

**Integrating Human Rights into Business**  
**Company-Related and Systemic Dynamics**

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## Abstract

The purpose of integrating human rights into business is to leverage companies' direct impact on human rights as well as their role in the broader economic and social system. Business is uniquely positioned as it is directly involved in this system and possesses capacities relevant to influencing human rights. In light of globalization, human rights considerations are becoming more evident, and companies are increasingly engaging in cooperative initiatives. Still, a governance gap remains, as the existing structures only partly resolve problematic business-related human rights impacts. While this increases the expectations toward companies to proactively apply due diligence, it also provides companies with the scope to frame their response to human rights. This study argues that companies' understanding of human rights and global interdependencies are crucial issues. It seeks to identify those company-related and systemic dynamics that affect the integration of human rights into business.

Considering company-related dynamics, this study analyzes the framing that companies apply to human rights in order to gain deeper insight into the common perceptions of human rights. These perceptions include both how companies understand human rights and how they perceive their role in ensuring such rights. A metasynthesis identifies eight frame dimensions applied by companies in a context-specific manner. These frame dimensions are then reviewed for their impact on the business and human rights discourse. Next, systemic dynamics are considered. Within current international trade structures, human rights cannot be reliably and effectively realized. A governance gap, decoupling effects, and inequality can lead to human rights abuses and limited access to remedy. It is argued that not counteracting these developments may entail conditions (e.g., modern slavery) where economic activity tolerates "rightless" spaces. Such developments may be seen to constitute *de facto* othering. Hence, an effective response to human rights issues must also consider indirect, systemic interdependencies.

Based on the results, a twofold approach is suggested to better anchor human rights in business. Regarding corporate awareness of and commitment to human rights, a holistic understanding is needed that considers both company-related and systemic dynamics. Shaping the discourse on business and human rights requires introducing formal regulations, while the debate should be reframed to respond to systemic interdependencies.

## Zusammenfassung

Die Integration von Menschenrechten in der Wirtschaft zielt darauf ab, den direkten Einfluss von Unternehmen auf Menschenrechte sowie ihre Rolle im wirtschaftlichen und sozialen System zu nutzen. Unternehmen sind in besonderer Weise geeignet, auf Menschenrechte Einfluss zu nehmen, da sie direkt beteiligt sind und relevante Kapazitäten besitzen. Angesichts der Globalisierung tritt die Bedeutung der Menschenrechte in der Wirtschaft zunehmend deutlicher hervor, und Unternehmen engagieren sich zunehmend in partnerschaftlichen Initiativen. Dennoch bleibt die Kontrolle lückenhaft, da die derzeitigen Strukturen problematische Auswirkungen von Business auf Menschenrechte nur teilweise lösen können. Zwar erhöht dies die Erwartungen an Unternehmen, proaktiv ihrer Sorgfaltspflicht nachzukommen, zugleich entsteht jedoch auch ein Ermessensspielraum für Unternehmen, um ihre Haltung gegenüber Menschenrechten festzulegen. Diese Studie legt nahe, dass das Verständnis der Unternehmen für Menschenrechte sowie globale Abhängigkeiten Schlüsselfaktoren sind. Sie hat zum Ziel, unternehmensbezogene und systemische Dynamiken zu identifizieren, die die Integration von Menschenrechten in der Wirtschaft beeinflussen.

Angesichts der unternehmensbezogenen Dynamik analysiert diese Studie das Framing, das Unternehmen auf Menschenrechte anwenden, um ein tieferes Verständnis davon zu gewinnen, wie Menschenrechte wahrgenommen werden. Dies schliesst das Verständnis der Unternehmen über die Bedeutung und die eigene Rolle in Bezug auf Menschenrechte ein. Eine Metasynthese identifiziert acht Dimensionen von Frames, die von Unternehmen kontextspezifisch angewendet werden. Diese Dimensionen von Frames werden dann auf ihre Auswirkungen auf den Diskurs von Business und Menschenrechten überprüft. Anschliessend wird die systemische Dynamik betrachtet. In den derzeitigen internationalen Handelsstrukturen können Menschenrechte nicht zuverlässig und effektiv umgesetzt werden. Ungleichheit, eine lückenhafte Durchsetzung und Entkopplungseffekte können zu Menschenrechtsverletzungen und eingeschränktem Zugang zu Wiedergutmachungen führen. Es wird argumentiert, dass wenn diesen Entwicklungen nicht entgegengewirkt wird, diese zu Bedingungen führen können (wie moderne Sklaverei), unter denen wirtschaftliche Aktivitäten «rechtlose» Räume tolerieren. Solche Entwicklungen können letztlich als auf ein De Facto Othering hinauslaufend angesehen werden.



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Eine wirksame Entgegnung auf Menschenrechtsthemen muss daher auch indirekte, systemische Abhängigkeiten berücksichtigen.

Auf Basis der Ergebnisse wird ein zweifacher Ansatz vorgeschlagen, um Menschenrechte besser in der Wirtschaft zu verankern. Im Hinblick auf das Bewusstsein von Unternehmen und die Selbstverpflichtung auf Menschenrechte ist ein ganzheitliches Verständnis erforderlich, das sowohl unternehmensbezogene als auch systemische Dynamiken berücksichtigt. Bezüglich der Gestaltung des Diskurses über Wirtschaft und Menschenrechte müssen die formalen Regulierungen verbessert werden. Gleichzeitig sollte der Schwerpunkt der Debatte neu formuliert werden, um systemische Interdependenzen zu berücksichtigen.



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## List of Abbreviations

AICHR	ASEAN Intergovernmental Commission on Human Rights
Art.	Article
ASEAN	Association of Southeast Asian Nations
ATCA	Alien Tort Claims Act
BHR	Business and Human Rights
CEO	Chief Executive Officer
CSR	Corporate Social Responsibility
e.g.	exempli gratia (for example)
EITI	Extractive Industries Transparency Initiative
et al.	et alii (and others)
etc.	et cetera (and the rest)
EU	European Union
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GNI	Global Network Initiative
GRI	Global Reporting Initiative
HRDD	Human Rights Due Diligence
HRIA	Human Rights Impact Assessment
HRs	Human Rights
i.e.	id est (that is)
ibid.	ibidem (in the same place)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ISO	International Organization for Standardization
MNE	Multinational Enterprise
n.d.	no date
NAP	National Action Plan
NCP	National Contact Point
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
OEIGWG	Open-ended Intergovernmental Working Group
OHCHR	Office of the High Commissioner for Human Rights
p., pp.	page, pages
para.	Paragraph

SDG	Sustainable Development Goals
SME	Small and Medium-Sized Enterprise
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGC	UN Global Compact
UNGPs	UN Guiding Principles on Business and Human Rights
U.S., US	United States of America
VPSHR	Voluntary Principles on Security and Human Rights

# 1 Introduction

## 1.1 Research Context and Relevance

Globalization and the shifting roles of the actors impacting human rights have pushed the current institutionalization of human rights to its limits (e.g., Bilchitz & Deva, 2013, pp. 25-26; Cassel, 2001, pp. 267-268; Ramasastry, 2015, p. 243). With the rise of large multinational companies, the relation of business to human rights is being increasingly debated (e.g., Brenkert, 2016, pp. 277-278). Companies' impact on human rights has been well documented. Experience shows that this impact can be beneficial or detrimental and may affect almost any human right (Nolan, 2016, p. 3; Ruggie, 2013, p. 20). Accordingly, companies have come to acknowledge their role regarding human rights. However, existing governance structures do not effectively account for the impact of business on human rights. Among others, this is due to the transnational operations and the unresolved legal status of large multinational companies (e.g., Muchlinski, 2012, p. 151). The symptoms include the emergence of a governance gap, uncertainty among stakeholders regarding their responsibilities, and challenges to the understanding of human rights (Bernaz, 2017, p. 9; Bilchitz, 2017, pp. 2-4).

In the course of these developments, the question about the responsibility of business for human rights has attracted increasing attention both in academia and in public discourse over the last three decades (Brenkert, 2016, p. 277; Ramasastry, 2015, p. 241). Companies have become sensitized to human rights questions, not least due to increasing regulatory efforts and growing public awareness (e.g., Ramasastry, 2015, p. 242). In the field of business and human rights (BHR), two major areas of discussion have emerged: First, the normative foundations and scope of corporate responsibility; second, measures for addressing conflicts, for instance, by closing persisting regulatory gaps or by introducing diverse voluntary standards (e.g., Arnold, 2016, p. 255; Brenkert, 2016, pp. 277-279; Hsieh, 2015, p. 218). Addressing companies' impact on human rights becomes even more relevant as the established remedial mechanisms prove insufficient. This is the case given the changing role and position of corporations and states in the wake of globalization. In particular the increase in international trade and ever more

complex supply chains and company structures raise concerns about how corporate activity directly and indirectly affects human rights (e.g., Cassel, 2001, p. 261; Chandler, 2003, p. 22; Santoro, 2010, p. 286). Two parallel approaches, both seeking to ensure concern for human rights in business contexts, can be observed (Ramasastry, 2015, p. 238). One approach is directed at establishing the legal accountability of companies for human rights so as to provide effective forums for remedy where human rights abuses occur (e.g., Bilchitz, 2016, p. 216; Bilchitz & Deva, 2013, pp. 25-26; Muchlinski, 2012, p. 146). The other approach highlights the need to strengthen the preventive measures taken by companies and how companies can positively impact promoting respect for human rights (Buhmann, 2018, p. 39). This second approach seeks to strengthen this impact by creating supporting guidelines.

The field of BHR is beginning to consolidate, both as an academic field and as a practical development (Bernaz, 2017, p. 2). Originally anchored in international law, the discourse on business and human rights has now begun strongly resonating also in the business sector, both on a normative and on a practice-oriented level (Ramasastry, 2015, pp. 242-243). In the absence of a clear legal framework for corporate human rights duties, several voluntary standards have become available. These specify a number of principles that companies should abide by in order to prevent possible human rights conflicts. Those standards as well as prominent media coverage of specific cases have raised awareness of the relevance of the issue (*ibid.*). And yet, while companies are adopting human rights policies, a decoupling effect can be observed in practice: commitment is not matched by actual implementation (Müller & Dos Santos, 2014, p. 13; Silvestri & Gulati, 2015, p. 82). Thus, one of the main challenges is to address this unsatisfactory situation, where regulatory unclarity and insufficiency, complex transnational business structures, and decoupling tendencies hinder effectively protecting human rights.

The discourse on BHR is interdisciplinary and regularly combines insights from law, ethics, and economics, as well as from political science and sociology (e.g., Baumann-Pauly & Nolan, 2016, p. xix). This reflects the complexity of the issue, not least because protecting human rights in the business sector involves diverse actors. These actors include governments, courts, industry organizations, civil society, and communities, each having different mandates, resources, and influence. Within BHR, several parallel approaches have emerged to strengthen companies' ability to comply with human rights.



To ensure rights are enforced, normative arguments, aimed at establishing corporate responsibility, and legal arguments, aimed at defining companies' legal status, have been elaborated (e.g., Muchlinski, 2001, p. 31; Palombo, 2019, pp. 265-266). These arguments are complemented with voluntary approaches, such as rule-based, international guidelines, or project-based initiatives and multi-stakeholder initiatives, which have become more frequent to channel diverse expertise and resources (Nolan, 2016, p. 9; Ramasastry, 2015, p. 243). Also lively debated is how companies are already contributing to a better human rights environment, and hence to enhancing its inherent potential, through their corporate responsibility and sustainability engagement (e.g., Nolan, 2016, p. 3).

The current BHR debate comes down to two key questions: How much engagement can be and should be demanded of companies, and in which form? And how might different actors leverage their influence in order to strengthen human rights and mitigate the consequences of the governance gap? In a managerial view, these questions recur in different facets and are key to implementing BHR in companies. This, in turn, influences how companies contribute to more effectively integrating business interests and human rights.

## **1.2 Research Question and Research Approach**

Integrating human rights into business has two aims: first, to strengthen awareness and consideration of human rights; second, to anchor human rights on an operational level in companies to improve enforcement. By reinforcing positive dynamics and by countering negative ones that affect company conduct, integrating human rights into business aims to strengthen companies' engagement with human rights, and thereby to improve company impact.

The relationship between human rights and business has been widely addressed (Baumann-Pauly & Nolan, 2016, p. xix). In one form or another, it has entered the political and corporate agenda alike. However, in a globalized economy, companies are confronted with diverse regulatory environments regarding human rights (e.g., Ruggie, 2013, p. 3). Integrating human rights into business is challenging whenever what exactly "human rights and business" encompasses remains unclear. Companies face a fragmented environment of human rights regulations and guidelines (ibid.). Often, industry-

specific codes of conduct are in place while references to basic human rights standards can be found in corporate responsibility publications. In a legal view, however, current enforcement mechanisms only insufficiently provide reliable venues for remedying human rights violations by corporate actors (Arnold, 2017, p. 311; Cragg, 2000, p. 209). At the same time, companies encounter highly context-specific situations in their operations where human rights are impacted and where managerial decisions are required (Bernaz, 2017, p. 9). While due diligence is part of most voluntary standards and demands that companies thoroughly evaluate human rights issues, it leaves room for different courses of action, depending on evaluation (Buhmann, 2018, p. 33; Festerling & Demuijnck, 2013, p. 807; McCorquodale, Smit, Neely, & Brooks, 2017, p. 198). Companies develop their own strategies for responding to the room for discretion governed neither by law nor by principles. How companies cope with this situation impacts both how they integrate human rights into their practices and how they conduct the discourse on human rights.

This study addresses the governance gap on the business side. It considers both the external and internal dynamics influencing the integration of human rights into business. Effective integration requires accounting for both company-internal understanding of human rights and the external systemic factors affecting and shaping companies' human rights conduct and its consequences. Thus, the guiding research question of this dissertation is: *Which company-related and systemic dynamics influence the integration of human rights into business?*

Analyzing company-related dynamics involves considering how companies frame human rights. This illumines the interpretations and operationalizations of human rights in business practice. Concerning systemic dynamics, this study considers the impact of company conduct in the context of systemic interrelations in global trade in terms of whether and how far the existing human rights system allows for systemically failing to enforce human rights, and hence might enable othering.

First, the prevalent understanding of human rights and ensuing responsibilities within companies are considered. A company's understanding of human rights is the basis of its actions toward integrating human rights into its business (Obara, 2017, p. 249; Scheufele & Iyengar, 2017, p. 622). Thus, showing how business can effectively inte-

grate human rights first requires examining corporate perceptions of the concept of human rights. It also means considering the individual company's impact and responsibility and thus how it frames the issue. This step in the analysis will characterize the different perspectives and conceptualizations of human rights in business, in particular how they concern the affected stakeholders and shape the BHR discourse. A metasynthesis of framing analyses will take stock of the different perceptions of the topic of business and human rights. This approach helps to identify the frame dimensions prevalent in business and provides insights into the practical challenges of effectively ensuring human rights in a business context. Making frames explicit that are used in practice also contributes to the academic discussion of how human rights can be better integrated proactively into business. Understanding company frames also enables advancing understanding of possible sources of conflict between the parties involved in the human rights discourse. Such insights can form the basis for developing tailored approaches to better integrate human rights into business that explicitly address a company's current frame. Understanding company framing further allows deducing ways of addressing the shortcomings of current human rights guidelines and thus of improving their effectiveness.

Second, when integrating human rights into business, it is important to anchor both the catalogue of rights and the underlying idea of human rights. Hence, one relevant aspect of an effective approach to BHR is whether all affected parties are considered, or whether some parties are structurally disadvantaged in voicing and claiming their rights (Zeid, 2015). This focal area emphasizes the systemic requirements for upholding the rights of right-holders. Independent of the obligatoriness of human rights guidelines for companies, this part of the study inquires whether more fundamental challenges exist in establishing BHR structures. This question arises from the fact that the dynamics of global trade at times starkly contrast with the human rights system, traditionally centered on sovereign states protecting human rights. Globalization inevitably means encountering the "unknown," for instance, in form of different regulations, assumptions, and practices. While this leads to uncertainty at the very least, it may also result in a misfit of familiar habits and approaches (Donaldson, 1996, p. 48). Following this line of argumentation, this study asks whether the current (un)regulated structures of global trade may "other" certain groups, ones with unequal chances to access the human rights system, or whether those structures enable adequately responding to the "other." The results

of the analysis show that the current human rights system provides space for *de facto* othering.

This dissertation focuses on the economic sphere. Successfully integrating human rights into business depends greatly on companies accepting, considering, and actualizing human rights on the operational level, in decision-making processes, and in transactions between business partners. It is widely acknowledged that developing a robust business and human rights regime is a complex and fragile endeavor, one that requires the multinational and cross-disciplinary involvement of many stakeholders (Kinley, 2009, p. 210; Nolan, 2016, p. 9). This endeavor requires a supportive legal and political infrastructure, as well as a society that is aware of its rights, role, and responsibilities in creating a fertile environment for ensuring human rights (Reinisch, 2005, pp. 67-68). This study goes beyond regarding companies as mere stakeholders in the process of enforcing human rights and considers them instead to be actors, that is, agents actively shaping BHR. In sum, this study examines how companies affect and are affected by different dynamics in the field of business and human rights.

### **1.3 Dissertation Outline**

The thesis is structured as follows (see Figure 1-1). Chapter 2 reviews the progress that has been made in human rights being recognized in business. It outlines the development and state of the field of business and human rights, with a particular focus on the achievements and challenges that, to date, determine the approach toward establishing structures able to ensure human rights in the global business context. Chapter 3 concentrates on the frames used by companies, and which dominate the BHR discussion, and on how these affect efforts to support human rights. A metasynthesis of framing analyses on companies' understanding of human rights is used to investigate the frame dimensions applied by companies. Chapter 4 addresses the meta-perspective and explores the interdependence of different actors and structures in global trade vis-à-vis the goal of preventing companies from violating any person's human rights. It suggests that, in light of the global nature of many business and human rights issues, systemic effects emerge that may *de facto* "other" vulnerable groups. Chapter 5 formulates specific contributions to the field of BHR and concludes this research by relating the findings to the prospects for the integration of human rights into business.

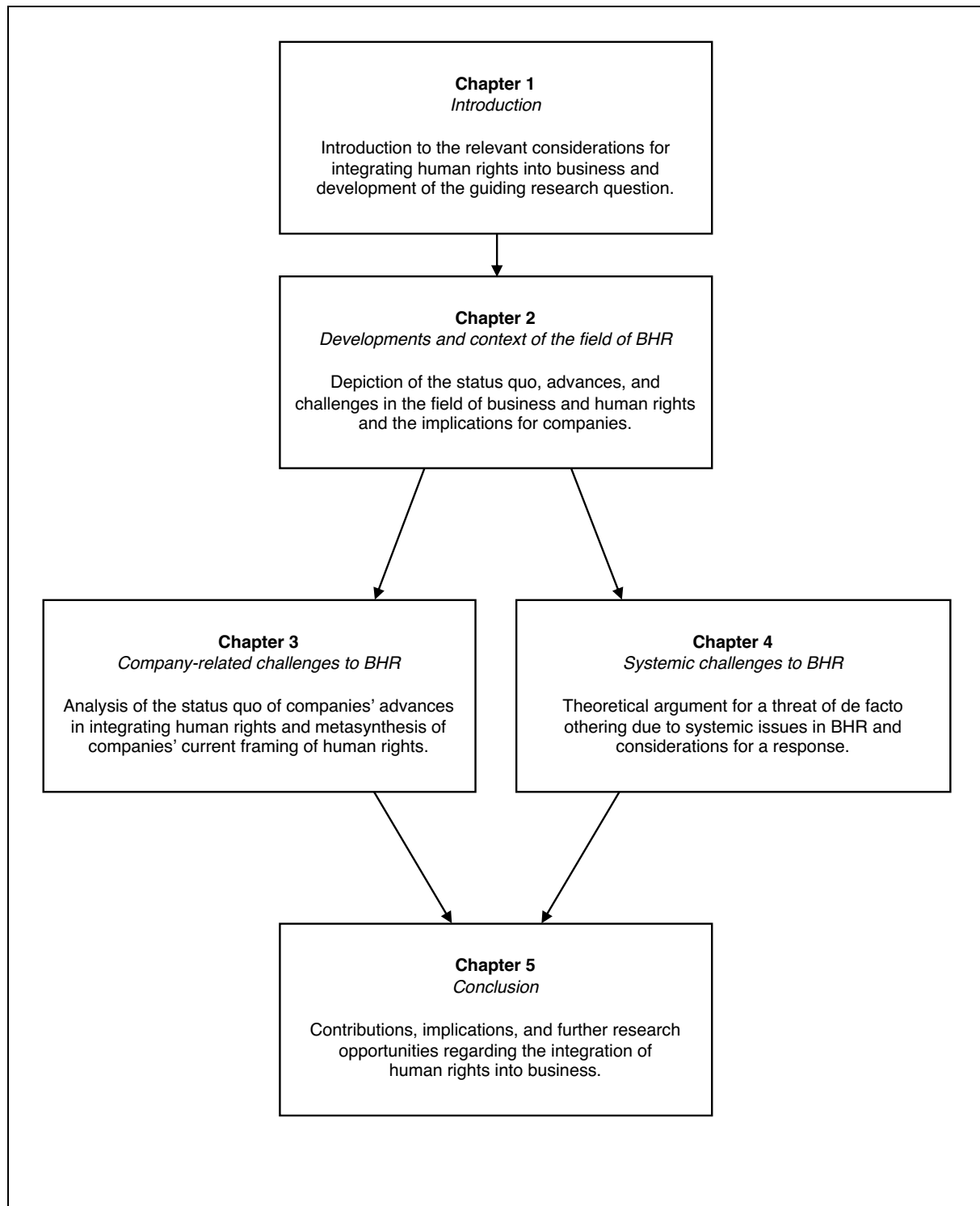


Figure 1-1 Overview of the dissertation

## **2 The Field of Business and Human Rights**

The relationship between companies and human rights raises a number of theoretical and practical questions, such as the supervision of corporate human rights impacts (from recognition to remedy) or how far companies are responsible for safeguarding human rights. More fundamentally, this relationship also calls into question the organization of social responsibilities with respect to the distribution of responsibility and influence between the state and companies.

This chapter discusses the development of the BHR field and the core areas in this discussion. It reviews the current state of this field in terms of its meaning for companies, as well as in terms of how consistently human rights have been and are being integrated into business.

### **2.1 Human Rights and Their Relation to Business**

#### **2.1.1 Status Quo of Business and Human Rights**

As companies have grown in size and reach, and as trade is increasingly globally interconnected, human rights issues have also become increasingly apparent in relation to corporate activity (see, e.g., Bernaz, 2017, p. 1; Brenkert, 2016, p. 277; Nolan, 2016, p. 3; Ratner, 2001, p. 446; Ruggie, 2013, p. xv). To date, the enforcement of human rights as part of international law relies on a state-centric approach (Kobrin, 2009, p. 365; Methven O'Brien & Dhanarajan, 2016, p. 555). From a regulatory point of view, corporate actors, in particular transnational corporations (TNCs), are not sufficiently covered by current structures. Despite advances in the realm of voluntary commitments by the private sector, the human rights policies that companies have in place do not fully ensure the reliable protection of human rights to the same extent (see, e.g., Bernaz, 2017, p. 8; Chandler, 2003, p. 26; Deva & Bilchitz, 2017, p. xix; Ramasastry, 2015, p. 248). The relationship between business and human rights remains controversial. Moreover, the foundations of legal accountability, normative responsibility, and levels of complicity are still being developed.

