon how good it will be for the victims of the Rana Plaza disaster that do not enable the Rana Plaza victims to participate fails to respect their epistemically superior standing.[196] The respect one owes them as autonomous agents and not merely passive recipients of European generosity is eroded as well in that process: their very recognition as moral agents is threatened.[197] Their position as marginal, by definition, in international law and in the European politics makes it is too easy to overlook and ignore their voices.[198] The French narrative on the adoption of the law is very different from the multilateral treaty process, even if the latter is not the *beau ideal* of inclusivity and participation of marginalised voices.

[189] Mutua, note 163, 234–235.
[190] Conklin, note 152, 421.
[191] Ibid, 420.
[192] Ibid.
[193] Ibid, 423.
[194] Simon Rippon and Miklós Zala, 'Public Opinions and Political Philosophy', paper presented at the colloquium of the Fellows Academic Program of the Edmond J Safra Center for Ethics, Tel Aviv University on 1 November 2021, 23.
[195] Economic and Social Council, Disability Department, note 12.
[196] Rippon and Zala, note 194, 17.
[197] Ibid.
[198] Ibid, 18.

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A similar sentiment is echoed by Lichuma where she accepts that the binding treaty process enables the developing states to have a greater voice and takes seriously the participation of Global South peoples.[199] National mHRDD laws, on the other hand, put the trust of the majority of the world population into the benevolence of those who had colonised the planet and retain hegemonic interests: to put it mildly, some scepticism is indeed warranted.[200] Indeed, multilateralism is not a silver bullet and international institutions suffer from democracy deficits as well.[201] However, even considering non-democratic Global South states, the state is the primary sphere of influence of Global South people which can then bubble up into multilateral discussions.[202]

Lichuma separates the problems of absence of international law, extraterritoriality of domestic laws and the white saviour complex but essentially proposes greater Global South voices for this issue to be subsumed by international law.[203] She states that the 'vigilante justice' character of unilateral legislation can only be tackled by the procedural fairness and safeguards of multilateral participation that a treaty drafting process entails, granting the Global South access to decisions on norm-setting.[204] On the acceleration of already eroding sovereignty of the Global South states through such unilateral legislation, she advocates for inclusion of opinions of Global South people in domestic law-making procedures in the Global North states *in absence of* a binding international treaty.[205] The proposal to counter the white saviour complex is similar.[206]

Thus, while national law may play *a* role, it can merely be a piecemeal pathway towards international legal regulation of corporate responsibility. The French (or any) parliament, to put it simply, is not a desirable or possible substitute for the UN General Assembly or robust multilateralism. This is also where, contrary to Lichuma, it must be asserted that multilateralism *is* the minimum threshold for granting people from the Global South a voice – the question of national–international regulation and the disenfranchisement of Global South perspectives, while could be made analytically separate for academic simplification, cannot but be a single narrative of Global South struggle. As was mentioned in the outset, *at least* states would be able to participate and shape the law – they cannot do so in the French parliament.

The obligations of corporations arising under international law would ensure a better balance of power between states, and between states and TNCs compared with domestic regimes.[207] This is due to a common standard of liability and jurisdiction, informed by what is acceptable to Global South peoples as an avenue of justice – liability would thus not only arise within the varied domestic frameworks of the Global North. So, even if, say, imperialism is acceptable to the Global South peoples,[208] let them say so at the table of

[199] Lichuma, note 19, 518.

[200] Ibid.

[201] Bhupinder Singh Chimni, 'The World of TWAIL: Introduction to the Special Issue Special Issue: Third World Approaches to International Law: Editorial' (2011) 3 *Trade, Law and Development* [vii], 20–21; Bhupinder Singh Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century Symposium: Third World Approaches to International Law (TWAIL) Conference: Capitalism and the Common Good' (2012) 14 *Oregon Review of International Law* 17, 23.

[202] Bhupinder Singh Chimni, 'The Limits of the All Affected Principle: Attending to Deep Structures' (2018) 3 *Third World Thematics: A TWQ Journal* 807. However, Chimni argues for devolution of some power lost by postcolonial states into the national plane to bring decision-making closer to people affected.

[203] Lichuma, note 19, 515–524.

[204] Ibid, 517–518.

[205] Ibid, 520–521.

[206] Ibid, 523–524.

[207] Ibid, 526.

[208] Palombo, note 119, 24.

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multilateral/multistakeholder negotiations – consultations in national laws would still be a second-best option to a substantive treaty. This deference is also a reason to refrain from providing substantive recommendations for international law:[209] an academic piece cannot possibly embody the thousand silenced voices from Viña del Mar to Varanasi.

V. Conclusion

As Chimni laid down in his *Manifesto*, resistance has to seek a balance between 'liberal optimism' and 'left wing pessimism'.[210] The former assumes that more international law and institutions lead us to the realisation of a just world order, while the latter rejects that view for an account of the jump from domination to domination through the inherent malleability of rules.[211] He states that resistance should rest on a room for a third view that lies between the two extremes.[212] In our context, cautiousness over rejection (or full acceptance) stems from this vision of a third route: that the current push for national legislation can be a temporary solution but the struggle is far from over.

From half a century ago, we have indeed come a long way in global economic integration and trying to mitigate its negative effects on human rights. Business and human rights have a rich history in the international arena of being the flashpoint between the Global North and the Global South, with each having put forth normative considerations that seek to serve their interests. How this is reflected in modern day instruments may be revealing of how we can expect the story to unfold as time goes by.

While national mHRDD laws can certainly further the exercise of sovereignty and can 'tame the bull' of markets and their pursuit of perpetual profits to the detriment of human rights considerations (especially) of the Global South, one must be cautious in being too quick to declare victory. As this article shows, once one delves into the narrative of the French law, a 'behind the scenes' walk provides more insight into the motivation for the law – it was to universalise French values to assist the helpless Global South peoples unable to enjoy their human rights on par with the French.

National mHRDD laws, therefore, are treading a very thin line of being empowering and yet dominating – the plurality of their nature cannot be perceived in any other way than to draw from its historical context as one among a lengthy line of possibilities that were pursued to regulate TNCs. As an alternative to no regulation, they may seem like progress, but they can only be second best as an alternative to a robust multilateral substantive treaty. Cautious optimism is the way forward so that even the treaty negotiations do not fortify the *status quo* and become a hostage of history.

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[209] Seck, note 24, 601.

[210] Bhupinder Singh Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3, 19.

[211] Ibid.

[212] Ibid, 19–20.

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