The question of corporate responsibility for human rights has gained increasing prominence both in academia and in public discourse over the last three decades and has led

to BHR establishing itself as a field in its own right (see, e.g., Baumann-Pauly & Nolan, 2016, p. xix; Bernaz, 2017, p. 2). The interconnection between business and human rights has been recognized and attracted growing global attention, not least through various often dramatic events (e.g., the Bhopal disaster in 1984, Shell in Nigeria in the 1990s, the collapse of Rana Plaza in 2013) (Buhmann, 2018, p. 30; Hess, 2017, p. 643; Nolan, 2016, pp. 3-4; Ruggie, 2013, pp. 3-18). These events revealed some of the side effects of globalization and trade liberalization, among others, the expanding influence of companies beyond the economic to the socio-political sphere (Bijlmakers, 2019, p. 20; Chandler, 2003, pp. 22-23; Kobrin, 2009, p. 350).

Economic activity has always involved considering the responsibilities of business toward society, even before the expansion of globalization and the emergence of BHR as a field (Rosenblum, 2015, p. 37). Many of the related questions and issues have been subsumed under the umbrella of corporate social responsibility (CSR) (Scherer & Palazzo, 2007, p. 1096). BHR is a much younger field and began emerging in the mid-1990s (Ramasastry, 2015, p. 240; Ruggie, 2013, p. xxv; Wettstein, 2012a, p. 742). One event widely considered key to advancing the BHR debate is the protest of the Ogoni people against the destruction of their livelihood through Western oil companies in the Niger Delta. The protests culminated in the execution of activist Ken Saro-Wiwa and sparked international protests (see, e.g., Alston, 2005, pp. 11-12; Chandler, 2003, p. 24).

The interface between business and human rights has become an independent research discipline involving diverse fields, such as law, ethics, economics, as well as political science and sociology (e.g., Baumann-Pauly & Nolan, 2016, p. xix). It concerns a diverse set of actors, who look at BHR from different angles. States, inter-organizational institutions and non-governmental organizations (NGOs), as well as companies have all begun engaging with these issues (Bijlmakers, 2019, pp. 31-32; Ruggie, 2013, pp. xxvi-xxvii). Work in this field involves systematic reports and impact assessments, regulating and sensitizing relevant actors, and alleviating conflicts and damages caused by corporate activities with regard to human rights.

BHR deals as much with notorious issue-specific problems as with the responsibilities of companies arising from TNCs' socio-political influence. This is reflected in its research, which seeks to enable enforcing human rights, but also critically explores the grounds on which corporate responsibility is assigned (e.g., Arnold, 2016; Brenkert,

2016, pp. 277-279; Hsieh, 2015; Ramasastry, 2015, p. 249). In some respects, a grey zone exists regarding the distribution of responsibility for human rights between companies and governments. This blurredness results from conflicting interests: expecting high accountability from companies on the one hand, and reservations about handing over responsibility to companies on the other (Cragg, 2009, pp. 279-282; Muchlinski, 2001, pp. 44-46; Scherer, Palazzo, & Matten, 2014, p. 149; Vazquez, 2005, pp. 949-950).

In the academic literature, several aspects are being pursued simultaneously. Together, they contribute to devising strong enforcement structures and to delineating the particular role of businesses with respect to human rights. The field is benefitting from interdisciplinary contributions. The majority of work has come from legal scholars and business ethicists (Baumann-Pauly & Nolan, 2016, p. xix; Deva, Ramasastry, Santoro, & Wettstein, 2016, p. 202; Ramasastry, 2015, p. 242). BHR initiatives are gaining more foothold also in practice. Governments are addressing the issue, for instance, by formalizing soft law and elevating it to a national level. Slowly, progress is being made in jurisdictions, including the hearing of cases involving transnational corporations. From within the corporate sphere, industry initiatives have begun constituting networks in order to exchange ideas and experiences and to dynamically improve human rights conditions in the field.

### **2.1.2 Defining Human Rights**

Human rights are fundamental rights and freedoms that every human being is entitled to (Donnelly, 2013, p. 10; Griffin, 2008, p. 13; United Nations, 1948, Art. 1-2). Despite the lack of an exclusive list of rights or even a definition for deriving specific rights (Alston & Goodman, 2013, p. 492; Griffin, 2008, pp. 25, 202), conceptually, human rights are characterized as being equal, inalienable, and universal (Donnelly, 2013, p. 10). Even though there are different conceptions of the nature and origin of human rights, Brenkert (2016, p. 279) notes that “[m]ost business ethics accounts attribute a number of common features to human rights” and summarizes that “they are a) rights; b) held by individuals; c) matters of significant importance (high priority); and d) inalienable, i.e., they cannot simply be waived.”



The implementation and specification of human rights ranges from narrow to broader interpretations of what constitutes a fundamental right (Griffin, 2008, p. 50). While exact perceptions might differ in a geographic or temporal dimension, depending on the particular cultural or historic context, these differences should not change the underlying claim and status associated with human rights (see, e.g., Brenkert, 2016, pp. 279-280; Campbell, 2006, p. 103; Donaldson, 1996, pp. 52-53).<sup>1</sup>

The core idea of human rights has been referred to as “moral rights of the highest order” (Donnelly, 2013, p. 11). This definition sets human rights apart from legal rights or basic values (Donnelly, 2013, p. 13; Griffin, 2008, p. 191). The conceptualization of the United Nations (UN) builds on the recognition and protection of human dignity as the central issue. It also highlights the aim to provide conditions that ensure a life in “freedom from fear and want” for every human being (see Preamble, United Nations, 1948, 1966a, 1966b).<sup>2</sup> This definition accepts that human rights are inherent and thus precede any external attribution of rights. Thus, those holding these rights “cannot lose, not through anything they do themselves (waiver or forfeiture), nor through anything others do, for instance through an alteration of the law” their human rights (Pogge, 2011, p. 7).

While human rights are understood to be innate and inalienable (United Nations, 1948), some rights can be restricted under exceptional circumstances. Such derogations are temporary and follow strict conditions (Alston & Goodman, 2013, p. 394). There are two critical distinctions: between absolute and non-absolute rights, and between derogable and non-derogable rights (Attorney-General’s Department, n.d.; Ball, 2011, pp. 1-2; European Commission, n.d.). There are a number of *absolute rights*. By definition, these may not be suspended (among others, they include the freedom from torture or from discrimination) (ibid.). By further definition, they are also *non-derogable rights* (Ball, 2011, p. 2; European Commission, n.d.). *Derogable rights*, on the other hand, can be limited (e.g., a curfew can restrict the freedom of assembly and association) (Alston & Goodman, 2013, p. 394). Importantly, *non-absolute rights* can still be non-derogable

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<sup>1</sup> Enderle (2016, p. 178) reaffirms the necessity to justify human rights, including “different philosophical perspectives and faith traditions.” In particular due to their claim of a universal scope of application, and with respect to the world’s pluralistic character, the justification should be undertaken from different perspectives.

<sup>2</sup> The UN Charter and the International Bill of Rights mention “dignity” in the preamble, yet only the specific rights in the core of the document – not the preamble – are legally binding (Bernaz, 2018).

(European Commission, n.d.). Hence, there are reasons where a right can be restricted under certain conditions (e.g., certain religious practices justify limitations, yet not suspending the freedom of religion).

Human rights have been categorized into different groups of rights, which have also been termed generations (Griffin, 2008, p. 256; Vasak, 1977, p. 29; Viljoen, 2009). The first two generations concern the most well-known and, in form of separate Covenants in the International Bill of Rights, also the best-established forms of rights (Griffin, 2008, pp. 193, 256; Wellman, 2000, p. 639).

First generation rights refer to *civil and political rights* (or *liberty rights*) (Griffin, 2008, p. 256; Vasak, 1977, p. 29). These rights mostly affect individuals and concern negative obligations in the sense that they require non-interference (ibid.). Civil and political rights include, for instance, the right to life and safety, freedom from torture, freedom from slavery, the right to fair trial, the freedom of speech, thought, conscience and religion, protection from discrimination, freedom of assembly and movement, right to privacy, and the right to vote (see ICCPR, United Nations, 1966a).

Second generation rights are *economic, social, and cultural rights* (or *welfare rights*) (Griffin, 2008, p. 256; Vasak, 1977, p. 29). Most, albeit not all of these rights, entail positive obligations in the sense that they must be actively provided for (ibid.), typically through state action (Wellman, 2000, p. 642). Examples of economic, social, and cultural rights include the right to social security, labor rights, the right to family life, the right to an adequate standard of living, the right to health, and the right to free education (see ICESCR, United Nations, 1966b).

Third generation rights have been labeled *solidarity rights* (or *development rights*) (Griffin, 2008, p. 256; Vasak, 1977, p. 29). These rights include collective group rights (Griffin, 2008, p. 256) and lie within the responsibility of the international community, as opposed to individual states alone (Vasak, 1977, p. 29; Wellman, 2000, p. 639), in particular in light of growing global interdependencies (Wellman, 2000, p. 642). Examples of solidarity rights include the right to development, the right to peace, and the right to a healthy environment (Minnerop, Roht-Arriaza, & Aminzadeh, 2018; Vasak, 1977, p. 29).

There are also discussions whether a fourth generation of human rights might be foreseen as a response to the “digitalization and datafication” (Soh, Connolly, & Nam, 2018)

of industry processes, as well as of communication and information processing, that have disruptive potential for both industries and civil society. The implications of these developments for human rights demand responses to privacy concerns, to the effects of automation, or to the potential domination of artificial intelligence applications. This holds true in particular for questions of data aggregation and for who controls access to and the use of data (see, e.g., Soh et al., 2018).

The division of human rights into generations has been questioned as this might artificially create differences between rights (Macklem, 2015, p. 62; Whelan, 2010, pp. 210-211). For instance, there are concerns about the classification of rights — despite its usefulness in practice — that warn about the robustness of human rights being weakened (see, e.g., Kinley, 2009, p. 33). Although it is not contested that rights can be legitimately differentiated, caution has been urged about representing human rights in categories as this tends to facilitate ranking or hierarchizing rights (Hamelink & Hoffmann, 2008, pp. 13-14; S. L. B. Jensen, 2017; Macklem, 2015, p. 82). However, these categories are not intended to qualify rights per se:

Whether chronological or analytical, a generational conception that stylises these differences misses the fact that, despite the diverse sets of interests they seek to protect, human rights in international law share a common purpose: to mitigate injustices produced by the ways in which international law brings legal order to global politics (Macklem, 2015, p. 62).

Essentially, this reading underlines that the unique standing and fundamental claim of human rights should not be bypassed by dividing or replacing them. Minnerop et al. (2018) observed that “[t]he term ‘generation’ implies not that some rights are superseded by others, but it underlines the fact that some rights can only be enjoyed within a certain framework established by the general protection of rights and the rule of law.” This view was already upheld by the Vienna Declaration (which reaffirmed the commitment of states to human rights and devised a “Programme of Action”): “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis” (World Conference on Human Rights, 1993). Thus, bundling rights into groups is an approximation to help organize and make accessible the idea of human rights. It does not, however, intend to evaluate the different rights in competition

to one another or suggest that rights could be replaced (Minnerop et al., 2018; Viljoen, 2009; Wellman, 2000, p. 641).

### **2.1.3 The International Human Rights System**

Institutionalizing human rights is crucial in political and legal contexts as well as in international relations. In practice, human rights are mostly referenced in terms of the United Nations' International Bill of Human Rights (Alston & Goodman, 2013, pp. 143-144; Donnelly, 2013, pp. 26, 55-57; Griffin, 2008, p. 25; United Nations, 2011). The Bill is a globally acknowledged standard and will also serve as a reference point for this dissertation. In the UN Charter, the founding treaty of the United Nations, member states committed to "promoting and encouraging respect for human rights" as part of the purposes of the United Nations (United Nations, 1945). The International Bill of Human Rights consists of three core documents in which human rights are laid down: the Universal Declaration of Human Rights (UDHR, adopted in 1948), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (the latter two were both adopted in 1966 and entered into force in 1976). A number of more specific conventions have since been developed to further specify rights (e.g., migrant workers' rights, elimination of racial discrimination, anti-corruption) or to protect certain groups of right holders (e.g., children or minorities) (OHCHR, 1996, n.d.-b).

The UDHR ascribes strong global influence to human rights by positing that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (United Nations, 1948, Preamble). The enforcement of human rights relies strongly on the commitment of individual states and on regional human rights regimes, which bridge national and international law on human rights concerns (Cassese, 2005, p. 389; Donnelly, 2013, p. 11). These regional systems perform a supervisory role and provide a forum where governments can be tried and remedy be sought for victims of human rights violations. In particular, the European, Inter-American, and African regional systems are advanced. Each has adopted its own human rights charter and has set up a human rights commission and an independent court (Cassese, 2005, p. 389; Donnelly, 2013, pp. 173-178). Other regional systems are being developed. The launch of comparable structures

in the ASEAN region and through the League of Arab States is currently under development but not yet fully established (AICHR, n.d.; Donnelly, 2013, pp. 178-179; Pisanò, 2014, p. 409; Rishmawi, 2010, p. 169). Moreover, human rights are part of national legislation and are often integral to state constitutions (Cragg, 2000, pp. 205-206; Donnelly, 2013, p. 11). Member states of UN conventions may express reasonable reservations upon ratification. Otherwise, it is expected that national law will be adapted to a signed convention, protocol, or treaty (Cassese, 2005, pp. 174-175).

#### **2.1.4 Developments in Human Rights**

The dynamic nature of rights has long been noted. For instance, Raz (1986, p. 171) observed that “most if not all formulations [...] disregard the dynamic aspect of rights. They all assume that a right can be exhaustively stated by stating those duties which it has already established.” This is true also for human rights law. Vasak (1977, p. 29) called the UDHR a “living document,” whose intention transcends interpretations of the legal status of the provisions therein. The existing body of human rights is continuously evolving and being debated and developed to account for ongoing socio-political or legal developments (Alston & Goodman, 2013, p. 1516; Donnelly, 2013, p. 39; Macklem, 2017, pp. 123-124; Wellman, 2000, pp. 640, 645). One way in which this happens is case law, which can establish precedents or provide well-informed evaluations and detailed accounts of specific legal questions (Wellman, 2000, p. 645). Often, these developments start in more general terms (e.g., in the form of declarations or resolutions) and become more precise as they gain international acceptance and find legal application (Wellman, 2000, pp. 645-646). Such developments can serve as an important orientation for the intent and focus toward human rights action, even if they are not legally binding (*ibid*).

These dynamic developments emphasize the importance of maintaining the strong foundation of human rights (Alston, 2002, pp. 842-843; Hamelink, 2003, p. 160; Kinley, 2009, pp. 34-35). Despite the natural developments in and different perspectives on human rights, their foundation must not be diluted. In this regard, the expansion of human rights, and an inflationary use of rights language, have been pointed out, both in terms of legal practice and in terms of the conceptualization of corporate responsibility (Gready, 2008, pp. 736, 743-744; Kinley, 2009, p. 32; Kumm, 2018, pp. 240, 243-244). Retaining a strong foundation also means that, according to the “object and purpose” of

human rights law, “standards on human rights must prevail over the concerns of sovereign States” (Cassese, 2005, p. 175).

A related debate, on the interpretation of human rights, concerns realizing the inherent concept of human rights and addresses the tension between a universalist and a (cultural) relativist approach (Alston & Goodman, 2013, pp. 50, 531-533; Donnelly, 2013, p. 93; Kinley, 2009, pp. 10-11; Marks & Clapham, 2005, p. 385). Human rights, as laid down in the UN treaties, are an ambitious endeavor, one that establishes human rights as universally applicable and specifies them in a number of treaties (*ibid.*). The sensitive nature of human rights, as well as their contextual contingencies (historical, political, or cultural), raise the question whether a universalist approach is practicable (Donnelly, 2013, pp. 99-100, 105; Kinley, 2009, p. 11; Koskenniemi, 2018, pp. 42, 56-57). Human rights are at times context-dependent and might be interpreted differently in different cultures. This fuels a debate on whether a universalist approach is legitimate or whether it ignores cultural specificities and thereby risks contradicting its own aspirations (Alston & Goodman, 2013, pp. 50, 531-533; De George, 1993, p. 9; Donaldson, 1996, p. 48; Marks & Clapham, 2005, p. 387).

Both extremes can be problematic. A relativist approach risks depriving human rights of their moral urgency if it leaves the definition of rights open to interpretation to the extent that opposite understandings might be equally valid (Donaldson, 1996, pp. 48-49; Donnelly, 2013, pp. 109-110). An absolutist understanding of human rights (e.g., universalism), on the other hand, might presuppose a narrow range of permissible action, which in turn might promulgate an “imperialist” approach (Donaldson, 1996, pp. 49, 52; Marks & Clapham, 2005, p. 387). Thus, context matters, just as cultural diversity and different ethical traditions are relevant considerations (Donaldson, 1996, p. 52; Donnelly, 2013, p. 100). Overall, however, the essence of human rights holds across cultural differences and does not conflict with different contextual backgrounds (Brenkert, 2016, p. 280; Donnelly, 2013, p. 94; Griffin, 2008, p. 27; Marks & Clapham, 2005, p. 398). This is also supported by the Vienna Declaration, which reaffirmed the commitment of the UN member states to the promotion and protection of human rights (Donnelly, 2013, p. 95; Hamelink, 2003, p. 123; World Conference on Human Rights, 1993, Preamble).

### 2.1.5 Corporate Involvement in Human Rights Abuses

Human rights impacts are also a question in business. The parameters for integrating human rights are being more and more debated amid increasingly transnational trade, deregulation, and large corporations (Bishop, 2012, p. 121). One key concern of BHR is the risks of negative human rights impacts as a consequence of business operations. Companies can stand in various relations to human rights abuses (Brenkert, 2016, p. 301). Companies can directly impact human rights in both their immediate and indirect operating environment (e.g., the rights of their employees, customers, or local communities). More often, however, companies are involved either partly or passively; rather than violating human rights themselves, they are complicit in abuses (Kobrin, 2009, p. 351). Complicitous corporate action may range from rather active to rather passive, and can take different forms (e.g., material, infrastructural, or monetary) (Brenkert, 2009, pp. 458-459; 2016, p. 303; Tripathi, 2005, p. 118). According to the UN,

[a] company is complicit in human rights abuses if it authorises, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse. The participation of the company need not actually cause the abuse. Rather, the company's assistance or encouragement has to be to a degree that, without such participation, the abuses most probably would not have occurred to the same extent or in the same way (United Nations Global Compact & OHCHR, 2004, p. 19).

Three forms of corporate complicity are distinguished: direct complicity, beneficial complicity, and silent complicity. The boundaries, however, are not always clear-cut (Brenkert, 2016, p. 302; Clapham & Jerbi, 2001, p. 342; United Nations Global Compact, n.d.). *Direct complicity* means that “a company provides goods or services that it knows will be used to carry out the abuse” (United Nations Global Compact, n.d.). It also includes that a company “supports, aids, or abets another agent in the abuse of human rights” (Brenkert, 2016, p. 302). Decisive in this case is not the company's intention, but rather its knowledge of the impact of its actions (Clapham & Jerbi, 2001, p. 342). *Beneficial complicity* refers to contexts “when a company benefits from human rights abuses even if it did not positively assist or cause them” (United Nations Global Compact, n.d.). It is a form of indirect complicity, in which a company benefits from human rights abuses committed by another party, yet without the company partaking in

the violative action (Brenkert, 2016, p. 302). Finally, *silent complicity* occurs “when the company is silent or inactive in the face of systematic or continuous human rights abuse” (United Nations Global Compact, n.d.). This represents another form of indirect complicity, one that is more controversial, yet very relevant (Brenkert, 2016, p. 302; Chandler, 2003, pp. 25-26; United Nations Global Compact, n.d.; Wettstein, 2012b, p. 38). There are instances where companies face a dilemma or a conflict of interest, or are not aware of the impact of their operations (Brenkert, 2009, p. 453; Hoffman & McNulty, 2009, p. 542; Wettstein, 2012b, p. 37). However, given their economic power, their mobility, and their freedom to choose their business partners or operating sites, companies are considered to be in a particular position to react (Chandler, 2003, p. 26; Cragg, 2000, p. 209). It has been argued that this entails expectations about companies using their influence to promote human rights (Clapham & Jerbi, 2001, p. 348; Wettstein, 2012b, pp. 38-39; Wood, 2012, p. 76).

Currently, however, attributing human rights abuses to companies remains challenging in practice. This holds true both for producing evidence of companies’ influence and for inferring corresponding claims to accountability. Several attempts exist in the literature to clarify corporate human rights responsibility, as will be discussed in the following.

### **2.1.6 Corporate Responsibility for Human Rights**

Under the current international human rights law regime, enforcing human rights rests largely on state-centric structures. Nevertheless, the business sector has also begun actively engaging in business and human rights questions (Kobrin, 2009, p. 365; Methven O’Brien & Dhanarajan, 2016, p. 555). As the scale of corporate involvement has grown, several approaches have been developed to make the case for corporate human rights responsibility. On the one hand, these approaches include theoretical accounts, which debate how best to justify corporate responsibility for human rights and its possible sources. On the other stand practice-driven approaches, which put forward proposals to motivate companies to engage with their human rights impact. The goal is to incorporate companies in the human rights governance framework, as they emerge as influential, globally operating actors besides states, so as to facilitate the provision of relief where human rights cannot be satisfactorily realized in consequence of corporate activities, and to establish preventive structures as widely as possible (Cragg, 2009, pp. 267-268).



Early accounts of corporate human rights obligations are grounded in legal theory and have largely informed the discussion to date (Cragg, 2009, pp. 277-278). Legal accounts traditionally emphasize the role of states in protecting human rights (*ibid.*). Following this perspective, corporate human rights obligations are established through laws imposed on companies by states and are thus mostly indirect or derivative responsibilities (Brenkert, 2016, p. 287). Accordingly, corporations remain primarily subject to domestic law rather than directly to rights holders (*ibid.*). This approach has been challenged as companies' operations have turned increasingly transnational and thus evade the regulatory reach of states, which are bound to domestic jurisdictions (Cragg, 2009, pp. 279-282).

Another source of deriving corporate human rights responsibility is based on moral approaches (see, e.g., Brenkert, 2016, p. 288; Wettstein, 2018, p. 376). These accounts build on moral agency and relate corporate actions (potentially) affecting human rights to more immediate human rights responsibility (*ibid.*). The different lines of argumentation analyze companies' impact on and leverage toward human rights. Examples include considering companies to be quasi-governmental actors (Wettstein, 2009b), the fair share theory (Santoro, 2010), or the type of services that companies perform, as in the publicness approach (Karp, 2014). These approaches arrive at different conclusions about the scope of corporate responsibility, ranging from rather limited to more expansive accounts (see, e.g., Arnold, 2010, p. 388; Bishop, 2012, pp. 141-142; Hsieh, 2015, p. 219; Wettstein, 2018, p. 376).

The normative debate on the assignment and justification of a corporate obligation for human rights raises several key interrelated questions: who ought to be responsible, why, to what degree, and under which conditions? The respective debate among legal scholars or business ethicists has developed the basis for grounding and defining responsibility and explores the requirements for assigning responsibility. Further, the debate addresses the distribution and attribution of responsibility between states, companies, and civil society (Brenkert, 2016, p. 290; Reinisch, 2005, pp. 67-68). Whereas there is broad support for the notion of some degree of corporate human rights responsibility, the debate also concerns delimiting the extent and reach of corporate human rights responsibility (e.g., Baumann-Pauly & Posner, 2016, pp. 12-13; Brenkert, 2016, p. 279; Nolan & Taylor, 2009, p. 433). This prominently involves debating whether companies

have duties, and whether the responsibility to at least respect human rights includes positive obligations or stops at the equivalent of “do no harm” (Bilchitz, 2010, p. 7; Wood, 2012, p. 64).

Besides normative legal and moral accounts of corporate human rights responsibility, practice-driven approaches encourage companies to assume responsibility for human rights. These approaches extend existing concepts of corporate responsibility to encompass human rights, or advocate human rights engagement in response to external drivers, or build on intrinsic motivation. The business case for human rights has been invoked, albeit with marginal success, as no empirical relationship between strong human rights policies and corresponding financial returns could be demonstrated (Baumann-Pauly & Posner, 2016, pp. 13-14; Brenkert, 2016, p. 286). Related arguments revolve around the concept of the “social license to operate.” This focuses on the reputational and relational aspects of corporate human rights responsibilities. It maintains that stakeholders have a legitimate interest in holding companies to account and that companies must satisfy these social expectations to gain legitimacy (Demuijnck & Fasterling, 2016, p. 680; Leisinger, 2005, pp. 577-578). For utilitarian approaches, however, which build on voluntary commitments to harness corporate capacities and capabilities to mitigate adverse human rights impacts, the most significant problems are the attribution of externalities and indirect human rights costs, as well as the risk of selectively approaching human rights (Cragg, 2009, p. 287; Demuijnck & Fasterling, 2016, pp. 677-678). Finally, research in BHR deals with value-based concepts grounded in the intrinsic motivation to integrate responsible human rights conduct into companies (Wettstein, 2009a, p. 130).

One prominent example of a pragmatic approach is the United Nations “*Protect, Respect and Remedy*” Framework on the division of human rights responsibilities in BHR. The framework was developed by John G. Ruggie, the former UN Secretary-General’s Special Representative for Business and Human Rights, and published in 2008 as a result of systematically surveying the relation between business and human rights. The framework “presents a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors” (Human Rights Council, 2008). It rests on three core principles: “the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies”; the last one refers to both states

and non-state actors, such as corporations (ibid.). The framework thus assigns responsibility to companies, based on their influence on human rights (Human Rights Council, 2011). The framework has, however, been criticized for lacking a strong normative foundation, one capable of sustaining either moral or legal obligations, and for narrowing the scope of corporate obligations to non-infringement (e.g., Cragg, 2012, p. 10; Fasterling & Demuijnck, 2013, p. 812; McCorquodale, 2009, p. 392; Wettstein, 2012a, p. 745).

Opinions diverge as to the justification and extent of corporate responsibility. Nevertheless, it is widely acknowledged that companies need to engage in safeguarding human rights, in order to strengthen and enforce such rights in the business context (Bishop, 2012, p. 123; Brenkert, 2016, p. 299; Cragg, 2012, p. 11). Within the present structures, however, there is a disconnect between commitment and enforcement.

The field of business and human rights approaches this governance gap in various ways. These include efforts to close the gap and introduce regulatory clarity, domestically or internationally, as well as voluntary initiatives to bridge this gap and establish human rights, as will be discussed in the following.

## **2.2 Institutionalization of Business and Human Rights**

### **2.2.1 The UN Guiding Principles on Business and Human Rights**

One important step toward systematically reviewing the relation between business and human rights was the appointment of John G. Ruggie as the UN Secretary-General's Special Representative for Business and Human Rights in 2005.<sup>3</sup> Over the course of six years, Ruggie investigated the impact, roles, and practices of both companies and states and laid much of the groundwork for today's discussion on BHR (Human Rights Council, 2008; Ruggie, 2013, pp. xlvii-xlviii). Ruggie's work resulted in the *"Protect, Respect and Remedy" Framework* (2008) and the *"UN Guiding Principles on Business*

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<sup>3</sup> Earlier attempts include the UN Draft Norms ("Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights"), however, these were abandoned later (Mares, 2012, pp. 1-2; Ruggie, 2013, p. xvii; Weissbrodt & Kruger, 2005, p. 315).

*and Human Rights*” (UNGPs) (2011), which were unanimously endorsed by the Human Rights Council (Ruggie, 2013, pp. 105, 120).

The UNGPs are a guide to implementing Ruggie’s previously developed “Protect, Respect and Remedy” Framework (United Nations, 2011). They reiterate the fundamental assumption of this framework, namely, that it is the state’s duty to protect human rights. The second pillar, “respect,” suggests a duty to respect human rights for companies, while the third demands that mainly states, but also companies, install judicial and non-judicial procedures to provide remedy for victims of human rights violations. The UNGPs build on the body of UN declarations and covenants as the authoritative list of human rights (Brenkert, 2016, p. 283). Ruggie’s approach, “principled pragmatism,” sought broad consensus (among civil, legal and corporate actors), in order to motivate action rather than opposition and to yield effective improvements where rights are impacted by corporate activities (Backer, 2012, pp. 80-82; Bijlmakers, 2019, pp. 48-51; Fasterling & Demuijnck, 2013, p. 800; Ruggie, 2013, pp. xlii-xliii). To this end, Ruggie suggests a polycentric governance framework as opposed to the traditional state-centric approach.

The UNGPs created a previously missing focal point for the BHR debate and have since become a key resource within the BHR debate (Bilchitz & Deva, 2013, p. 2; Human Rights Council, 2008, para. 5; Ramasastry, 2015, p. 247; Wettstein, 2012a, p. 741). They represent comprehensive guidelines and are expressly meant to provide guidance to the business sector. Their polycentric focus is regarded as an opportunity for raising the profile of BHR commitment in practice by reflecting the developments in the respective statuses of states and companies. This presupposes, however, that the concessions made toward enforceability are outweighed by the benefits of broader commitment (Cantú Rivera, 2019, p. 236; Hampton, 2019, pp. 244-245; Methven O’Brien & Dhanarajan, 2016, pp. 544, 555). This is also the major criticism levelled at the UNGPs. The main concern is that the lack of corporate accountability and legal enforceability risks stagnation in business and human rights conflicts and allows companies to choose which rights to prioritize (McCorquodale et al., 2017, p. 200; Methven O’Brien & Dhanarajan, 2016, p. 555).

The corporate responsibility to respect human rights entails three main requirements for embedding concern for human rights impacts in business activities: a “policy commitment,” a “human rights due diligence” process, and “remediation” processes, and it is regarded as a “management, governance and communication process” (Fasterling & Demuijnck, 2013, p. 801). Communication encompasses internal and external communications and thus supports corporate accountability (Buhmann, 2018, p. 24). Due diligence is a cornerstone of the efforts to engage the business sector, to create transparency, and thereby to create a basis for demanding, and providing, reliable structures to address human rights in business operations.

### 2.2.2 Human Rights Due Diligence

One key concept of companies assuming human rights responsibility is *due diligence* (Cragg, 2012, p. 24; Mares, 2012, p. 10). Human Rights Due Diligence (HRDD) forms an important part of both Pillars I and II of the “Protect, Respect and Remedy” Framework (Buhmann, 2018, p. 24). In the context of business and human rights, due diligence is defined in the implementation guide to the UNGPs as an ongoing process, “[i]n order to identify, prevent, mitigate and account for how [companies] address their adverse human rights impacts” (United Nations, 2011, p. 17). It includes four key steps: “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed” (ibid.). Due diligence assumes a proactive approach on the side of companies, as it includes undertaking a human rights impact assessment, as well as subsequent monitoring and necessary processes, in order to respond to potential conflicts. *Human rights impact assessments (HRIA)* refer to identifying company-specific human rights impacts and encompass gathering of relevant information from internal and external sources as well as monitoring developments over time (McCorquodale et al., 2017, p. 205; Methven O’Brien & Dhanarajan, 2016, pp. 548-549). While companies are expected to disseminate their findings appropriately “across relevant internal functions and processes” (United Nations, 2011, p. 19), the exact scope will vary depending on the particular context (McCorquodale et al., 2017, pp. 199-200; United Nations, 2011, p. 19). The interpretive guide to the UNGPs specifies due diligence as follows:

Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the

particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights (United Nations, 2012, p. 4).

The aim of due diligence is to support companies in fulfilling their responsibility to respect human rights (Fasterling & Demuijnck, 2013, p. 807; Graf & Iff, 2017, p. 121). This goal is threefold and comprises both an internal and an external component. Due diligence aims to increase a company's *awareness and knowledge* of its (direct and indirect) connection with human rights issues (Fasterling & Demuijnck, 2013, p. 801). To this end, exercising HRDD includes conducting a detailed human rights impact assessment, reaching out to stakeholders, or identifying possible conflicts with operational activities and strategic priorities (Buhmann, 2018, p. 39). Moreover, the results of the due diligence process raise expectations about greater *transparency*, which in turn should increase accountability through public scrutiny (Fasterling & Demuijnck, 2013, p. 801). Ultimately, due diligence seeks to *contribute to closing the governance gap* (Fasterling & Demuijnck, 2013, pp. 801, 807). As such, proper due diligence encompasses action. This may involve resolving internal conflicts of interest, establishing or maintaining procedures for handling complaints and remedy, or organizing relevant training (see, e.g., McCorquodale et al., 2017, p. 200).

Due diligence is also a familiar term in other contexts. In the legal context, it may serve to “discharge the defendant, if it can demonstrate and document a certain standard of precaution taken” (Fasterling & Demuijnck, 2013, p. 807). In the business context, it is often used to assess financial investment decisions, but also environmental and social impacts (see, e.g., Buhmann, 2018, p. 33; Cragg, 2012, p. 24; Götzmann, 2017, p. 89; Graf & Iff, 2017, p. 117; McCorquodale et al., 2017, pp. 198-199; Muchlinski, 2012, p. 156).

While Ruggie's concept of HRDD builds on these established definitions (Graf & Iff, 2017, p. 117; Muchlinski, 2012, p. 156), HRDD has some distinct characteristics. Due diligence in relation to human rights extends beyond the risks for the company and accounts for those of rights holders (Cragg, 2012, p. 25; McCorquodale et al., 2017, p.

199; Muchlinski, 2012, p. 156).<sup>4</sup> Moreover, HRDD is an ongoing process, which is not attributable solely to a particular activity or decision, but reiterates (Buhmann, 2018, p. 32; McCorquodale et al., 2017, p. 200). A further characteristic of HRDD is its strong preventative focus, with the goal of preventing adverse human rights impacts (Buhmann, 2018, p. 40; Graf & Iff, 2017, p. 121). As Buhmann (2018, p. 40) remarks, this is even more important as “[h]uman rights damage is rarely fully remediable.” Thus, “however important remedy is, prevention of harm is preferable” (ibid.).

Overall, the concept of due diligence is generally recognized in academia and practice as it presents a capable, comprehensive mechanism that is robust enough to demand a satisfyingly substantial engagement of companies to positively impact human rights while being reasonably feasible for companies (see, e.g., Buhmann, 2018, p. 33; Fasterling & Demuijnck, 2013, p. 812). Due diligence rests on the assumption that companies can — and ought to — assess their human rights footprint, as well as analyze and prepare for different scenarios, familiarize themselves with the realities, and employ their leverage throughout their supply chain.

The concept of due diligence has various strengths. By requiring companies to sufficiently reflect on human rights issues, their knowledge and ability to address these are expected to increase (Fasterling & Demuijnck, 2013, pp. 801, 811). Moreover, on an aggregate level, the collective insights from the business community have the potential to raise the profile of human rights through the availability not only of more, but also of more differentiated, information on the relation between business practice and human rights in different contexts (Fasterling & Demuijnck, 2013, p. 801). Its embedding in the UNGPs enables the concept to serve a safeguarding function for companies by maintaining that companies can satisfy due diligence criteria and attain a sufficient level of precautionary attention to human rights (Fasterling & Demuijnck, 2013, pp. 805-806; McCorquodale et al., 2017, p. 200). This shields the company against human rights related risks prior to these unfolding (Fasterling & Demuijnck, 2013, p. 809). As such, it

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<sup>4</sup> Due diligence as described in the UNGPs is thus understood as an “ethical framework” as opposed to a tool to manage direct material risks only, as it is commonly used in a business context (Cragg, 2012, p. 25). A company might still benefit from the required inclusion of human rights risks for stakeholders, e.g., by foreseeing and containing the economic risks from reputational damages that might stem from associations with human rights conflicts in the company’s broader business environment (Buhmann, 2018, p. 32; Fasterling & Demuijnck, 2013, p. 810).

establishes a framework of what may reasonably be expected of companies while ensuring that no undue burden be imposed and that the responsibility for human rights enforcement is a shared one. The process of due diligence, if carried out properly, thus highlights human rights issues and encourages their resolution. This follows from creating relevant internal procedures as well as from transparent communication and accountability toward stakeholders (Fasterling & Demuijnck, 2013, pp. 801, 812).

However, present-day HRDD has various shortcomings. One concern addresses the conceptual ambiguity of the status (in relation to the law) and the focus (company-internal versus extended to society) aimed for by HRDD. This applies, for instance, to the lack of a consistent definition across different international instruments that make reference to due diligence and to its partly unspecific scope (Buhmann, 2018, p. 33; McCorquodale et al., 2017, p. 198). Another concern is that to become fully effective, due diligence would need to be combined with stricter accountability mechanisms. Fasterling and Demuijnck (2013, p. 807) argue that in the absence of legal liability and reliable means for verifying the disclosed information, this might exacerbate the problem of effectiveness. Further criticism has been levelled at more practical obstacles, which prevent companies from realizing their full potential. Such reasons may stem, among others, from financial, strategic, or reputational considerations. As Fasterling and Demuijnck (2013, p. 808) noted, “there is a risk that corporations pay more attention to form than substance,” and that due diligence efforts might be dimmed “when proper due diligence efforts are too costly, produce an information record that could be used against the corporation, or impose decisions that conflict with the corporation’s financial objectives.” Thus, a major concern is that human rights impacts are not even identified or prioritized in the first place (McCorquodale et al., 2017, p. 211). Nor is HRDD able to rule out an instrumental use of the concept and may thus (involuntarily) perpetuate a business case logic where “strategic benefits” outweigh the moral argument (Fasterling & Demuijnck, 2013, pp. 809, 811).

Human rights due diligence has been taken up in practice, yet the results are mixed (see, e.g., McCorquodale et al., 2017, pp. 204-205). In a business context, in one of the first ever empirical studies, McCorquodale et al. (2017, p. 207) found that “where dedicated HRDD is undertaken, human rights are more likely to be detected than during non-specific human rights processes.” The latter address human rights issues indirectly under



related topics, such as “labour, and health and safety issues.” Corporate responses, however, appear to be “piecemeal” and to lack coherence (McCorquodale et al., 2017, p. 214). In a legal context, HRDD has also begun to be invoked (McCorquodale et al., 2017, p. 203). Finally, in a regulatory context, due diligence is part of more recent regulatory instruments and appears in BHR-related laws passed or currently being debated by governments (Buhmann, 2018, p. 34; McCorquodale et al., 2017, pp. 201-202; Palombo, 2019, p. 280). These laws differ in their scope of validity, as well as in the due diligence requirements imposed on companies, and still need to prove their potential to protect human rights in practice (Palombo, 2019, pp. 285-286).

### **2.2.3 Legal Regulation of Companies**

Despite their effect on human rights, companies thus far face no direct legally binding obligations under international human rights law (i.e., other than duties stipulated by national corporate law or labor law) (Bernaz, 2017, p. 81; Muchlinski, 2012, p. 151; Ruggie, 2013, p. 39; Vazquez, 2005, p. 947). Two fundamental issues currently limit companies’ legal accountability for human rights: first, their legal status (i.e., the question of legal personality); second, the question of extraterritoriality (i.e., the reach of a state’s jurisdiction over companies’ foreign activities) (Alston, 2005, p. 20; Bilchitz, 2016, p. 217; De Schutter, 2005, p. 230; McCorquodale, 2009, p. 389; Reinisch, 2005, p. 59). A third issue that complicates a judicial answer to BHR conflicts concerns the “how” of corporate accountability rather than the “if” (Wells & Elias, 2005, pp. 150-151), meaning the effective design of legal regulation.

Thus, legal approaches to holding companies to account need to take different routes to reason corporate human rights responsibility and to provide remedy to victims. There are instances in which individual corporate actors face legal actions for their involvement in human rights abuses. These include cases of exceptional, severe human rights abuses (such as war crimes, genocide, crimes against humanity, torture, extrajudicial killings, forced disappearances, and slavery-like practices), in which individual organizational members can be prosecuted under international criminal law (Clapham, 2006, p. 29; Ruggie, 2013, p. xxxii). Furthermore, complaints against companies for human rights abuses abroad have also been filed in companies’ home states by drawing on domestic laws (see, e.g., Reinisch, 2005, pp. 53-54). In most cases, charges were dropped or resulted in a settlement (Bernaz, 2017, p. 257; De Schutter, 2005, p. 282; Macklin,

2003, p. 279; Schrempf-Stirling & Wettstein, 2017, p. 546). Nonetheless, Schrempf-Stirling and Wettstein (2017, p. 546) found an educational and a regulatory effect of human rights litigation against companies, as companies as well as competitors enhance their human rights policies in response to the threat of litigation.

Until recently, many cases were filed under the Alien Tort Claims Act (ATCA) in the United States. This brought the influence of corporations on human rights into the judicial sphere, intensified the debate on responsibilities, and emphasized the need for grievance and remedy mechanisms (Clapham, 2006, p. 252; Nolan & Taylor, 2009, p. 439). One setback in this respect was *Kiobel v. Royal Dutch Petroleum Co.* (2013), where the court ruled that the ATCA generally does not apply to extraterritorial conduct outside the U.S. This position was reaffirmed by *Jesner v. Arab Bank* (2018), where the court excluded foreign corporations from eligibility under the ATCA (Dodge, 2019, p. 131). The court's decision closed one of the most effective and at that time one of the only forums where cases could be filed against TNCs. Nonetheless, the ruling may have opened up new opportunities, as several cases have since been brought before and admitted to other national courts (McCorquodale, 2013, p. 846; Van Ho, 2015, pp. 121-122). There are still too few cases to indicate a trend, but there is hope that this development will continue, not least as other states are permitting BHR litigations in their jurisdictions.

Recent examples of regional and national legislation that addresses or pertains to BHR concerns include the US Dodd-Frank Act (2010), the EU Non-Financial Reporting Directive (2014), the UK Modern Slavery Act (2015), the Dutch Child Labor Due Diligence Law (2017), or the French Corporate Duty of Vigilance Law (2017). These novel initiatives strive to issue direct mandatory duties on companies to report on their human rights impact and to take action to prevent or remedy adverse impacts (see, e.g., Narine, 2015, pp. 88-89; Wettstein, 2018, pp. 384-385). Through such legal regulation, countries impose due diligence requirements on companies that are registered there and thereby overcome the lack of a jurisdictional forum for handling extraterritorial human rights abuses (Palombo, 2019, p. 270). These developments also consider companies' stakeholders and establish the link between parent companies, subsidiaries, or business partners that otherwise poses a significant obstacle to corporate liability (Cassel, 2016, p. 186).

To date, no equivalent UN human rights convention encompasses the private sector, although a working group established in 2014 has been drafting a binding BHR treaty (OEIGWG, 2018). In the meantime, states are encouraged to take a progressive stance toward directing national BHR efforts. Building on the UNGPs' governmental obligation to protect human rights, states are advised to create National Action Plans (NAPs) in order to advance human rights in a business context. NAPs are intended as soft law instruments capable of documenting political commitment to protect human rights in a business context and of outlining respective policy plans (Methven O'Brien, Mehra, Blackwell, & Poulsen-Hansen, 2016, p. 118). To date, more than 20 countries have enacted respective plans, and over 30 are developing a NAP (OHCHR, n.d.-a). A first round of reviews has curbed expectations, however. While the NAPs' intentions are generally moving in the right direction, they are too generous in terms of enforcement, remedy, and transition time granted, thus leaning toward economic maxims at the cost of more certainty for human rights (Methven O'Brien et al., 2016, pp. 122-125). Whereas NAPs hold the potential to initiate an inclusive and transparent process and to develop coherent, vertically and horizontally aligned policy tools to advance progress in BHR, similar to other regulatory takes on BHR, they are susceptible to corporate lobbying for weaker standards and depend on the quality of government commitment (McCorquodale, 2009, p. 385; Methven O'Brien et al., 2016, p. 121).

#### **2.2.4 Voluntary Standards for Companies**

Apart from legal instruments, a number of international standards and guidelines are available to incorporate human rights in business and to assist companies with implementation (Nolan & Taylor, 2009, p. 437). Many of these are supplemented with additional material, such as explanatory guides, and references to voluntary standards are increasingly found in companies' corporate responsibility and annual reports (see, e.g., Cassel, 2001, p. 269; Clapham, 2006, p. 197; Nolan & Taylor, 2009, p. 434; Reinisch, 2005, p. 42). Voluntary standards and guidelines often focus on a particular industry or a specific area of human rights and thus help to make companies aware of BHR. For instance, they are applied to human rights impact assessments, where human rights impacts are anticipated in the analysis, planning, set-up, and evaluation of particular projects or operations (Götzmann, 2017, p. 89).

One of the earliest documents to mention human rights in the context of corporate responsibility is the *United Nations Global Compact (UNGC)*, which was formed in 2000 (United Nations Global Compact, 2016). The UNGC meanwhile led to the creation of numerous national networks that provide platforms for exchange between members and that conduct studies and trainings. Several international organizations have picked up the increasing relevance of human rights in business and have either created or adapted their guidelines accordingly. The *OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines)* were revised in 2011 and now include provisions on human rights adherence in accordance with the UNGPs (OECD, 2011, p. 31). The OECD MNE Guidelines are valid on a country-level and include National Contact Points (NCPs), where complaints can be filed. The International Labour Organization (ILO) meanwhile also references human rights in its *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO Tripartite Declaration)*, with the revised edition drawing largely on the UNGPs (International Labour Organization, 2017). In 2010, the International Organization for Standardization (ISO) published the *ISO 26000*. This provides social responsibility guidelines for companies (International Organization for Standardization, 2010); moreover, one of its seven core subjects concerns human rights. Although this standard is not certifiable, it borrows from the ISO's reputation to promote acceptance of human rights impacts.

Since the human rights concerns encountered by different industries vary, industry-specific guidelines have been developed, including the *Extractive Industries Transparency Initiative (EITI)* (EITI, 2015), the *Voluntary Principles on Security and Human Rights (VPSHR)* (VPSHR, 2000), or the *Global Network Initiative (GNI)*. In addition to guidelines specifying goals and definitions, the *Global Reporting Initiative (GRI)* has devised a reporting framework that supports organizations (including businesses) in communicating on their sustainability activities (GRI, 2015).

These standards differ in terms of content and format. The centrality of human rights varies, and the guidelines exhibit different governance structures (see, e.g., Clapham, 2006, pp. 195-270). Common to all standards is that they are voluntary or at best can be considered as soft law. The greatest perceived weakness of the standards is the lack of strong monitoring and enforcement mechanisms (De Schutter, 2005, p. 295; Reinisch, 2005, p. 52).

The outcome for human rights depends on corporate commitment to follow through and on their ability to comprehensively assess and address human rights challenges within their business operations (Bilchitz, 2016, pp. 212-213). Over time, the commitment to human rights standards and the required application of human rights due diligence can be norm-setting and support organizational learning (Buhmann, 2018, p. 39; McCorquodale et al., 2017, p. 204). Moreover, Kobrin (2009, p. 362) notes the flexibility of smaller-scale voluntary initiatives which means that they are faster to become implemented, remarking that “they can be negotiated relatively quickly and do not threaten the sovereignty of states.”

The multitude of guidelines and their at times conflicting language detracts from their compatibility as regards implementation (Shavin, 2018, p. 5; Simons, 2004, p. 130). In terms of their human rights objectives, however, voluntary standards are well aligned and complementary (Shavin, 2018, p. 5). Also, as Buhmann (2018, p. 31) notes, whereas in terms of compliance, the incentive to fulfill voluntary standards might be weaker than to obey the legally binding regulations, companies might have economic reasons for adhering to such guidelines, as “social expectations may be coupled with social or market-based sanctions, which can be considerable in financial terms.” Overall, a level playing field is needed to incentivize corporate commitment on a large scale (Kobrin, 2009, p. 362; Methven O’Brien & Dhanarajan, 2016, p. 548).

### **2.2.5 Development of a Binding Treaty**

As Ruggie put it rather pragmatically, a “trade-off exists between the ‘comprehensiveness’ of international instruments in complex and contested domains, and their ‘bindingness’” (Ruggie, 2016, p. 66). The UNGPs were thus intended to lay a foundation, already mindful that “binding instruments conceived as ‘precision tools’” would need to follow (ibid.). Arguably, some would have preferred a more rigorous approach toward binding human rights obligations for corporations from the start. Overall, however, the need for and the benefits of an array of approaches (including voluntary commitments, internal policies and external regulation) that work hand in hand is uncontested.

However, in terms of enforcement, the lack of an authoritative source of reference, one reinforced by political and judicial power, remains a decisive weakness. As Bloomer and Zorob (2018) note:

In the last year, the Business & Human Rights Resource Centre has sought responses from companies in relation to over 400 allegations of corporate abuse. What have we learned? Affected communities rarely receive adequate remedies, and only a small cluster of responsible companies makes efforts to learn from their failure to comply with human rights standards and incorporate this into their due diligence processes. It is this reality that is driving the efforts to develop a Treaty on business and human rights.

The main motivation for introducing a binding treaty on business and human rights is to advance the enforceability of human rights and to close the governance gap. Bilchitz (2017, pp. 2-4) summarizes four main legal problems encountered in enforcing human rights in business that a binding treaty would hopefully mitigate: corporate human rights obligations, weak state governance, corporate structure, and access to remedies. In addition, a corresponding treaty would be expected to strengthen and facilitate BHR on a structural level through better coordination and policy coherence and through the level of commitment among states (Leader, 2017, p. 79). Finally, the hopes pinned on a treaty include its ability to provide a strong foundation, which — even if it did not replace the question of corporate responsibility — would at least answer it in part. Thus, a legally binding instrument would direct more attention to realizing rights in practice and to specifying treaty provisions, thereby somewhat alleviating the need to justify calls for corporate accountability.

The process of developing a binding treaty was initiated in 2014 with Resolution 26/9, adopted by the Human Rights Council during its 26th session, with the decision to

[...] establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the mandate of which shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (Human Rights Council, 2014).

In July 2018, the open-ended intergovernmental working group on transnational corporations and other business enterprises (OEIGWG) presented the Zero Draft and shortly afterward the Optional Protocol. The OEIGWG, chaired by the Permanent Mission of Ecuador, developed the Zero Draft over a process of four sessions extending over four years. A revised draft has been published in July 2019. All interested parties were invited to contribute and comment on the draft at all stages. The Draft in its current form is a

working document. Devising a treaty is a lengthy process, and it is uncertain when (and whether) a draft treaty will eventually enter into force.

The Zero Draft generally received approval for attempting to strengthen BHR and close the governance gap. This support refers to the various purposes of the treaty: to prevent harm, to mandatorily require due diligence from companies, and to provide remedy, notwithstanding reservations toward the exact wording proposed in the draft (Cassel, 2018; Ruggie, 2018). Moreover, hopes are tied to the treaty to unite international efforts by fostering legal consistency and mutual assistance and cooperation among states (Parcasio & Hughes-Jennett, 2018; Ruggie, 2018). Positively noted is also the reference to practical access to justice, as well as the planned establishment of an expert committee for international monitoring (Cassel, 2018).

However, critics have also pointed out weaknesses and unclarity of the draft text, in particular ones that run counter to the goal of introducing more specific and actionable obligations through an authoritative, binding instrument. Recurring issues concern the treaty's intended scope, as well as its integration with other BHR instruments and international regulations. Another point of concern is that the draft's current focus on transnational activities does not encompass all corporate activities (as opposed to the UNGPs). Further, the Zero Draft has been considered too vague about the type of business activities to which it would apply and that it might be interpreted as excluding state-owned enterprises (e.g., Parcasio & Hughes-Jennett, 2018; Ruggie, 2018). Similarly, other commentators have remarked that it fails to clearly establish which kind of rights (i.e., international or domestic norms) it considers as its basis (e.g., Ruggie, 2018).

Regarding the treaty's goal, to strengthen the enforceability of rights and hold companies to account, it has been doubted whether the specification of liability in the draft suffices to do so (Berthet, Hood, & Hughes-Jennett, 2018; Cassel, 2018; Ruggie, 2018). This also holds true for the distinction, and relation, between due diligence and liability for the supply chain (Ruggie, 2018). This concern for effectiveness is reaffirmed as the draft treaty does not contain a "binding international enforcement mechanism," such as an "international court" or "a mechanism for complaints to an international treaty committee" (Cassel, 2018). By way of an aside, the draft's failure to demand the stronger protection of groups facing particular risks (such as gender-based discrimination and

human rights defenders) is lamented. By leaving unclear the standing of the treaty compared to other international trade agreements (*ibid.*), the draft accepts a weaker positioning even before entering into force (Bloomer & Zorob, 2018). Thus, the draft treaty is a “‘concrete’ reference point for further discussion and refinement” (Deva, 2018). There appears to be consensus among scholars that a BHR treaty could only be employed in conjunction with other means, such as voluntary initiatives, in order to comprehensively and efficiently contribute to regulating BHR:

[...] there should not be any illusion that it would fix all the existing regulatory gaps or end completely the current state of corporate impunity. This treaty would be only an additional regulatory tool to ensure that businesses comply with human rights norms. As businesses are complex regulatory targets, multiple regulatory tools should be employed in tandem to achieve some level of regulatory efficacy (Deva, 2018).

## **2.3 Evolving Concerns in Business and Human Rights**

### **2.3.1 Tensions Between Human Rights and the Global Economy**

Within the discussions on integrating human rights into business, a dilemma remains about the attribution of responsibility for human rights. This concerns balancing between the need to create stronger corporate accountability and actively integrating the business sector into creating a better environment for human rights. This dilemma also involves handing over power to companies and the unease arising from — mostly private — economic entities gaining too much authority (e.g., Bartley, 2018, p. 52; Bishop, 2012, p. 124; Cragg, 2009, p. 288). In this regard, critical voices have addressed, among others, the lacking democratic legitimization of companies and have called to closely examine questions of power, impartiality, role and purpose, and potential conflicts of corporate interest (e.g., Bartley, 2018, pp. 52, 59; Cragg, 2009, p. 288; Fuchs, 2005, pp. 21-22).

On the one hand, companies have the power to exert influence over human rights (Human Rights Council, 2008). Accordingly, it is in the interest of human rights enforceability to formally establish a relationship between impact and accountability. This implies that companies would need to actively acknowledge, improve, and monitor their human rights impact, as well as develop respective policies that respond to both partners



and victims. On the other hand, there are arguments for exercising caution about affording private corporate actors responsibility and oversight for the realization of human rights (Van Ho, 2015, pp. 136-137). Companies are neither impartial nor democratically legitimized entities. Nor do they have as clear a mandate as states to realize human rights (Cragg, 2009, p. 278; Werhane, 2016, p. 18). Instead, they are bound by economic and stakeholder interests (Bilchitz, 2016, pp. 212-213). There are thus concerns whether companies will effectively prevent or remedy their own human rights infringements when facing a conflict of interest between rights holders and stakeholders (e.g., Bartley, 2018, p. 59; Cassel, 2001, pp. 267-268; Clapham, 2006, p. 197). In this view, primary control over protecting human rights should remain with states.

And yet, the ability of states to effectively protect human rights has changed (and is continuing to change) in the wake of global economic developments. Despite progress toward better accounting for human rights in business, governments are in a weaker position to protect human rights in a global business context, not only legally but also due to heightened competitive pressure in today's ever more interconnected markets (e.g., Bishop, 2012, p. 121; Nolan, 2016, p. 2).

### **2.3.2 Globalization as an Amplifier of BHR Concerns**

Configuring the integration of human rights into business is becoming even more urgent in light of the effects of globalization. Globalization is an amplifier, if not the primary cause, of tensions and uncertainty with regard to human rights in the business context (see, e.g., Cragg, 2009, pp. 267-268; Marks & Clapham, 2005, pp. 185-186; Ratner, 2001, p. 447; Wells & Elias, 2005, p. 147). As Ruggie observes:

[t]he root cause of the business and human rights predicament today lies in the governance gaps created by globalization — between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge (Human Rights Council, 2008, para. 3).

Transnational corporations operate in local contexts potentially differing substantially in terms of economic development, laws, culture, and political order, which in turn also affects the human rights situation (Bartley, 2018, pp. 45-47; Baumann-Pauly & Posner,

2016, p. 12; Ruggie, 2013, p. 2). By expanding the scope of their activities, companies encounter human rights issues on a larger, often global scale. When operating in host states, companies may face different human rights challenges, such as lower-standard labor laws, less than living wages, child labor, discrimination of minorities, land conflicts with local communities, or conflict zones (e.g., Chandler, 2003, pp. 22-23). At the same time, the presence of companies itself also impacts local situations (Bishop, 2012, p. 121; Chandler, 2003, pp. 25-26; Hoffman & McNulty, 2009, p. 542). States are receptive to corporate influence, for instance, as they profit from foreign direct investment (FDI), pursue their own national economic agenda, seek to strengthen their attractiveness as an investment location, or avoid the threat of corporate relocations and resulting job losses (e.g., Cassel, 2001, pp. 267-268; Fuchs, 2005, pp. 19-20; Kinley, 2009, p. 19; Wells & Elias, 2005, p. 144). Their sheer size and number give TNCs significant economic and socio-political weight:

There are somewhere between 70,000 and 80,000 transnational corporations (precise numbers keep changing because of mergers and acquisitions, among other factors). According to the ILO, one out of seven jobs worldwide is global supply chain-related, not counting “informal” and “non-standard” work. According to UNCTAD, 80 percent of global trade (in terms of gross exports) is linked to the international production networks of transnational corporations. World trade in intermediate goods (‘transnational business activities’) is greater than all other non-oil traded goods combined. [...] No international economic system like this has ever existed. Therefore one would wish to ensure that the instrumentalities for monitoring and provisions for attributing legal liability are up to the magnitude of the task (Ruggie, 2018).

As a result of globalization, company structures are becoming increasingly complex through transnational, interdependent supply chains, extraterritorial subsidiaries, or sales distributors (McCorquodale, 2009, pp. 389-390; Ruggie, 2013, p. xxxiv). This adds a level of complexity to stakeholder relations and diversifies the operating environments that companies need to both consider and manage. A business activity in one location may trigger human rights abuses in other parts of the supply chain, just as an activity and a subsequent human rights impact may be separated in time and space by intermediary activities (Hampton, 2019, p. 240). Consequently, this complicates tracking human rights performance and maintaining human rights standards throughout the supply chain (Bilchitz, 2016, p. 217).

Human rights concerns are not equally imminent for all companies in their day-to-day operations. First, some *industries* are disproportionately involved in human rights conflicts (Cragg, 2009, pp. 296-297; Ruggie, 2013, p. xxvi). The reasons are frequently found in the business model, e.g., when companies benefit from weak human rights protection, or when they are bound to a particular location (Bilchitz, 2016, p. 217). For instance, when a competitive advantage relies on cost minimization, this often results in informal subcontracting structures and hence in reducing wage costs, workplace safety, or equipment standards (Baumann-Pauly, Nolan, & Posner, 2016, p. 317; Santoro, 2000, pp. 19-20). Notorious examples include manufacturing-intensive industries, such as the textile and electronics industries (see, e.g., Locke, 2016, pp. 299-301; Palazzo, Morhart, & Schrempf-Stirling, 2016, pp. 200-201; Wells & Elias, 2005, p. 144). A similarly problematic field are mining operations, as companies depend on the location of resources and are thus subject to the respective human rights environment (Wells & Elias, 2005, pp. 151-152).

Second, the same applies to certain *geographic regions*, which may be disproportionately involved, often due to their political situation. Although locations with weaker governance structures do not necessarily entail human rights abuses, human rights are more at risk in such environments (Bernaz, 2017, p. 9; Graf & Iff, 2017, p. 114; Hoffman & McNulty, 2009, pp. 542-543; Ruggie, 2013, p. 29). Companies need to navigate the different contexts and decide to what extent they can assert their own practices and to what extent they ought to adapt to local political and also cultural standards (Cragg, 2009, p. 291; Donaldson, 1996, p. 52; Kamminga, 2016, p. 108; Ruggie, 2013, p. xxxii).

Third, the level of a *company's involvement* in human rights conflicts may differ. This does not mean relativizing or ranking rights, but describing the degree to which a human rights situation and a company's activities may be causally (and plausibly) linked (Ruggie, 2013, pp. 26-27). It is the nature of companies' impact on human rights that varies. Thus, not all issues are caused directly and knowingly by corporations. Rather, these may also result from any indirect or complicit impact that should be identified.

Finally, some *rights* are more at risk of being affected by global business conduct than others, depending on a company's particular context (Rees & Davis, 2016, pp. 103-104; United Nations, 2012, p. 8).

### 2.3.3 Changing Power Dynamics

Several structural phenomena accompany globalization. They change the context of doing business and affect the ability of states to fulfill their regulatory and juridical duties (see, e.g., Alston, 2005, p. 17; Bijlmakers, 2019, p. 18; Cragg, 2009, pp. 280-282). *Trade liberalization and deregulation* weakens labor standards (Alston, 2005, p. 17; Bishop, 2012, p. 121; Ruggie, 2013, p. xxvii). Globalization supports tendencies toward the *concentration* of economic power (or even monopolization) in business (Bishop, 2012, p. 121). Through *privatization* and the (partial) transfer of responsibility to large corporations, companies may gain influence over issues that were traditionally in the realm of the state (e.g., infrastructure, energy or water provision, healthcare services) (Clapham, 2006, pp. 8-12; Reinisch, 2005, p. 75; Wettstein, 2009b, p. 237; Wood, 2012, p. 76). *Digitalization* increases interconnectedness and interdependencies, and the use of digital infrastructure provided by the private sector may lead to conflicts (Deva, Ramasastry, Santoro, & Wettstein, 2019, pp. 210-211). The influence of the financial sector in terms of *capital mobilization*, financial speculation, tax abuse or private foreign investment raises interdependencies that reduce the economic sovereignty of states and orient markets toward short-term financial goals (Alston, 2005, p. 17; Darcy, 2017, p. 1; Kinley, 2018, p. 4; Wells & Elias, 2005, pp. 146-147).

These developments shift the power dynamics between states as the conventional regulators and companies emerging as political actors. As Cragg (2000, p. 209) notes, “while globalization has strengthened the capacity of multinational corporations to choose and shape the regulatory environment in which they operate, it has weakened the capacity of nation states to regulate business activity.” The impact of large, globally active companies extends beyond their economic weight. Companies contribute substantially to a county’s gross domestic product (GDP) and taxes, as well as to a location’s attractiveness for investors, or as employers. States will thus care about corporate interests. To the extent that the size and impact of companies makes states susceptible to their influence, the business sector gains leverage on political decisions (Arnold, 2017, p. 311; Fuchs, 2005, pp. 142-143; Kobrin, 2009, p. 350; Ruggie, 2013, p. xxxiii; Wells & Elias, 2005, p. 144).

In practical terms, it is acknowledged that the inclusion of the business sector is imperative to improving human rights (e.g., Cragg, 2012, p. 11). Kinley (2009, p. 210) emphasized the role of the three “spheres of (1) the economy, (2) government and (3) jurisdiction” as key determinants of the relation between the global economy and human rights. He also identified the “‘contingencies’ made, or ‘balances’ struck” between the spheres as the parameters of the “nature of the relationship.” Given the complex dynamics between the spheres, significant leeway exists for the different actors to negotiate and design the human rights governance framework.

Regarding the impact of global business on human rights, the outcome is rarely purely beneficial or purely detrimental (e.g., Vazquez, 2005, p. 949). On the one hand, corporate influence, resources, and networks can be capitalized on in order to benefit human rights (W. H. Meyer, 1996, pp. 396-397; Nolan, 2016, p. 3). On the other hand, as discussed above, global business may equally compromise actualizing human rights (see Section 2.3.2). Considering the relation between globalization and human rights, Dunoff (1999, p. 132) dismissed the two polarizing narratives that the relationship between globalization and human rights is linear, as well as either “mutually supportive” or “inverse,” with globalization leading to “increased exploitation and instability, and decreased satisfaction of human rights.” He instead proposed the more refined analogy of a “double helix” to better grasp the relation between globalized markets and human rights:

[W]hile the two regimes started at the same time and with many common political commitments, they quickly assumed different trajectories. At times they have moved promisingly in the same direction. At other times, they have intersected at cross purposes. So, unlike the two dominant accounts, this is a story of historical and political contingency, of important but tentative gains and missed opportunities” (ibid.).

This observation illustrates the importance of the fundamental assumptions that inform human rights policies. One assumption rests on the question whether increasing economic welfare is perceived as appropriate to sustainably advance human rights (Marks & Clapham, 2005, p. 91; McKeon, 2018, pp. 82-83). Some approaches to integrating human rights into business assume a complementarity of economic goals and human rights goals. For instance, the complementarity of the Sustainable Development Goals (SDGs) and the goals of the UNGPs is promoted. Similarly, industry-driven initiatives

have been formed for the purpose of prioritizing rights within or through economic activity (Cragg, 2009, p. 268; Hampton, 2019, p. 240). At other times, the development agenda diverts from particular human rights concerns and falls short of the more holistic and strict compliance requirements of the latter.

The shifting power dynamics between states and corporate actors influences how human rights are interpreted and realized within the business sphere. The fragmentation of initiatives seeking to integrate human rights into business opens up room for specifically targeted approaches and for differently paced policy commitments (see, e.g., Hampton, 2019, p. 240). Yet, the underlying challenge arising from the lack of a consistent, authoritative framework for corporate human rights responsibility will persist as long as trade remains global whereas regulation does not (Kobrin, 2009, p. 350; Ratner, 2001, p. 448).

### 2.3.4 Prevailing Governance Gap

According to Ruggie (2010), the danger of governance gaps (between companies' impact on human rights and limited means of holding them accountable) lies in the fact that "these governance gaps create the permissive environment within which blameworthy acts by corporations may occur without adequate sanctions or reparation" (Human Rights Council, 2010, para. 31). Underlying the governance gap is institutional misalignment (Human Rights Council, 2008, para. 3, 7). Institutions that are entrusted with enforcement fail to do so, whether due to a lack of control, formal capacity, resources, or incentive (Arnold, 2016, p. 270; Bernaz, 2017, p. 9; Bishop, 2012, p. 121). Companies can exploit such regulatory voids and thereby reinforce systemic structures where market arguments trump rights (Arnold, 2016, p. 270; Walker-Said & Kelly, 2015, p. 8).

As the legal premises for states to protect human rights currently do not suffice to close the governance gap, the UNGPs stress a *polycentric governance* approach, "under which public and private governance systems — corporate as well as civil — each come to add distinct value, compensate for one another's weaknesses, and play mutually reinforcing roles," which might in future induce comprehensive legal regulation (Ruggie, 2013, p. 78). Success hinges on the complementarity of state obligations and corporate responsibilities as divided by the three pillars of the "Protect, Respect and Remedy" Framework. Hampton (2019, p. 262) has recently suggested that mechanisms for strengthening this

governance model should include, among others, stakeholder involvement in monitoring, policy coherence, ongoing policy measuring and updating, and allocating funds to BHR. This also includes a turn toward alternative forms of collaboration such as multi-stakeholder initiatives. Investors, and to some degree consumers, are important stakeholder groups having some leverage over corporate strategic behavior, as their priorities and decisions affect companies' financial assets and revenue (Reinisch, 2005, pp. 67-68). However, their ability to advance human rights also depends on their knowledge and commitment and the availability of transparent disclosures from companies (e.g., Narine, 2015, pp. 87, 138).

In order to scale human rights realization in business, non-binding approaches such as fostering human rights due diligence, establishing reporting requirements, and producing guidelines are important contributions. At the same time, considering that legal accountability and access to remedy are crucial aspects of human rights protection, legal clarity is indispensable for complementing voluntary approaches (Bilchitz, 2016, p. 216; Ratner, 2001, p. 448). To date, as Fasterling and Demuijnck (2013, p. 808) conclude, "without moral commitment human rights due diligence is a weak instrument for closing governance gaps, and rather requires that governance gaps are already closed."

The governance gap translates into uncertainty for *victims of business-related human rights abuses* who encounter challenges from finding a forum willing to accept BHR claims through proving corporate involvement to receiving proper remedy and acknowledgement (De Schutter, 2016, p. 49; Nolan & Taylor, 2009, p. 434). Within BHR, the enforcement of their rights remains uncertain for rights holders given the absence of corporate legal accountability, slow progress in state regulation of BHR, and the indefiniteness of human rights provisions that leaves room for judicial interpretation (Brenkert, 2016, p. 304; Ratner, 2001, p. 448).

For *states* and *state institutions*, which are entrusted with protecting human rights, a key source of uncertainty arises from the transnational character of business-related human rights conflicts as this places companies beyond the reach of current regulations (Bilchitz, 2017, p. 8; Ratner, 2001, p. 448). In order to meet their obligation to protect human rights, states need to address, first, situations in which current legal measures do not encompass the role of companies, and, second, governance gaps in which the impact

of companies on human rights is not yet accounted for. One challenge for states in safeguarding human rights is that they are limited by their borders, as opposed to companies, which often operate internationally (i.e., outside their home country). This sheer fact may limit the scope of state regulation. Moreover, the legal status of foreign companies in the host country needs clarification (De Schutter, 2005, p. 237).

For *companies*, the uncertainty often shows in their supply chain or concerns operations in countries with weaker human rights structures. In these cases, companies may feel that economic considerations compete with human rights considerations. Companies face uncertainties regarding human rights as they must deal with the political environment of the host state. This requires case-by-case assessment of the company's effect on the local human rights situation and of its business partners' human rights record, as well as a willingness to learn and review human rights related decisions (De George, 1993, p. 41). A further source of uncertainty for companies is the possibility of lawsuits, in particular in light of the small number of precedent cases, which makes understanding appropriate compliance, management, and decision-making challenging for companies (Human Rights Council, 2008, para. 22). As the field is still evolving, the expectations toward companies to fulfill their human rights vary considerably, not least due to the multitude of guidelines and the different language they employ. Companies, too, differ significantly in their experience with and internal organization of human rights commitment.

In sum, three major challenges can be observed, each creating uncertainty about implementing mechanisms serving to adequately protect human rights in a business context. First, legally, complex organizational structures make it difficult to “pierce the corporate veil,” that is, identifying the internal relationship between parent company and subsidiary, as well as understanding communication flow and determining the degree of independence between parent company and subsidiary (De Schutter, 2005, p. 276; 2016, pp. 48-49; Muchlinski, 2012, p. 152; Reinisch, 2005, p. 56). Second, politically, the limited capacity of states to regulate business and human rights is a concern. Third, a particular economic dilemma exists: although companies have the capacity, influence, and network, as well as often also the motivation, to promote human rights, this may conflict with business realities, such as a focus on shareholder interests or competitive pressure on an uneven global playing field (Arnold, 2016, p. 268; Fuchs, 2005, p. 21).



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These challenges have direct implications for realizing human rights. Hence, how companies deal with this uncertainty and incrementally fill the existing vagueness with meaning merits closer investigation (Deva & Bilchitz, 2013, p. xix). As companies can both support and impede human rights, the way in which they understand human rights matters, as this determines how human rights are subsequently represented and embedded in corporate activities. Chapter 3 explores these internal dynamics, which represent one factor influencing the integration of human rights into business. Addressing the other relevant factor, Chapter 4 analyzes external dynamics, which extend beyond the control of individual companies. It investigates the impact of systemic interdependencies, of which companies form part, on human rights.

### 3 Company-Related Dynamics: Framing

When integrating human rights into business, it is important that companies engage with human rights concerns. Moreover, it is important how they interpret and realize human rights, so that a positive contribution to human rights can be fully leveraged. Their increasingly active role in the human rights discourse makes it relevant to analyze how companies' interpretation of their human rights responsibilities impacts the discourse and subsequent implementation of human rights.

This chapter focuses on company-internal dynamics in order to identify recurring patterns that describe companies' understanding of human rights in business. Different understandings of human rights have consequences for shaping the external discourse on BHR and influence how companies are likely to respond to human rights concerns. This analysis thus addresses how companies internally frame and operationalize their human rights responsibility.

#### 3.1 Relevance of Framing for Shaping the Human Rights Discourse

Chapter 2 has shown that the governance gap remains a key challenge for effectively realizing human rights in business. Frame analysis provides insights into how companies fill this gap by revealing companies' understanding of human rights, which in turn informs their human rights management. As different actors step in to compensate for the lack of a central authority on BHR, two processes are decisive. First, through *sensegiving*, companies present their interpretation to the discourse (Gioia & Chittipeddi, 1991, p. 442). Companies' "discursive power" is a significant "[dimension] of business power in global governance" (Fuchs, 2005, p. 20). Second, the governance gap creates ambiguity about interpreting human rights standards. Companies respond to this ambiguity through *sensemaking* (Weick, 1993, p. 635). This serves to develop an interpretation that in turn informs companies' human rights conduct and is reflected in their internal and external communications (Gioia & Chittipeddi, 1991, p. 442).

Understanding how companies interpret their responsibility is crucial for protecting human rights. Insights into companies' human rights communication can support integrating such rights into business. In analyzing corporate perceptions of business and human

rights, frame theory enables grasping companies' interaction with information or events and thoroughly understanding underlying motivations. Developing such understanding includes analyzing how companies anchor human rights internally in terms of awareness, processes, and performance assessment (e.g., McPhail & Adams, 2016, p. 654; Obara, 2017, pp. 250-251). Thus, as a result, frame analysis allows identifying the origins of points of consent and points of contention regarding the interpretation of human rights. The revealed frames can indicate discrepancies between companies' perception of adequate human rights responsibility and that of other parties in the discourse. Research has shown that measures for fostering respect for human rights should "resonate with the firm's logic" to be effective (Buhmann, 2018, p. 44). Understanding companies' framing thus supports designing both human rights guidelines and targeted approaches to address corporate dispositions.

International documents and standards outline human rights principles and expectations. To the extent that they leave room for interpretation and prove too vague, static, or little intuitive to govern corporate human rights conduct in practice, individual companies' approaches reveal how these guidelines are interpreted and translated into practical business operations and managerial decisions. Frames provide insights into the potential of companies' genuine efforts to make sense of their impact on human rights.

Framing analysis reveals mismatches between standards and guidelines on the one hand, and corporate framing of human rights on the other. It thus points to the corresponding measures that need to be taken to bridge such mismatches. The employed language plays a decisive role in designing effective guidelines and approaches. "Translating" human rights is an important task for enabling the integration of human rights into operational business activities and for enhancing recognition of human rights concerns (McCorquodale et al., 2017, pp. 208, 222). Kinley (2009, p. 32) observes that "[t]he correct mixture of economic enunciations and rights rhetoric [...] can build bridges, just as its absence can entrench opposition." He acknowledges that human rights terms will be interpreted differently from an economic or a legal perspective, for instance, and that negotiating different perspectives in the discourse potentially enables bundling efforts to protect human rights in business (Kinley, 2009, pp. 32-35). Frames are not static but can be actively changed. Thus, once the frames prevailing in business are understood, these insights can serve to influence framing among businesses and thus indirectly affect companies' human rights engagement.

Applying frame analysis to the BHR discourse provides rich insights, which allow mapping the positions of companies in the discourse. In the multi-actor discourse, particularly the ways in which companies frame human rights are relevant as they influence the action taken, the tone of the discourse, and the extent of human rights protection (McBeth & Joseph, 2005, pp. 108-109). The results of frame analyses articulate underlying conceptions and make them explicit. Frame theory is a tool for mapping the different lines of argumentation applied by companies, in particular with a view to encouraging companies to integrate consideration for human rights. It allows understanding the reasoning informing the different positions assumed by companies in the BHR discourse and distinguishing their respective philosophies, priorities, beliefs, and perceived key BHR issues (McBeth & Joseph, 2005, p. 95; Obara & Peattie, 2018, p. 782). Thus, frame theory serves as a basis for adapting, supplementing or targeting BHR guidelines by acknowledging the frames of specific addressees.

In addition, frames are also evaluated in terms of their ability to encourage concern for human rights. As frames serve to interpret (i.e., make sense of) and to act on human rights standards, they provide insights into companies' fundamental assumptions about human rights. Moreover, comparing companies' different frames allows identifying best practices in business.

## **3.2 Theoretical Background on the Framing Approach**

### **3.2.1 The Concept of Framing**

Framing is a form of *information processing*. The purpose of frames and framing is to understand the interaction between subjective sensemaking and the larger social context. The framing approach focuses on the socio-political dimension of information processing (Dahinden, 2006, p. 93). It also aims to understand how a frame embeds an issue and how this in turn shapes the discourse. Typically, frame-based research studies controversial and timely issues from within public communication (Dahinden, 2006, p. 93; Hallahan, 1999, p. 217). Regardless of discipline, the framing approach investigates the socio-political dimension in which the research topic is embedded.

The framing approach explores the principles of organization that are used to make sense of a situation and to give it meaning (Goffman, 1986 [1974], p. 10). It studies events, subjective involvement in these, and prior experiences (Goffman, 1986 [1974], pp. 10-

11). *Framing* is an ongoing, dynamic, and often subtle process, whose outcome are called *frames* (Matthes, 2014, pp. 10-11). Frames can be considered auxiliary constructs that attempt to capture a dynamic but temporarily stable mindset, as well as attitudes toward or perceptions of an issue (Benford, 1997, pp. 415-416; Cornelissen & Werner, 2014, p. 199). In this view, frames affect the communication, decision-making, and actions of frame holders.

Framing occurs on different levels. It can refer to the *communicator* (who articulates an issue), the *message content* (that represents an issue in a specific way), and the *recipient* (who organizes incoming information or occurrences) (Entman, 1993, pp. 52-53; Matthes, 2014, p. 10). These levels are interconnected and all actively participate in creating frames. The process of framing is contextually bound and dynamic, considers both past and present, is sensitive to actor constellation in a debate, and receptive to subtle changes in presentation or wording (Cornelissen, Holt, & Zundel, 2011, pp. 1710-1711; Price & Tewksbury, 1997, pp. 184, 194).

Within framing research, several lines of application have evolved. Among these, one line emphasizes the psychological dimension of frames, while another focuses on frames as a political tool (Hallahan, 1999, pp. 205-206; Scheufele & Iyengar, 2017, p. 619). In the social sciences, frame analysis emphasizing the psychological dimension is used to create in-depth, differentiated understanding of discourse positions. Analysis treating framing as a political tool examines how frame elements are chosen and composed. This approach assumes that a frame always pursues a specific goal and seeks to persuade recipients. Both are relevant for BHR, although the first research area has recently attracted greater attention in BHR research.

### *Definition of Framing*

Frames have been characterized as “guidelines for giving meaning” (Matthes, 2014, pp. 24-25), as “a spatial and temporal bounding of a set of interactive messages” (Bateson, 1972, p. 191), as socially or culturally shared belief systems or spheres of meaning (Goffman, 1986 [1974], p. 27; Snow & Benford, 1992, p. 136), or as a political tool for persuasion (Iyengar, 1991, p. 2). Essentially, all of these characterizations concern how variations in presenting information translate into differences in opinion formation and reaction decisions (Hallahan, 1999, p. 224; Scheufele & Iyengar, 2017, p. 622).

This study adopts the definition by Entman (1993, p. 52), according to which framing means to “*select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described.*” This implies that a frame “indicates how the message should be interpreted” (Cornelissen et al., 2011, p. 1704). In this function, a frame can be considered “a bridging concept between language, cognition and culture” (ibid.).

The mind naturally and constantly frames information. This process is inevitable, although it is not necessarily intentional (Matthes, 2014, p. 78; Meriläinen & Vos, 2013, p. 130). Frames are interpretive constructs that organize the perception of reality. They aim at making sense of “what is going on” (Goffman, 1986 [1974], p. 10) and assess a situation in order to arrive at an appropriate reaction (Goffman, 1986 [1974], pp. 1-2; Hallahan, 1999, p. 224; Matthes, 2014, p. 24; Weick, Sutcliffe, & Obstfeld, 2005, p. 409).

Framing is a *meaning-making* process and as such a form of information processing comprising cognitive, affective, and relational components (Cornelissen et al., 2011, p. 1704; Hallahan, 1999, pp. 207, 210; Matthes, 2014, p. 73). Framing looks for cues in a situation and interacts with cognitive beliefs, personal values, and prior experiences (Cornelissen et al., 2011, p. 1711; Entman, 1993, p. 53; Hallahan, 1999, p. 208). Moreover, framing seeks to capture the situational context and to identify the positions of different relevant actors on a specific issue in a particular discourse. Thus, a frame depicts a certain *perspective* on the issue in question. It emphasizes some elements and omits others, thereby affecting the salience of certain message attributes (Entman, 1993, p. 53). It is a *selective* process, which reflects individual perceptions of what matters and is meaningful, and thereby indicates underlying assumptions and reveals characteristic interpretations of events, relationships, and salient aspects (Hallahan, 1999, p. 207; Lecheler & de Vreese, 2010, p. 77).

Whenever actors attempt to quickly comprehend an issue or a situation, frames provide an initial interpretation along with a set of assumptions (Goffman, 1986 [1974], p. 38). On the one hand, frames have a facilitative, enabling role (Benford, 1997, p. 415; Goffman, 1986 [1974], p. 21). On the other, a frame represents a certain perspective that is rarely neutral (Entman, 1993; Hallahan, 1999, p. 207). Frames help to “recognize”

and categorize events and are continuously updated and refined (Matthes, 2014, p. 24; Snow & Benford, 1992, pp. 136-137). This process also draws on existing frames and experiences. As such, frames are retrieved when associated with incoming information. Retrieving frames rests partly on the association with and activation of *cognitive schemata*. Cognitive schemata consist of “prestructured, relatively stable sets of knowledge that can be activated or not” (Matthes, 2014, p. 27). These mental structures are learned over the long-term and summarize experiences into standard situations that can be retrieved over the course of information processing (Dahinden, 2006, p. 91; Graber, 1984, p. 150; Price & Tewksbury, 1997, pp. 184-185). When, within a frame, a matching schema is recognized, this schema triggers a memorized response (Goffman, 1986 [1974], p. 21; Hallahan, 1999, p. 208). In particular, schemata fulfill three supportive functions (Matthes, 2014, p. 28). First, they free up resources, second, they structure a situation, and third, they complement incomplete information with assumptions based on previous knowledge. Within a frame, different cognitive schemata can co-exist or condition each another. Depending on the issue, several frames can be retrieved at the same time (Scheufele & Iyengar, 2017, p. 625).

Framing is a *context-dependent* and *subjective* process that results in the formation of more stable frames (see, e.g., Hallahan, 1999, pp. 209, 211). Frames form a distinct pattern of attitudes and cognitions. These in turn represent a consistent set of opinions and knowledge about a certain issue and form a “*belief system*” that can be shared in a social context (Gerhards, 1993, p. 128; Goffman, 1986 [1974], p. 27). This is captured in *collective action frames* (Benford & Snow, 2000, p. 163). Thus, equally important is the relational, *discursive* aspect of frames. The integration of new information into an existing frame makes frames relatively coherent and relatively stable over time (Benford, 1997, pp. 415-416).

Whereas frames have been analyzed as mechanisms for individuals to organize experiences, there are also strategic frames, which concern the interactional co-construction of frames (Cornelissen & Werner, 2014, p. 197). Frames are also social constructs. As such, they foster coherent understanding among individuals sharing a particular frame and facilitate communication based on the same implicit or underlying assumptions. A frame articulates more than what is actually said (Goffman, 1986 [1974], p. xiii). Frame

analysis uniquely draws a *comprehensive* picture of how an issue or a situation is understood.

### *Origin and Application of the Framing Approach*

Framing is a construct that enables revealing processes of opinion formation. It has traditionally been linked to political and media effects, yet has found growing application in the broader field of communication research. Research on framing is rooted in sociology, communication studies, and psychology (Matthes, 2014, pp. 13, 24, 76). Originally, frames were conceived of as a construct for describing how a situation is interpreted in order to choose an appropriate reaction. Recent developments in frame research have evolved from this initial conception and are primarily concerned with the analysis of communicated content and the selection of salient elements (Matthes, 2014, pp. 24-25). Regarding the use of framing analysis in BHR, previous studies have tended to apply more holistic approaches, in order to capture underlying understandings rather than external communications of an issue (see, e.g., Obara, 2017, p. 249).

The framing concept is valuable for “social issues [which] often concern broader problems that are relevant for various actors with different views and interests” (Meriläinen & Vos, 2013, p. 120). Notably, issues are understood as “social constructions that can exist independently of the verifiable conditions on which they are based” (Hallahan, 2001, pp. 28-29). This matters for BHR, as the meaning and extent of corporate human rights responsibility are subject to extensive debate. The effectiveness of initiatives within the polycentric governance approach depends strongly on the proactive commitment of companies. Besides, current guidelines leave room for interpretation.

The term framing, understood as the public construction of the reality of an issue through discourse, often refers either to *sensemaking*, i.e., framing in terms of “meaning construction and reconstruction by the involved parties” in an attempt to develop an understanding of a situation, an event or of reality, or to *sensegiving*, i.e. framing in terms of “the process of attempting to influence the sensemaking and meaning construction of others toward a preferred redefinition” of an issue that is often complex and of timely socio-political relevance (Gioia & Chittipeddi, 1991, p. 442). This distinction is an approximation to describe the setting in which frames are investigated — whether as the subjective perspective of an individual person or entity, or as the presentation of one among several frames within an “*issue arena*,” i.e., the public sphere within which an



issue is discussed (Luoma-aho & Vos, 2010, p. 316). In practice, these two dimensions overlap. Individual frames evolve through consideration of and interaction with other public frames.

### 3.2.2 Characteristics of the Framing Approach

Frames can be distinguished by their purpose. Most prominent is the division into *diagnostic*, *prognostic*, and *motivational* framing (Snow & Benford, 1988, pp. 199-204). Also, the *object of frames* can vary. Here, Hallahan (1999, p. 209) lists the “framing of situations, attributes, choices, actions, issues, responsibilities, and news.” Finally, types of frames are distinguished (see, e.g., Scheufele & Iyengar, 2017, pp. 620-622). First, *equivalence frames* refer to subtle variations in the presentation of alternatives that otherwise contain the same content or logical value. Known representatives of this research stream include Kahneman and Tversky’s studies on choice (e.g., framing logically equivalent options by varying the wording in terms of the probability to win or to lose) (Kahneman & Tversky, 1984, p. 341). Second, *emphasis frames* describe perspectives on an issue that each highlight different aspects and differ more fundamentally in their reasoning. Frames can, to this end, offer substantive contextual insights that help to understand underlying assumptions and their consequences for formulating arguments and drawing conclusions.

Four assumptions characterize the definition of framing (Matthes, 2014, pp. 20-22). First, frames are characterized by *ambivalence*, which recognizes the availability of different perspectives on the issue under debate. Second, frames are characterized by their *selection* of some aspects over others that are deemed most important and thus dominate a frame’s contributions to the discourse. This choice of salient aspects arises as part of the discourse and does not necessarily mean an intentionally introduced bias. Third, frames require an inherent *consistency* to provide a logical line of argumentation within the premises of the frame. Fourth, frames are dynamic and stand in *competition* with each other. An essential quality of frames is their responsiveness in the interaction with other frames.

A frame consists of *frame elements*. Entman (1993, p. 52) distinguishes four such functions of frames, namely, to define problems, diagnose causes, make moral judgments, and suggest remedies. A frame thus proposes a comprehensive interpretation of an issue

or a situation that goes well beyond an opinion. It pre-structures a problem in coherent terms that imply a likely set of responses. It identifies relevant actors, the relationship between them, and attributes particular roles to them as causal agents. One aspect that is controversially discussed in research is the extent to which framing has an *evaluative dimension* (Matthes, 2014, p. 60). Some authors suggest that the evaluative aspect is an integral part of frames and central to their explanatory power, whereas others explicitly exclude valence from their definition of framing (ibid.).

Frames indirectly guide the attitudinal and behavioral response of frame recipients and frame holders toward an issue. Frames vary in their level of detail, but typically contain meaning on cognitive and affective components. By abstracting and reducing possible scenarios, frames offer orientation for choosing a suitable reaction (Graber, 1984, p. 174). In strategic communication, framing devices are readily applied and appreciated to connect with a target audience and thus to anchor the desired message in both subtle and transparent ways. Compared to the cognitive component of framing, the impact of the *affective component* can be significant, although initially it was long neglected in research (Benford, 1997, pp. 418-419). Concerning the affective component, emotions that are repeatedly associated with an issue or a situation can amplify a corresponding frame, to the point that particular frames and emotions reciprocally affect each other (Matthes, 2014, pp. 75-76; Nabi, 2003, p. 227).

### 3.2.3 Effects of Framing

Prior research has distinguished *accessibility-based* and *applicability-based* effects of communication (Price & Tewksbury, 1997, p. 197; Scheufele & Iyengar, 2017, p. 625). Accessibility is triggered by agenda-setting or priming. A resulting effect occurs comparatively constantly across audiences and context (see, e.g., Price & Tewksbury, 1997, p. 197; Uscinski, 2009, p. 797). The probability of influencing attitudes increases for more accessible cognitive structures. Framing, on the other hand, is an applicability effect (Price & Tewksbury, 1997, pp. 197-198). The outcome of framing depends on how information is attributed and thus on the recipient's pre-existing mental schemata as well as on which schemata are chosen to make sense of information (Scheufele & Iyengar, 2017, p. 625). According to Scheufele and Iyengar (2017, p. 619), "framing effects refer to behavioral or attitudinal outcomes that are not due to differences in *what* is being

communicated, but rather to variations in *how* a given piece of information is being presented (or framed) in public discourse.”

Whereas typical persuasion strategies rely on arguments, framing effects are based on integrative effects (Matthes, 2014, p. 79). Thus, framing does not evaluate a specific statement, but instead interprets information in light of particular message cues so that it creates a consistent, meaningful worldview (Hallahan, 1999, p. 208). While frames allow inferences about how the communicator embeds an issue, their effect on the recipient is less predictable. Importantly, not every frame yields an influential effect that changes recipients' opinions (Matthes, 2014, p. 79).

Several factors determine the likelihood of an effect to occur as a result of framing. Some prior knowledge on the issue must exist, the issue must be accessible to the recipient, and the recipient needs to trigger and apply the frame to the incoming information (Chong & Druckman, 2007, p. 110). The likelihood of a framing effect depends on how salient an issue is for the recipient and on the motivation to engage with the issue (Schütz, 1970, as cited in Goffman, 1986 [1974], pp. 8-9; Petty, Cacioppo, & Goldman, 1981, pp. 853-854). In addition, both the frequency of exposure to a frame, as well as the recipient's processing schemata, influence to what extent the frame's content is adopted (Scheufele & Iyengar, 2017, pp. 622-623). Usually, frames have an effect on some recipients, yet rarely a universal effect on all recipients (Kahneman & Tversky, 1984, pp. 343-344).

The strength of framing effects depends on the recipient's personal characteristics. These characteristics include whether the recipient tends toward critical reflection (in which case the effect of framing is lower) or whether the frame elements are consistent with the recipient's personal values and beliefs (in which case the effect is stronger) (Druckman & Nelson, 2003, p. 741; Meriläinen & Vos, 2013, p. 121). A further crucial factor is cultural resonance (Matthes, 2014, p. 79). Notably, issues are strongly interconnected (Meriläinen & Vos, 2013, p. 130). In cases where the recipient discusses different frames simultaneously, no framing effect of any one frame is detected; instead, their interplay affects the recipient (Druckman & Nelson, 2003, p. 741).

Source credibility acts as a factor that implicitly affects the impact of framing (Druckman, 2001, p. 1061). It increases the chances of a frame receiving attention, even if the frame does not per se penetrate a recipient's existing worldview. Meriläinen and

Vos (2013, p. 122) note that “[c]redibility, legitimacy and power influence not only framing, but also the ownership of issues.” The more credible a source, the easier it is to also position a particular frame from that source as credible (Druckman, 2001, p. 1061). Larger and more renowned actors are at an advantage and can use their weight to increase the credibility and salience of their message. In contrast, for less central actors, collaboration has been found to compensate for a lack of reputation (Carpenter, 2011, pp. 97-98; Cornelissen et al., 2011, p. 1709). As a discourse develops its own dynamics, it is also the “interaction between the actors in the issue arena [that] may change public perceptions” of their role within that discourse (Meriläinen & Vos, 2013, p. 123).

For the communicator, framing amounts to a strategic choice. Strategic framing uses linguistic and rhetorical devices to strengthen the framing effect. In addition to the selective reporting on an issue, the choice of wording, the values and metaphors that are invoked, or the depiction of relationships can support a particular concept (Hallahan, 1999, p. 224). With regard to strategic frames, which seek a specific effect with the audience, the mode of presentation, i.e., the frame, can influence the likelihood of activating a particular processing schema (Hallahan, 1999, p. 217; Scheufele & Iyengar, 2017, p. 625). A carefully chosen frame can emphasize several issues at once and increase their salience (Meriläinen & Vos, 2013, p. 121). The choice of frame “determines whether most people notice and how they understand and remember a problem, as well as how they evaluate and choose to act upon it” (ibid.). Goffman (1986 [1974], p. 38) summarized this as follows: “[m]ere perceiving, then, is a much more active penetration of the world than at first might be thought.”

The effects of framing can be observed from a meta-level perspective as they extend to society. Carving out the principles of framing, Goffman (1986 [1974], p. 39) noted that individuals “actively project their frames of reference into the world immediately around them, and one fails to see their so doing only because events ordinarily confirm these projections.” Taking this a step further, Entman (1993, p. 57) even pointed to the possibility that framing processes can determine “public opinion” and found that “framing appears to be a central power in the democratic process, for political elites control the framing of issues.” Similar concerns are raised, claiming that frames can make use of different tools to manipulate public opinion and the dominant voices or opinions in a discourse (see, e.g., Dahan & Gittens, 2010, p. 229; Druckman, 2001, p. 1041).

In summary, a frame portrays an issue in a particular way that stresses some aspects while bypassing others. Explicitly or subtextually, frames convey assumptions about relationships between actors or issues, sympathize with one value-system or another, and propose interpretations. Frames also provide a comprehensive perspective and set the scene within which a debate takes place. The concept of framing is dynamic, particularly as it is prominent in the context of ongoing debates on unresolved issues of social and political relevance. Hence, if a topic is intended to remain salient over a period of time, attention needs to be paid to the development of frames in the discourse and their perception by discourse members.

Studies in the field of business and human rights have applied a frame theory perspective to investigate the knowledge and perception of human rights among practitioners within the business context. A primary objective of using frame theory is to understand the composition and context of a particular point of view, as well as the implications of such a frame for realizing human rights. Frame analysis can offer insights into the definitions, assumptions, and values assigned by individual (personal or organizational) actors to a human rights issue. Moreover, by considering the strategic and social aspects of communication, frame analysis provides indicative evidence on an actor's motivation or priorities. The identified frames can then be named, categorized, and evaluated. Frame analysis facilitates analyzing and comparing different perceptions of an issue in a debate. In socio-political research, framing has been described as an "audience-driven framework" (Uscinski, 2009, p. 798) that "calls for dialogue" and is "in part conducted within the public debate" (Meriläinen & Vos, 2013, p. 120). Using a framing approach thus has two main benefits: it enables drawing a nuanced and differentiated picture of the BHR discourse; and it helps to explicate and abstract different positions within this discourse.

### **3.3 Methodology**

Integrating human rights into business requires clarifying companies' understanding of human rights. Analyzing the frames applied by companies provides insights into the status quo in practice. In this study, a metasynthesis was conducted to answer the question how companies currently understand and frame human rights.

Within the field of BHR, various studies have considered the framing of human rights in different industries and from different perspectives. These studies include ones that consider the academic perspective (e.g., Meriläinen & Vos, 2013), ones that focus on the company perspective (e.g., Obara & Peattie, 2018), or ones that explore companies' own contributions (e.g., De Wit, Wade, & Schouten, 2006). In order to understand companies' framing of human rights, the second group of studies, those analyzing the company perspective, are of particular interest and have therefore been selected for analysis. Existing framing studies differ in how they describe companies' frames and in their presentation, or categorization, of prevailing frames. In order to bring these findings together, so that a comprehensive picture can be drawn of how companies currently understand human rights, a metasynthesis of existing frame studies in BHR was conducted. Metasynthesis collects the individual findings on companies' frames and enables generating new knowledge by "collect[ing], compar[ing], and synthesiz[ing] the key findings of a number of related interpretive/qualitative studies" (Saldaña, 2013, p. 181). As such, metasynthesis can be considered the qualitative equivalent of a quantitative meta-analysis (ibid.). Importantly, rather than ignoring or oversimplifying complexity, metasynthesis constitutes a method "in which differences are retained and complexity enlightened" (Thorne, Jensen, Kearney, Noblit, & Sandelowski, 2004, p. 1346). The goal of metasynthesis has been described as reaching an "integrative conclusion that extends beyond the scope of what would have been achievable within the temporal, spatial, or epistemological confines of individual studies or programs of research" (Thorne, 2008, p. 510). Thus, for the purposes of this study, this method seems well suited to gaining deeper insight with a view to more generally assessing the dominant understanding of human rights in practice, which extends across different industries and focus areas.

The "data" of metasynthesis are individual studies (Thorne, 2008, p. 510). Identifying the relevant individual studies involved a systematic literature review (Bailey, Madden, Alfes, & Fletcher, 2017, pp. 32-34; Briner & Denyer, 2012, p. 115; Tranfield, Denyer, & Smart, 2003, pp. 214-219). Similar to other systematic reviews in the broader field (e.g., Aliu, Akatay, Aliu, & Eroglu, 2017, p. 6; C. R. Carter & Easton, 2011, p. 51; Fassin, Rossem, & Buelens, 2011, p. 431), the search was conducted using the databases Scopus, Business Source Ultimate, and ABI/inform. This enabled drawing on comprehensive sources for studies in the fields of business and economics. The search term was

formulated so as to identify articles focusing on human rights, taking into account framing, and set in a managerial context.

Based on screening the initial results of the relevant literature, the initially defined search term was adapted and refined. During this step, the scope was also adjusted, in order to consider studies in the field of CSR referring to human rights besides ones focusing explicitly on human rights as their main research topic. This search yielded 504 articles in total. In order to identify relevant high-quality studies, three exclusion criteria were applied: articles had to be peer-reviewed, published in English or German, and needed to be accessible. This yielded a set of 264 articles. Removing duplicate articles further reduced the set to 192 studies, which were then thoroughly screened. Three inclusion criteria were defined in order to verify whether articles were suited to the research question. Particular consideration was given to whether studies were meaningful in terms of considering human rights and analyzing managerial framing, as well as whether they were empirical. After this screening, the full texts of 60 studies were analyzed in depth, in order to evaluate their focus and scope and thus their suitability for metasynthesis. The final data set contained 17 articles, which corresponds to the range of two to 20 studies recommended for metasyntheses by Saldaña (2013, p. 182). Inspecting the references of the selected articles yielded no additional studies. Figure 3-1 provides an overview of the systematic selection process.

Table 3-1 (starting on page 60) provides an overview of the 17 studies selected for analysis. The articles were published between 2001 and 2018. They appeared in different journals, except for two articles that were both published in the *Journal of Business Ethics* (Fukukawa & Teramoto, 2009; Richter & Arndt, 2018). Often, either the authors of the articles or the companies studied focused on a particular aspect of BHR, such as a particular incident, a particular set of human rights, or the role of CSR. The underlying analyses were based on either primary or secondary data, which included, e.g., subjective, institutional, or written statements.

The articles considered either a single company or multiple companies. Almost all of these companies actively engaged in human rights. Only three studies on multiple cases also included companies with little contact with the topic (Fukukawa & Teramoto, 2009; Mark-Ungericht, 2005; Obara & Peattie, 2018). Many of the companies had encountered

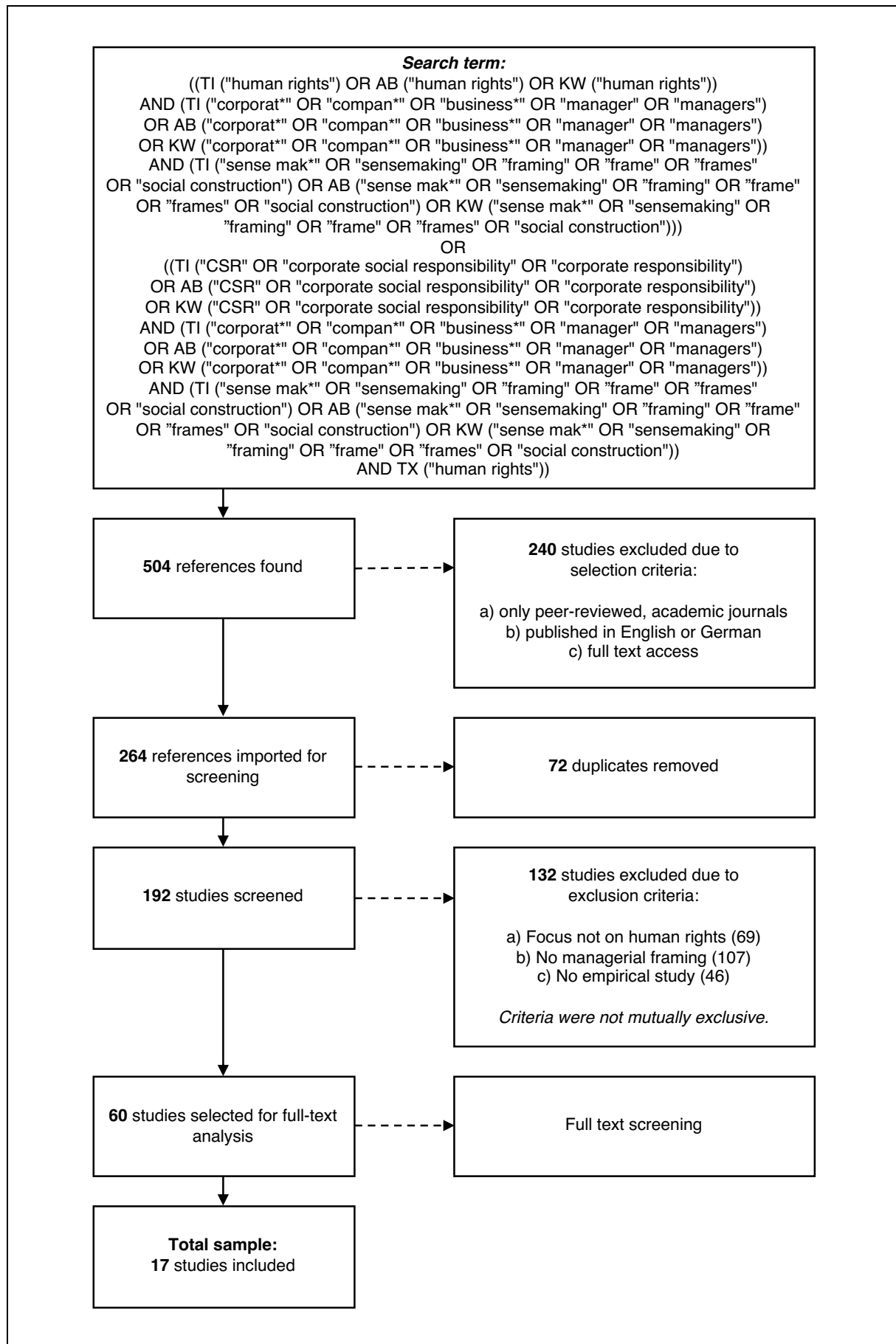


Figure 3-1 Metasynthesis: Selection process



human rights incidents related to their business (e.g., Reinecke & Ansari, 2016), had faced strong public pressure to engage in human rights dialogue (e.g., Golob, Johansen, Nielsen, & Podnar, 2014), or their core business had been questioned (e.g., Richter & Arndt, 2018). A majority of cases in the sample are critical cases (Yin, 2014, p. 51). In particular, seven of the studies considered companies in the extractive, energy, or mining industries, all of which had been susceptible to human rights incidents in the past. Three articles concentrated exclusively on Royal Dutch Shell. Finally, the articles were biased toward a western view on the topic, as only one study explicitly considered non-western companies (Fukukawa & Teramoto, 2009).

Although most of the companies investigated in the reviewed studies had encountered human rights incidents, they tended to avoid the issue (e.g., Obara & Peattie, 2018, p. 788). Many were confronted with the issue by a triggering event (e.g., Holzer, 2007). Often, this trigger was an external event, such as public pressure after a human rights incident (e.g., Golob et al., 2014, p. 369) or stricter regulation (e.g., Reinecke & Ansari, 2016, pp. 312-313). It could, however, be internal, such as a revision of the CSR strategy (Obara & Peattie, 2018, p. 787). In many cases, such a trigger initiated an intensive examination of the meaning of human rights. The reason for the initial reluctance to engage with human rights is that the issue was perceived as highly demanding and having potentially immense negative consequences for the company.

One key concern in this regard is a company's legitimacy, which many of the studies referred to and was most prominently analyzed by Richter and Arndt (2018, pp. 596-598). For companies, being implicated in human rights violations poses the threat of their corporate identity being questioned. Companies are also aware that human rights should not merely be treated from a marketing perspective, i.e., as part of their CSR strategy (Golob et al., 2014, p. 372). Thus, the issue of human rights is often met with some initial bias.

Overall, managers repeatedly addressed human rights issues without explicitly referring to human rights (e.g., Obara & Peattie, 2018, p. 788). Companies appeared to consciously choose between explicitly or implicitly addressing human rights concerns. This study considers both explicit and implicit references to human rights.

Table 3-1 Metasynthesis: Overview of studies

Author (Year)	Industry	Country	Companies	Methodological approach and main sources of data	Data collection	Research focus
Livesey (2001)	Oil and gas	North Sea, Nigeria, UK, Germany	Royal Dutch Shell	<i>Discourse analysis.</i> Publicly available documents	1995-1997	Effects of the socially contested nature of discourse respecting the natural environment and economic development
Mark-Ungericht (2005)	Mixed	-	Employers' organizations	<i>Qualitative content analysis.</i> Publicly available documents	not specified	Framing of the relation between business and HRs in the neoliberal inspired discourse and the critical (activist) discourse
Dashwood (2007)	Mining	Canada	Noranda, Placer Dome	<i>Case studies.</i> Interviews; publicly available documents	2002-2006	Influence of CSR norms on mining companies' adoption of CSR policies
Holzer (2007)	Oil and gas	Nigeria	Royal Dutch Shell	<i>Discourse analysis.</i> Interviews: among the respondents are Shell employees; British and German newspaper reports	1995-2001	Shifting frames of corporate responsibility for HRs in the public discourse
Fukukawa & Teramoto (2009)	Mixed	Japan	13 Japanese TNCs (among the top 50 listed companies)	<i>Interviews.</i> 22 interviews: Japanese CSR managers	2006	Framing of CSR in Japanese TNCs
Engen et al. (2010)	Oil and gas	Norway	Norsk Hydro, Statoil	<i>Case studies, critical incidents.</i> 31 semi-structured interviews: among the respondents are 18 company managers and employees; publicly available documents (annual reports, NGO reports, newspaper articles)	2004	Perceptions and interpretations of critical incidents and the social construction of CSR
De Chiara & Russo-Spena (2011)	Mixed	-	BMW, Levi Strauss & Co., Mattel, The Timberland Company	<i>Multiple case study.</i> Publicly available documents (formalized reports, formal and informal documents)	not specified	Framing TNC's behavior within CSR
Aggerholm & Trapp (2014)	Energy	Finland, Norway, Sweden, Denmark	Forum, Statoil, Vattenfall, DONG Energy	<i>Case studies, thematic analysis.</i> Publicly available documents (CEO introductory letters)	2009	Thematic positioning of companies to sustainability with CSR strategies (reflecting three generations of CSR)
Davoine & Gendrie (2014)	Textile	Switzerland	Multinational SME	<i>Single case study, cognitive mapping.</i> 7 semi-structured interviews: owner manager, certification manager; publicly available documents	not specified	Difficulties and tension fields linked to the different representations of social responsibility based on cognitive maps

Table 3-1 Metasynthesis: Overview of studies (continued)

Author (Year)	Industry	Country	Companies	Methodological approach and main sources of data	Data collection	Research focus
Golob et al. (2014)	Retail	Denmark	JYSK	<i>Single case study.</i> Interview: Communications and CSR manager; publicly available documents	2011	Systems perspective (sensemaking to construct shared meaning) to explore CSR and related complexities
McKinney (2015)	Agriculture	India	Monsanto	<i>Field research.</i> Semi-structured interviews and focus groups with 40 participants, among the respondents are seed company representatives; publicly available documents	2008-2009	Framing child labor and construction of a corporate response
Reinecke & An-sari (2016)	Gold and electronics	Democratic Republic of Congo	Gold and electronics companies	<i>Case study.</i> 29 semi-structured interviews: among the respondents are min. 15 respondents from gold and electronics industries; publicly available documents (e.g., reports, press releases, industry reports)	2005-2014	Frame shifts that lead companies to assume responsibility for a “wicked problem”
Hofferberth (2017)	Oil and gas	Nigeria	Royal Dutch Shell	<i>Single case study.</i> Publicly available documents	1995-2009	Sensemaking of changing expectations and interpretive frames and responsibility in and of global governance
Jørgensen (2017)	Internet platforms	US, international	Google, Facebook	<i>Context-oriented qualitative approach, interviews.</i> 21 semi-structured interviews: 13 with Google, 8 with Facebook (primarily policy staff); publicly available documents	2015-2016	Sensemaking of HRs (freedom of expression, privacy)
Jørgensen (2018)	Internet platforms	Europe, US	Google, Facebook	<i>Interviews.</i> 21 semi-structured interviews: 13 with Google, 8 with Facebook; on-site visits; publicly available documents	not specified	Framing HRs (freedom of expression, privacy) and embedding these frames in the company
Obara & Peattie (2018)	Mixed	UK	22 UK-based TNCs	<i>Interviews.</i> 30 semi-structured interviews: managers most closely responsible for HRs matters	2010-2011	Interpretation of HRs with regard to CSR
Richter & Arndt (2018)	Tobacco	Switzerland	British American Tobacco	<i>Single case study.</i> 24 semi-structured interviews: among the respondents are 13 company senior managers; publicly available documents	not specified	Cognitive processes underlying CSR decision-making

The analysis of the articles focused on companies' understanding of human rights, in particular on the identified frames. These frames and company perspectives were either referred to explicitly, or frame description was more implicit (e.g., when focusing on company behavior). Analysis considered both explicit and implicit frame descriptions, as both allow deducing the frames employed by companies. It was often possible to assign frames to individual companies, even in studies discussing multiple cases.

The analysis used an inductive coding approach, meaning that codes emerged during analysis (Miles, Huberman, & Saldaña, 2014, p. 81) and iterated between analysis within and across studies. Analysis begun by collecting text fragments relevant to the research question, in order to identify themes and create categories so as to structure the data (Gioia, Corley, & Hamilton, 2013, pp. 20-21). Therefore, theming the data was used for first-cycle coding, and axial coding was applied during second-cycle coding. Both procedures represent appropriate coding methods for metasynthesis (Saldaña, 2013, p. 183).

First-cycle coding yielded first-order *themes*. A theme "is an extended phrase or sentence that identifies what a unit of data is about and/or what it means" (Saldaña, 2013, p. 175). As no prior coding scheme was applied, this step was open to the different frames expressed in the articles and considered not only a company's understanding and meaning attribution, but also its role, language, and practices. Companies' inclination to address human rights and the context of discussion were also included in the analysis.

In a second step, axial coding was applied. This aims "to determine which [codes] in the research are the dominant ones and which are the less important ones," and thereby reduces redundancies and selects "the best representative codes" (Boeije, 2010, p. 109). This created second-order categories, which express the different dimensions articulated by companies in framing human rights. Each of these *frame dimensions*<sup>5</sup> was then de-

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<sup>5</sup> The studies in the sample used different interpretations for the meaning of frames. For example, Reinecke and Ansari (2016, p. 311) considered shifts of frames (e.g., "from denying responsibility to accepting responsibility") of companies involved in conflict minerals. Also other authors stressed the understanding of responsibility that emerges from human rights topics, e.g., Jørgensen (2018, p. 348) found that Google and Facebook "frame privacy as user controlled." Holzer (2007, p. 290) considered semantic categories as frames and, e.g., identified a frame stressing Shell's "contribution." Several authors, such as Golob et al. (2014, p. 368) and Obara and Peattie (2018, p. 790) considered the sensemaking process of companies and described a development over time. In this approach, Obara and Peattie (2018, p. 790) stressed the company perspective on human rights and found that "CSR represented a clear organizational-level 'frame'." All of these approaches aimed to describe the underlying phenomenon

efined. Eight dimensions were identified: strategic, technological, economic, legal, citizenship, social, cultural, and political. They express the emphasis established by companies when discussing human rights issues. The definition of these dimensions contains both companies' substantive understanding of human rights as well as their implied meaning for the company. Thus, whereas explicit or implicit statements about human rights may differ between companies, the employed frames can nonetheless be traced to the above eight dimensions.

Having identified the eight recurring frame dimensions, further analysis grouped these second-order categories into four aggregate dimensions. These aggregate dimensions relate the different frame dimensions to the larger context, by describing the dominating logic that characterizes a company's human rights understanding. In particular, focusing on the strategic or technological frame dimension expresses a business logic to make sense of human rights issues. An economic or legal frame dimension is associated with a market logic. Companies that emphasize the citizenship or cultural dimension follow a community logic in framing human rights. Finally, expressing a social or political frame dimension indicates that the company perceives human rights issues in terms of a societal logic.

Table 3-2 provides an overview of the coding results. It lists examples of the text fragments representing zero-order codes and shows the corresponding first-order themes, as well as the second-order categories and aggregate dimensions.

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and sought to describe companies' understanding of human rights. The results of the metasynthesis account for these differences by identifying *frame dimensions* that apply across the different uses of frames.

Table 3-2 Overview of the coding results

<b>Zero-order codes (text fragments)</b>	<b>First-order themes (examples)</b>	<b>Second-order categories</b>	<b>Aggregate dimensions</b>
“Freedom of expression is seen as a crucial element of the corporate identity, or as formulated by some of the interviewees: ‘Freedom of expression is an integrated part of everything we do’ [employee, Facebook] and ‘Freedom of expression is part of our founding DNA’ [employee, Google]” (Jørgensen, 2017, pp. 288-289).	Corporate identity and business model inherently protect human rights	Strategic	Business
“For both companies, their remodelled CSR strategy was part of a broader corporate ambition to become global leaders in their fields and CSR and [human rights] were perceived to contribute towards this by helping to improve corporate reputation and image externally: [...]” (Obara & Peattie, 2018, p. 786).	Strategic role of human rights in strengthening the market position		
“As an agricultural and technology company committed to human rights, we have a unique opportunity to protect and advance human rights” (CEO, Monsanto, in McKinney, 2015, p. 223).	Technological focus helps protect and advance human rights	Technological	
“[...] both companies seem to be guided by a strong belief in the power of technology, and in finding technical solutions to complex societal problems such as power inequality and uneven access to information” (Jørgensen, 2018, p. 344).	Technological solution to societal problems		
“From the Shell perspective, economic growth was thus represented to be the primary cure for poverty and social deprivation” (Livesey, 2001, p. 77).	Initial conviction of an economic solution to human rights problems	Economic	Market
“Economic success is the foundation (...). It is the successful companies that provide people with the necessary goods and services for a life in safety, welfare, and dignity” (CSR guideline, Austrian organization of employers, Mark-Ungericht, 2005, pp. 327-328).	Human rights as a result of liberalization and competition		
“As freedom of expression is not an absolute right, the national boundaries for its exercise vary considerably. [...] While compliance with national laws is stated as a given, U.S. law plays a prominent role in the standard-setting [...]” (Jørgensen, 2017, p. 289).	Human rights law as standard protection against repressive governments	Legal	
“The basic responsibility lies in obeying the law” (Manager, British American Tobacco, in Richter & Arndt, 2018, p. 597).	Strong corporate governance focused on legal compliance		

Table 3-2 Overview of the coding results (continued)

Zero-order codes (text fragments)	First-order themes (examples)	Second-order categories	Aggregate dimensions
“[...] the Norwegian oil and gas companies are actively supporting and participating in corporate citizenship initiatives. [...] This may be interpreted as a step away from exclusively fiduciary duties towards shareholders as was held by conventional views of the firm, and towards an integrative perspective to CSR” (Engen, Mikkelsen, & Grønhaug, 2010, p. 356).	Engagement in corporate citizenship initiatives after human rights incidents	Citizenship	Community
“[...] CSR represented a significant field of past learning that shaped the development and management of [human rights] within companies. [...] CSR represented a clear organizational-level ‘frame’ [...]” (Obara & Peattie, 2018, p. 790).	Using a CSR frame to clarify meaning and define corporate implications of human rights		
“[...] one reason that Japan in particular appears to have limited knowledge over issues of human rights relates to the more hermetic nature of Japanese culture and demography. The point raised is that for developing countries human rights are often related to issues of race, class, and faith, which are pronounced in multicultural societies” (Fukukawa & Teramoto, 2009, p. 143).	Relevance of human rights depends on national culture	Cultural	
“Consumers in developed countries traditionally view child labour as wrong, evil and exploitative (Andersen and Skjoett-Larsen 2009). JYSK, however, has been encouraging members of the public to rethink such perceptions by asking them to consider the alternative. [...] The company has therefore argued that it is more responsible to offer secure, regulated work conditions and education than to return the children to the streets” (Golob et al., 2014, p. 372).	Perception of child labor needs to adapt to local culture		
“Timberland believes that higher wages alone do not necessarily create improved living conditions; as a result, it has defined an approach to support and facilitate sustainable living by addressing the environment (societal infrastructure) within which workers live rather than focusing on wages alone” (De Chiara & Russo-Spena, 2011, p. 65).	Considering the larger social environment to enable human rights protection	Social	Society
“To underline its efforts, [British American Tobacco] Switzerland seeks to educate its consumers (i.e., smokers) to consider the needs of non-smokers, as well as, how to keep the environment clean of cigarette stubs” (Richter & Arndt, 2018, p. 595).	Assume responsibility for the social impact of company		
“[...] ‘we rely on Scandinavian political traditions upholding freedom of speech, democracy, and basic human rights’” (JYSK, in Golob et al., 2014, p. 370).	Educate customers on political traditions, including human rights	Political	
“Corporations assume political role ‘This is the moment for manufacturers everywhere to be powerful actors for good, to fundamentally change the way minerals are bought’” (Motorola Solution for Hope, in Reinecke & Ansari, 2016, p. 307).	Admitting political impact of corporate activities		

## 3.4 Findings on Companies' Human Rights Framing

### 3.4.1 Eight Frame Dimensions

The analysis revealed eight prevailing frame dimensions within companies. These dimensions combine into four distinct perspectives on human rights, which are defined below.

Within a *business logic*, business interests are key to all company activities. Thus, human rights issues, too, are subject to business-dominated assessment. This logic combines a strategic and a technological frame dimension. When emphasizing the *strategic frame dimension*, human rights assume a strategic role in company conduct and the human rights approach serves as a strategic instrument for creating advantages. In determining the human rights approach, companies emphasize, for instance, cost-benefit trade-offs, risk and reputational considerations, or implications for customers (Engen et al., 2010, p. 355; Obara & Peattie, 2018, pp. 786, 788). The *technological frame dimension* addresses human rights with the means of technology. Companies refer to their technological competency, which allows creating solutions to protect human rights. Often, this involves understanding that technology is not a source of human rights issues, but that technical solutions supporting human rights can be embedded in products and services (Jørgensen, 2018, p. 344; McKinney, 2015, p. 223).

According to a *market logic*, company activities are characterized as subject to market forces. How to respond to human rights thus also depends on market dynamics, as these are needed to protect human rights, just as they can adversely affect human rights. This logic corresponds to statements primarily reflecting an economic and a legal frame dimension. The *economic frame dimension* considers human rights as subject to economic mechanisms, which either protect or violate human rights. Unrestricted company conduct is favored as a means of protecting human rights. Trade liberalization is considered beneficial for adhering to human rights standards. Moreover, the economic frame dimension is used to argue that human rights incidents are typically caused by uncontrollable economic mechanisms, i.e., beyond a company's influence (Mark-Ungericht, 2005, pp. 327-328; Obara & Peattie, 2018, p. 788). Regarding the *legal frame dimension*, human rights law guides company conduct. Companies can operate within differ-



ent legal frameworks, which shape and enhance corporate measures for protecting human rights. Global companies in particular, which are subject to different local legal systems, have been found to use these different laws as a benchmark for improving their overall human rights approach beyond legal requirements (De Chiara & Russo-Spena, 2011, pp. 65-66; Jørgensen, 2017, p. 289).

Following a *community logic*, company activities take place in interaction with local communities. Accordingly, human rights are considered and understood within a specific local context. The frame dimensions emphasizing citizenship and culture express this logic. In the *citizenship frame dimension*, human rights implications are considered within a local context and are often informed by a CSR approach. Corporate citizenship implies human rights responsibilities that extend beyond economic and legal requirements. Human rights concerns that are locally relevant are in the foreground (Engen et al., 2010, p. 356; Golob et al., 2014, p. 372; McKinney, 2015, p. 224). When focusing on the *cultural frame dimension*, human rights are assessed within the local culture and require a differentiated approach. At the same time, companies are aware of their own cultural background affecting their human rights assessment. A human rights approach that is mindful of cultural differences does not necessarily mean that human rights standards are neglected, but instead demonstrates sensitivity to cultural specifics, interpretations, and customs (Fukukawa & Teramoto, 2009, p. 143; Golob et al., 2014, pp. 372-373).

Regarding a *society logic*, company activities are seen as responding to the larger societal context. It expresses a belief that human rights are essentially a societal issue and that protecting human rights should improve societal conditions. This logic is informed by a social or a political frame dimension. The *social frame dimension* understands human rights realization as being affected by the larger social system. Companies' active role within this social system implies the need to assume responsibility for human rights protection. As companies openly acknowledge the impact of their activities, they are also motivated to take action, in order to avoid being associated with human rights violations in the social system (De Chiara & Russo-Spena, 2011, p. 65; Richter & Arndt, 2018, p. 595). Along the lines of a *political frame dimension*, human rights are protected by political actors. Consequently, companies acknowledging the political dimension of their activities are associated with human rights responsibility. Thus, companies often

deny the political dimension of their activities in order to avoid far-reaching responsibility for human rights (Hofferberth, 2017, p. 155; Holzer, 2007, p. 294; Livesey, 2001, p. 78).

Table 3-3 summarizes the definitions of the eight frame dimensions.

Table 3-3 Definition of frame dimensions

<b>Underlying logic</b>	<b>Frame dimension</b>	<b>Definition</b>
Business logic	Strategic	Human rights assume a strategic role in company conduct. Human rights conduct serves as a strategic instrument for creating advantages for the company.
	Technological	Human rights are addressed with the means of technology. The company refers to its technological competency, which enables creating solutions to protect human rights.
Market logic	Economic	Human rights are subject to economic mechanisms that either protect or violate human rights. This frame dimension favors unrestricted company conduct as a means of protecting human rights.
	Legal	Human rights law guides company conduct. Companies operate within different legal frameworks that shape and can even enhance corporate measures for protecting human rights.
Community logic	Citizenship	Human rights implications are considered within local contexts and are often informed by a CSR approach. Corporate citizenship implies human rights responsibilities beyond economic and legal requirements.
	Cultural	Human rights are assessed within local culture and require a differentiated approach. At the same time, companies are aware of their own cultural background affecting their human rights assessment.
Society logic	Social	Human rights realization is understood as being affected by the larger social system. Companies' active role within this social system implies the need to assume responsibility for human rights protection.
	Political	Human rights are protected by political actors. Consequently, companies acknowledging the political dimension of their activities are associated with human rights responsibility.

The eight frame dimensions are not mutually exclusive and can coexist, also across logics. Companies often combine different frame dimensions. The analysis found that the strategic frame dimension in particular is frequently used to complement other dimensions. This suggests that company actions and decisions are often motivated by strategic concerns (e.g., by considering cost-benefit implications or assessing financial risks). The frame dimensions themselves do not imply a certain course of action or level of perceived responsibility toward human rights. Rather, the eight dimensions characterize the aspects most likely to be reflected on, as well as the considerations guiding

the evaluation of human rights issues. Each dimension may imply a human rights responsibility of some kind and for different reasons, or may deny the same. For example, companies in the reviewed studies have used a strategic frame by arguing that the specific nature of their business model inherently advances human rights, or by arguing that their business model is unrelated to human rights issues.

### 3.4.2 Frame Positioning

The results show that companies select and combine frame dimensions in order to position human rights issues in relation to their own business. This relation can be described along two dimensions: frames differ first in terms of the perceived distance they create between company identity and a human rights issue and second in terms of the tone they set for human rights communication. Based on these dimensions, the four dominant logics that were outlined above and the associated frame dimensions can be positioned according to their implied understanding of human rights (see Figure 3-2).

The *distance dimension* positions a human rights issue either as closely related to or as distant from the company and its operations. Issues that are presented as close to the company are often considered within a local context and are more immediately related to a company's operations. Issues that are perceived as distant from company activities are considered on a more abstract level and are framed as taking place within a larger system of diverse actors. The distance (and subsequent handling of an issue) tends to be implied within a frame and shapes the nature of companies' concern with human rights.

The *communication dimension* positions a human rights issue along a relational or rational line of argumentation. A relational argumentation emphasizes societal dynamics, by articulating primarily the framing of a society or community logic, whereas a more rational argumentation emphasizes the market and business logic in depicting human rights.

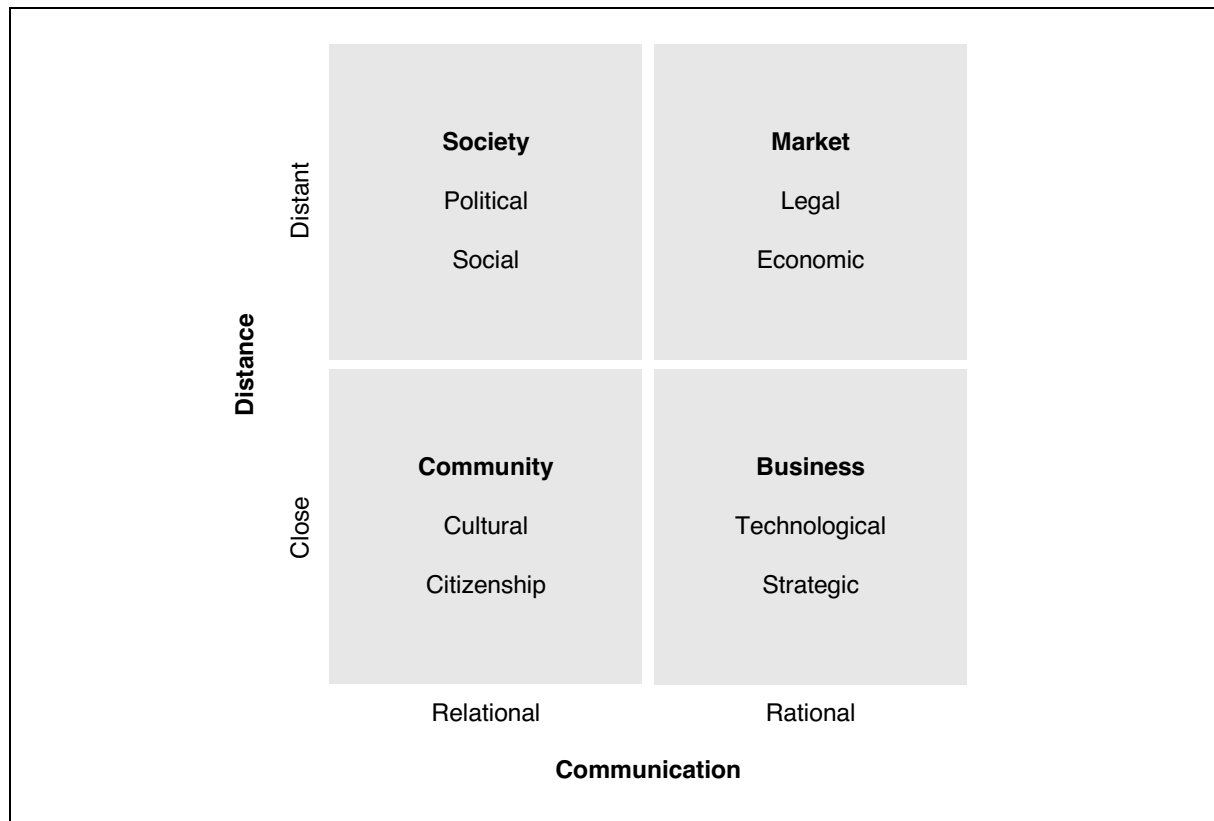


Figure 3-2 Frame positions in terms of distance and communication

The frames applied by companies may shift over time. For example, several of the studies examining Shell's response to the Ogoni people in Nigeria found that the company's framing changed throughout the public discourse (Hofferberth, 2017, p. 154; Holzer, 2007, p. 296; Livesey, 2001, p. 68). Initially, Shell followed a market logic by stressing its role as a purely economic actor, thereby aiming to create distance between the company and the human rights case and to emphasize the rational dimension. When this approach negatively impacted Shell in the discourse, the company applied a more relational framing. This emphasized the social context and reflected the company's willingness to assume local responsibility as a corporate citizen (e.g., through community projects) positioning human rights closer to its business.

Notably, different positions can also be pursued simultaneously within a company's human rights framing. For example, Golob et al. (2014, pp. 370-372) found that JYSK responded with a dual approach to accusations that were raised in a television documentary and employed both a rational and a relational line of argumentation. Its rational response included, among others, to admit mistakes resulting from the business model and to implement a new supplier strategy. This response was combined with a relational

approach that stressed the social dimension of activities, such as community projects implemented in partnership with NGOs.

### 3.4.3 Frame Application According to Context

Companies often adapt their framing to the specific discursive context. The frame dimensions identified above are not bound to a particular context, i.e., very different frames are used to respond to similar contexts. The reviewed studies on company framing repeatedly discuss human rights in several contexts: the core business, company operations, central stakeholders, and peripheral stakeholders.

When referring to the context of their core business, companies mainly mentioned their *general business principles and corporate communications*. Overall, while the companies studied were little inclined to consider this context from a human rights perspective, it was nonetheless often addressed (even if the business model itself was not questioned). Since the core business is key for companies and highly visible, the human rights frames adopted in this context indicated that companies aimed to anticipate and refute any human rights concerns. Most prominent were a business logic and particularly a strategic frame dimension. For instance, this enabled companies to frame their concern for human rights in terms of a specific case, as an inherent part of their business model, or, in contrast, as distinct from their business model. Companies more strongly engaging in human rights and critically reflecting on their impact complemented the same framing focus with remarks following a community logic, in particular the citizenship frame dimension. This framing approach reflects a company's appreciation of the intimate relation that social responsibility should have to one's core business.

When addressing human rights in the context of operations, the companies in the selected studies mostly referred to *employees, the upstream supply chain, and local as well as international operations*. Human rights topics were addressed more freely and openly in this context, possibly because potential human rights concerns are difficult to discard. The employee and supply chain contexts appeared to be particularly relevant and both represent concrete cases of applying human rights. Again, human rights were often articulated by referring strongly to the strategic frame dimension. This dimension was frequently complemented with references to the legal frame dimension, which concerns human rights in companies' local and international operations. Whenever human

rights were discussed particularly intensely (e.g., workers' rights in company operations), emphasis was also placed on the legal and social frame dimensions.

Companies mainly referred to *customers, the communities affected by their operations, and the wider society* when discussing human rights in relation to key stakeholders. Besides their core business, companies were particularly selective in choosing their frames in this context. The context of key stakeholders, due to its company-external dimension, holds particular risks for companies in form of public discourse. Companies' human rights framing in this context often emphasized a citizenship frame dimension, for example, by referencing community projects. Companies more openly discussing human rights also frequently referred to the economic frame dimension.

A further context arising repeatedly in the studies concerned stakeholders who play a more peripheral role in companies' human rights framing. In this respect, companies referred to their *industry, other countries in general, and the home and host governments*. Companies were not particularly inclined to discuss this context from a human rights perspective. One possible explanation might be that they felt less compelled to justify their human rights conduct in this context, and perhaps that human rights could be applied more selectively with less public pressure. In this context, none of the frame dimensions proved dominant. For instance, the political, cultural, or strategic frame dimensions all appeared in the frame analyses.

#### **3.4.4 Company Application of Framing**

Company application of the eight frame dimensions points to a dilemma. On the one hand, companies use frames in terms of sensegiving and, where it affects them, actively engage in and shape the public discourse on human rights. On the other, they use frames as sensemaking, and thus concede fundamental uncertainty about good conduct, their responsibilities and their role.

In terms of *sensegiving*, the results show that companies want to be actively involved in the public discourse on framing human rights. Through their choice of frame, they contribute relevantly to shaping the debate and the issues discussed. For instance, Shell initially avoided the human rights discourse as unrelated — and seemingly unfamiliar — territory, yet soon acknowledged that taking a more active role and entering a dialogue might be beneficial (Holzer, 2007, p. 295; Livesey, 2001, p. 79). Other companies,

too, entered the public discourse, considering an opportunity, among others, to educate customers, to affect a particular public frame, or to initiate change in the industry (Golob et al., 2014, p. 372; Reinecke & Ansari, 2016, p. 314). Such an active role in a sensegiving process implies a comprehensive assessment of human rights issues on the part of the company. It can create a differentiated dialogue between stakeholders, one in which companies present themselves as leaders on the issue of human rights who are prepared to embrace human rights responsibility. If used well, this is a chance to advance BHR and to foster comprehensive, concrete, and committed dialogue.

In terms of *sensemaking*, the analysis revealed uncertainty among companies with regard to human rights. This becomes evident, for example, in repeated frame switching (e.g., due to external pressure). Such switches indicate that framing partly also involves companies internally in understanding human rights and the associated responsibilities. For instance, differences in understanding start with the scope of human rights and with the stakeholders referred to by companies in their human rights considerations. For example, Richter and Arndt (2018, p. 593) found that British American Tobacco uses a very broad definition of human rights, one that also comprises rather distant stakeholders, such as farmers and their families, or non-customers. In contrast, Fukukawa and Teramoto (2009, p. 142) reported that some Japanese managers only consider first-tier suppliers with regard to human rights. To this end, Obara and Peattie (2018, pp. 787-788) noted that several managers claimed human rights to be conceptual and abstract, and thus difficult to relate to their operations. This latter perception is supported by the overall findings from the present metasynthesis, which established that companies often apply frame dimensions selectively and within a limited context. The understanding of human rights that is derived along the framing process often draws on a specific perspective. While deemed relevant in a particular situation, this perspective lacks a comprehensive foundational understanding of the conduct, obligations and responsibilities, and roles that emerge from a commitment to human rights.

### **3.5 Implications for the Discourse on Business and Human Rights**

The analysis showed that companies frame human rights by placing a different emphasis (at least at times) than the scholarly BHR discourse. Three diverging emphases were identified.

### *Holistic and Selective Approach*

The results indicate that managers tend to perceive the discourse on human rights as abstract and thus as not applicable. In the reviewed studies, company framing of human rights mostly related directly to a specific context and focused on either a specific frame dimension or specific rights. To the extent that framing is an ongoing process, the results indicated a learning effect in which companies' framing interacts with their experiences and aims within the discourse. In some cases, this might lead to a pick-and-choose approach. The frame that an actor contributes to the discourse is relevant, as a particular frame also implies a likely course of action. A comprehensive, multi-perspective approach to framing human rights was not observed within the companies investigated in the reviewed studies.

Regarding the *frame dimensions*, companies in the sample acknowledged different dimensions of human rights, but were often biased toward specific dimensions. The results showed that on the one hand, frame dimensions restrict the understanding of human rights topics within the assumptions of a specific logic, whereas on the other hand, companies also combine different frame dimensions. In most cases, a business logic was either explicitly or implicitly present as the dominant logic characterizing companies' understanding, and framing, of human rights. Herein lies an opportunity for complementing different human rights approaches in practice, as interacting with different frames defines the responsibilities and expectations that companies derive for themselves. The selection of frame dimensions can form part of a sensemaking or sensegiving process. In the latter, frames are actively selected to position the company with regard to a human rights issue (e.g., in order to legitimize corporate conduct, to shape public sentiment, or to argue for or against the need to assume responsibility). The role assumed by a company corresponds to its selected frame dimensions.

When discussing human rights, companies referred to some *contexts* more often than to others. For instance, working conditions and positive effects for human rights through existing engagement in communities were frequently mentioned in companies' framing, whereas, for instance, the investment context was not related to human rights. As expected, the openness to address an issue in terms of human rights varied between contexts. Within the studies in the sample, companies were particularly inclined to discuss



human rights when strong public pressure existed (e.g., with customer-related issues) or when issues potentially gained high visibility (e.g., regarding supply chain conditions). Finally, a focus on *specific rights* was observed among companies in the sample. Often, those rights that were primarily referred to were closely related to companies' activities. For the implementation of BHR, this indicates that such a selective approach is indebted to the particular frame dimension. It also suggests, however, that companies may find it easier to understand and determine specific responses and responsibilities toward a human rights issue when focusing on selective rights.

#### *Intrinsic and Extrinsic Motivation*

The academic discourse on BHR includes different arguments that lead companies to engage with human rights, most prominently with the legal framework that companies need to comply with, as well as with ethical motivations or obligations. The companies in the sample most commonly began engaging with human rights in response to a public trigger. Initially, companies' human rights framing built on this trigger event, and thus was guided significantly by anticipating the impact of different human rights responses on the public discourse about the company. Thus, in practice, *strategic considerations* (e.g., risk management and legitimizing corporate activities) and *external pressure* (e.g., media coverage) were the main drivers for selecting frame dimensions. Further, human rights issues were mostly considered in isolation. This further explains that no coherent human rights framing could be observed, despite several companies also reporting that intensive investigation of the meaning of human rights was thus initiated. Overall, however, companies' framing of human rights tends to focus on the opportunities for positively influencing the human rights environment. On the downside, the sampled companies tended to neglect possible negative impacts related to their business conduct.

#### *Ensuring and Surpassing Minimum Human Rights Standards*

Within BHR, a focus is on "do no harm" as a minimum requirement for companies, even if the tendency is to posit that effective BHR commitment needs to go further (see Section 2.1.6). In line with the UN definition, human rights are presented as minimum standards that must not be violated. Accordingly, strong emphasis is placed on enforcement. Whereas companies generally agree that human rights must be protected, their own presentation of human rights differs slightly. Negative connotations are mostly avoided, whenever possible, and harmful BHR impacts are rarely framed in terms of

human rights. Noticeably, companies frequently frame their relation to human rights as *enablers* of rights, or as leaders in supporting the realization of human rights. Companies not only focused on meeting minimum standards, but rather conveyed the impression of emphasizing instances of exceeding legal requirements. This focus potentially introduces a *degree of achievement* as a benchmark (thereby emphasizing comparative performance in relation to rights as an aspirational target), rather than the impact on human rights themselves. To this end, the finding that corporate practice tends to combine CSR and BHR activities — a link underpinned by several studies in the sample — corresponds to emphasizing the potential for contributing positively to human rights issues. A critical assessment of this link between CSR and BHR, which is found in the BHR literature (see, e.g., Ramasastry, 2015; Wettstein, 2012a), was only rarely present among the companies considered in the sample.

### *Outlook*

A discourse benefits from different actors contributing diverse frames. Typically, different frames enable and advance fruitful debate, in particular as long as actors share an objective. Where no overlap exists between frames, advancing an issue becomes much more challenging, even more so when the discourse is subject to polarization, one-sided reporting, or failure to present competing cognitive schemata to shed light on the issue from different angles. The findings from analyzing framing studies on BHR in companies indicate that — although company frames and the goal of BHR (as discussed in academia) do not converge — several connections exist between the applied frames and the theoretical human rights discourse. Pursuing the goal to anchor human rights in business and to foster holistic engagement with human rights, it is helpful to understand the frame dimensions applied by companies in order to complement them.

Companies' motivations and internal human rights policies are subject to underlying framing, which thus needs to be taken into account when aiming to improve the integration of human rights into business. Acknowledging the different human rights framings reverted to by companies can support *capacity-building initiatives* seeking to strengthen corporate human rights engagement. Above all, addressing the prevailing business perspective among companies can be used proactively to make human rights more accessible and meaningful for business, for instance, by specifically introducing measures that correspond to this perspective. At the same time, the goal must be to foster a holistic

understanding of human rights within companies. For instance, where currently a legal compliance perspective is not sufficient to resolve a human rights issue, an emphasis on other dimensions can introduce relevant triggers to address the root cause of the issue in question. This will gradually support a learning and re-framing process within companies regarding their understanding and operationalization of human rights.

A key requirement of corporate human rights responsibility is *human rights due diligence*. This is also a common element in efforts to enforce stricter regulations, which are steadily gaining traction. The motivation for HRDD and outcome expectations are likely to differ between companies and regulators' aspirations. The results show that companies tend to assume a business logic and rarely follow a holistic approach. This does not fully correspond to the objective of due diligence, which is to facilitate identifying and remedying adverse human rights impacts, as well as to establish the necessary practices and structures within companies. In order for HRDD to be effective in securing human rights, due diligence needs to be rigorous and outcome-oriented. While continuous progress toward human rights should be encouraged, the process should not itself become the goal. Effective HRDD ought to be measured against human rights impacts. Measures are needed to counteract possible biases. HRDD requirements need to be specified so that the different frame dimensions cannot justify a tradeoff, that is, where concern for human rights in one area compensates for relativizing human rights impacts in another.

A similar conclusion can be drawn for the development of a binding *BHR treaty*. The different perspectives that stakeholders contribute in the drafting process enrich the comprehensiveness of the process. At the same time, any dominant position also introduces a bias toward the respective framing toward human rights, possibly adding a structural bias as a result of the underlying assumptions. As Chong and Druckman (2007, p. 120) found, "deliberation and competition" of frames can mitigate subtle framing effects on actors. When devising BHR guidelines, stakeholder frames should be consciously and purposefully assessed in order to ensure their congruency with international human rights standards. Awareness of the different frames associated with the BHR discourse can strengthen both developing and accepting a BHR treaty.

Current measures for integrating human rights into business are largely voluntary. The analysis has shown that voluntariness tends to lead to selective engagement with human

rights, as companies emphasize their positive achievements but hesitate to frame problems in terms of human rights. This selective framing of human rights is often deliberate. Companies contribute their perspective and provide bottom-up approaches to bridge the *governance gap*. At the same time, however, companies' framing is frequently audience- and context-dependent. This has advantages, as it helps to connect with stakeholder groups (McCorquodale et al., 2017, p. 222). And yet, it becomes a challenge when a particular frame interferes with comprehensive human rights engagement. Thus, selective framing is unlikely to narrow the governance gap. Regulatory guidance could preempt such tendencies in order to strengthen the effectiveness and integrity of BHR. In sum, an important task of the BHR discourse will thus be to understand companies' human rights frames and to address them in a way that ensures that human rights are integrated into companies' core business.

## 4 Systemic Dynamics: Othering

Chapter 2 outlined the history, developments, and major challenges for human rights vis-à-vis the business sector (and vice-versa). It also explored the approaches and successes that have shaped the BHR field and led to its current international recognition. Chapter 3 began by asserting that frames create social realities and analyzed how the relation between business and human rights is perceived and debated, thereby providing insights into how companies approach human rights.

This chapter investigates the structural setting that the current human rights system offers for integrating human rights into business. As shown in Chapter 2, the enforcement of human rights is historically bound to national sovereignty. As markets have opened up and companies have grown larger, new structures have emerged that the current human rights system does not sufficiently represent. While accountability mechanisms exist within companies and toward their stakeholders (see Section 2.2.2), it is uncontested that the benefits, and the adverse consequences, of corporate activity are unequally distributed. If the resulting effects amount to systematic discrimination or inequality, this raises concerns about ensuring human rights. What follows analyzes mechanisms that potentially aggravate such developments and assesses the systemic context within which human rights are integrated into business.

### 4.1 Relevance of Systemic Interdependencies

Globalization, along with its preceding and subsequent developments, presents significant challenges to ensuring human rights. These challenges demand close review and potential recalibration of existing structures and assumptions (see Section 2.3.2). In the context of BHR, the developments accompanying globalization spark uncertainty on different levels. “Fundamental institutional misalignment” exists between the expansion and impact of global markets on the one hand, and the lacking capacity of societies to manage the adverse consequences of those markets on the other (Human Rights Council, 2007, para. 3). This misalignment has created “the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation” (ibid.). Such substantial changes to the established system and governance have created a sphere of ambiguity and raise concerns about the system’s reliability. This in

turn leads to systemic uncertainty, which affects all involved parties. For instance, this uncertainty affects the victims of rights abuses, who struggle to attain justice and recognition, which would address the root causes (and not only the consequences) of the abuse; it affects human rights defenders, who assess the chances and best venue for lodging successful claims; it affects corporations, who intend to plan for and manage their due diligence requirements and the range of potential liabilities; and it affects political actors, who ought to uphold human rights standards — morally and legally.

These effects are also evident in socio-economic relations. Since the debate is often embedded in a dominant market logic, and often relates to the gap in enforcing existing approaches, this regulatory uncertainty extends directly to business-related human rights incidents — and beyond — by producing the climate (if not the rules) for trade. The following sections address the structural dimension and uncertainty in terms of the content of BHR-related provisions or directives.

### *Structural Uncertainty*

On a structural level, uncertainty can be traced back to more general developments and to companies' shifting position in relation to politics or society. The last decades have witnessed a shift in the power balance throughout the world (Flint & Taylor, 2007, p. 118; Marks & Clapham, 2005, p. 183). The expanding economic sphere means that companies have developed into powerful conglomerates, supply chains have become more complex, and meanwhile span very differently developed parts of the world, and human rights issues have come to the fore. Partly, though not solely, as a consequence of globalization and more permeable borders, markets have emerged as a defining force that strongly impact politics and society — both passively, through their sheer (omni-) presence, and actively, in the form of dominant organizations, public service providers, or influential lobbies (see Section 2.3.3). In this situation, companies face an unclear status, among others, regarding legal issues, their debated role as quasi-political actors, or the relationship between parent companies and their subsidiaries (e.g., Scherer et al., 2014, p. 147).

This situation warrants more closely examining the implications for the structural context in which human rights are integrated into business. The UN-based human rights system assumes that, by virtue of being human, every human being is inherently entitled to certain rights. Changing external circumstances raise the question about how best to

cope with them. They do not, however, challenge the eligibility criteria for human rights. For the business sector, this means that corporate activities ought not to affect human rights negatively.

### *Content-Wise Uncertainty*

Some degree of uncertainty surrounds the human rights obligations that can or should be attributed to companies. In part, this can be ascribed to the fact that regulation in the field is still evolving and is thus fragmented both in content and authority. Still, progress is made in terms of guidelines being issued for corporate responsibilities toward human rights, both in terms of impact assessments (both for companies and industries), and in terms of approaches for facilitating and monitoring the implementation of respective strategies. Some initiatives enjoy governmental support (e.g., OECD, NAPs, UK Modern Slavery Act). Commendably, the field of BHR has harnessed expertise from diverse organizations in order to cooperate and develop new concepts (e.g., in the achievements of business consortia or multi-stakeholder-initiatives or of NGOs as temporary consulting partners) (Reinisch, 2005, p. 64; Scheper, 2015, pp. 747-748). The networked approach is an asset for integrating human rights into companies, as is its connectedness to related individual concerns (e.g., fair trade or SDGs).

## **4.2 Challenges to Realizing Human Rights**

### **4.2.1 Interplay of Institutional, Business, and Societal Challenges**

While the field of BHR has come a long way, substantial challenges still need to be overcome. In addition to companies' internal understanding and operationalization of human rights (see Chapter 3), systemic dynamics are parameters that influence companies' human rights activities. Corporate engagement with human rights takes place within companies' operating environment. This encompasses associated companies in the supply chain, the respective industry and competitive environment, the institutional and regulatory environment, and societal developments.

The effectiveness of integrating human rights into business is evaluated in terms of realizing human rights. The challenges faced by BHR include its substantive uncertainty (e.g., the definition of rights, the meaning of complicity, or the extent of due diligence) and structural, organizational uncertainties (e.g., the role of business, the division of

human rights responsibilities, or the representation of transnational structures). Many of the challenges within BHR are amplified by globalization and by the complex integration of transnational supply chains. Held (2005, pp. 186-187) summarized globalization as “the widening, intensifying, speeding up, and growing impact of worldwide interconnectedness,” which extends to political, economic, and social activities. The UNGPs accept this basic condition and pursue a polycentric governance approach (Ruggie, 2013, p. 78). This governance approach involves public and private, corporate, and civil governance structures.

Similarly, the challenges for integrating human rights into business span the institutional, business, and societal spheres. Three major structural phenomena correspond to each of these spheres: the enforcement problem, decoupling effects, and inequality. Together, they provide evidence for the challenges involved in integrating human rights into business.

*Enforcement problem as institutional challenge.* Not only do these structural mechanisms influence the ability of states to regulate human rights (see Section 2.3.1). The interdependencies of a global market challenge the inalienable, universal status of egalitarian, fundamental rights, as a state-centric system is not (yet) equipped to enforce human rights in business. The governance gap and the lack of legal accountability challenge the enforceability of human rights in business. Enforcement represents a notorious *shortcoming of current BHR measures*.

*Decoupling as business challenge.* Decoupling effects are problematic as they leave a gap in respecting human rights that can severely affect potential victims. Consequently, victims not only suffer a lack of protection, but also face situations in which purported solutions prove unfeasible in practice (Bromley & Powell, 2012, pp. 494-496). Decoupling raises concerns about the prevailing *understanding and approach* toward BHR.

*Inequality as societal challenge.* Zeid Ra’ad Al Hussein, former UN High Commissioner for Human Rights, called inequalities and discrimination “the defining challenges of our time” and among the “greatest human rights challenges” (Zeid, 2015). Inequality can *restrict access to rights*.



The institutional, business, and societal spheres are interdependent. Hence, the corresponding challenges cannot be solved in isolation. Together, today's institutional, business, and societal challenges indicate that the existing structures are unable to resolve the underlying systemic shortcomings.

#### **4.2.2 Enforcement Problem in Business and Human Rights**

Cases of systematic or ongoing discrimination and inequality pose severe challenges and reveal the limitations of current structures in protecting human rights. Thus, while states are responsible for protecting human rights (as assumed in the UNGPs), they are territorially confined and restricted by transnational corporate structures that evade human rights law (Bilchitz, 2016, p. 217; De Schutter, 2005, p. 230; Human Rights Council, 2008).

The dependence on states in the current state-centric system is a critical restriction to protecting and enforcing human rights. Enforcing human rights is impeded where judicial competencies are not clearly assigned, and where companies are only involved to a minor degree in preventing human rights abuses. As Sections 2.2.3 and 2.3.3 have shown, there also is a mismatch between the international structure of TNCs and the national character of law enforcement (Kobrin, 2009, pp. 350-351; Scherer, Palazzo, & Baumann, 2006, p. 512). This indicates that governments may no longer be in a position to uphold and enforce human rights standards. Following the premise that the intention of the human rights agenda does not end where state influence ends, companies would thus need to extend and supplement human rights efforts where the state can no longer fulfill its supervising role for structural reasons. In the context of global business, human rights thus have become an aspired-to, "regulative ideal," whereas their realization cannot be guaranteed (DeGooyer, Hunt, Maxwell, & Moyn, 2018, p. 14).

To summarize, while corporate expansion across national boundaries in global markets does not per se destabilize the human rights system, the current system does not satisfactorily institutionalize human rights issues involving companies. To date, the enforcement of human rights is primarily considered a political responsibility, as the human rights system ultimately relies on states — and sometimes their cooperation — to protect human rights (Kobrin, 2009, p. 365; Methven O'Brien & Dhanarajan, 2016, p. 555). At present, companies escape these established governance structures in part due to their

unresolved legal status and the transnational character of their organization and operations. This contributes to a governance gap and causes an inherently structural boundary to the realization of rights. These developments lead to a situation where current structures cannot adequately protect human rights. The current shortcoming can take two forms, when the sources of human rights abuses cannot be resolved by the current system with the active and voluntary support of the involved companies. First, this is the case, for instance, where no legal obligation exists (or where none can be established) for a corporate entity (e.g., through transnational parent subsidiary company structures), or, second, when the burdens for victims to access remedy are so high that they become unaffordable (Palombo, 2019, p. 266). This may entail unjust disadvantages and preclude certain cases from being legally pursued.

### 4.2.3 Decoupling Within Organizations

The complexity of business has increased and supply chains are so interwoven that most companies face human rights issues at some stage (see Section 2.3.2). Several provisions are established by national law (most frequently concerning labor law), others are part of codes of ethics (e.g., non-discrimination clauses), and yet others may be reflected in individual corporate responsibility considerations (and may focus, e.g., on sustainability, partnering or supporting humanitarian development projects, or participation in fair trade arrangements). Whereas companies are engaging increasingly with human rights issues, implementation often lags behind. If companies' human rights reporting deviates too far from its practice, this indicates a *decoupling effect*. According to Behnam and MacLean (2011, p. 48), this effect describes the process “[w]hen organizations decouple structure from process,” so that “they take visible actions that signal conformity with external expectations, such as formally adopting a particular program or policy, while simultaneously shielding the organization’s day-to-day operations from the impact of those policies.”

Decoupling occurs predominantly in cases where there are “ambiguous expectations, low cost of adoption and high cost of substantive compliance, a lack of assurance structures, and weak enforcement mechanisms” (Behnam & MacLean, 2011, p. 50). It seeks increased legitimacy due to commitment to a standard, while limiting conflicts over implementation and minimizing investment of resources (J. W. Meyer & Rowan, 1977, p. 357). As such, it remains symbolic and fails to fulfill policy requirements (Behnam &

MacLean, 2011, p. 48). Such effects have been found repeatedly in the context of corporate responsibility initiatives. The specificity and requirements of a standard, as well as the industry context, play a moderating role and influence the likelihood of decoupling, while clear expectations within standards, pressure from a company's operating environment, and effective monitoring all support actual compliance with the standard (Behnam & MacLean, 2011, pp. 50-51; Pope & Wæraas, 2016, p. 181). Importantly, there is also evidence that the framing of an issue affects the likelihood of decoupling (Fiss & Zajac, 2006, p. 1183). A particular form of decoupling is means-end decoupling. For instance, even if human rights concerns are taken seriously, and even if the respective steps are implemented in corporate policies and culture, these steps (or means) may not have the desired effect and may instead have to unwanted and unforeseen side-effects (Bromley & Powell, 2012, p. 484).

In sum, even when companies publicly commit to adhering to human rights standards, this does not ensure prevention of human rights abuses. Uncertainty about the formal regulatory demands on companies, and unclarities in the framing of human rights, reiterate the risk of decoupling. As companies fail to translate policies into concrete behavioral changes, the respective standards fail to permeate the organization and do not result in the intended realization of the standard. Decoupling may thus marginalize expectations, erode efforts to establish corporate human rights engagement, and instead prolong the conditions for human rights abuses or even mask the need to act (MacLean, 2003, p. 1).

#### **4.2.4 Inequality as a Challenge to Human Rights**

In the discussion about challenges to human rights, inequality remains a major issue (see, e.g., Zeid, 2015). Regarding the effect of inequality on human rights, the source and form of inequality are distinguished. Three particular distinctions are horizontal, vertical, and global inequality (Zeid, 2015). *Horizontal inequality* refers to differences between groups and often appears as discrimination based on social, ethnic, or linguistic characteristics (such as gender, race, caste, religion, or sexuality) (Balakrishnan & Heintz, 2015). These differences are “culturally defined or socially constructed” (ibid.) and have evolved historically (MacNaughton, 2017, p. 1051). Human rights law acknowledges these vulnerable groups and pays particular attention to their protection in dedicated conventions. *Vertical inequality* addresses disparities in distribution within

groups (Zeid, 2015). These differences pertain to economic inequalities (e.g., wealth or income) and social inequalities (e.g., health, education, housing, or political power) (Alston, 2015b, para. 6-7). Finally, *global inequality* compares the estimated standard of living and power between countries. Country-level inequality is considered a human rights issue as it points to the “imbalance of power replicated through inter-governmental organizations,” which “may have substantial impact on the realization of human rights” (MacNaughton, 2017, p. 1051).

Human rights are strongly related to differential three forms of inequality. The language of human rights helps to alleviate the adverse consequences of inequality by recognizing interdependency and by offering guidance (Balakrishnan, Heintz, & Elson, 2016, pp. 47-48). Extreme inequality has even been termed as the “antithesis of human rights” (Alston, 2015a). It is a fundamental, yet often overlooked “consequence as well as a cause of human rights deprivations” (Saiz & Oré Aguilar, 2015, see also Haupt, 2015). Moreover, horizontal and vertical inequality often overlap (Kinley, 2018, p. 23; United Nations Development Programme, 2013). In recent years, economic, social, and cultural rights have increasingly surfaced in debates. Well-being and human rights correlate such that excessive inequality jeopardizes achieved human rights and autonomy (Held & McGrew, 2002, in Marks & Clapham, 2005, p. 183). In his function as Special Rapporteur on extreme poverty and human rights, Alston has highlighted the relevance of the foundation of human rights by emphasizing that “there are limits to the degree of inequality that can be reconciled with notions of equality, dignity and commitments to human rights for everyone” (Alston, 2015a).

Inequality has been further distinguished. For the purposes of analysis, the *inequality of outcomes* and the *inequality of opportunity* are considered (Hunt, 2018, p. 78; United Nations Development Programme, 2013). These two forms of inequality have been found to be interdependent and have not been strictly distinguished (ibid.). Another distinction is that between *relative and absolute inequality* (James, 2012, p. 5). Whereas absolute levels of inequality have been seen as one criterion for the non-fulfillment of rights, relative levels of inequality also tend to entail and aggravate the challenge to human rights (e.g., Preiss, 2014, p. 70). While absolute inequalities of outcomes may appear more urgent, for instance, in debates on minimum subsistence levels or autonomously affording a life in dignity, relative inequalities may also promote human rights concerns, for instance, when depriving the poor of a political voice and increasing the

political power of the rich (Kinley, 2009, pp. 26-28). This disparity can also be observed in the global context, where relative inequality between states is causing significant challenges (James, 2012, pp. 10-11).

Regarding the integration of human rights into business, inequality is of twofold relevance. On the one hand, inequality may be a direct human rights concern, for instance, when concerning differential or discriminatory treatment. Evidence suggests that companies can aggravate human rights concerns through increasing inequality (Giuliani, 2019, p. 221; Phillips, 2017, p. 431). On the other hand, inequality has also been found to increase the likelihood of human rights abuses, including severe violations such as modern slavery (Gold, Trautrim, & Trodd, 2015, p. 486; Guay, 2008, pp. 72-73).

The three discussed challenges — enforcement gap, decoupling, and inequality — show that despite the efforts by BHR actors, the current structures leave room for systematic human rights violations.

### **4.3 The “Right to Have Rights” as a Foundation of Human Rights**

#### *The Universality Claim of Human Rights*

In theory, human rights are intended as fundamental rights, or natural rights, which are innate to the individual human being and irrevocable and thus independent of affirmation by any community (Arendt, 2017 [1951], pp. 297-298). At the same time, human rights have been attested an ambiguous relation toward plurality and individuality. Discussing codified human rights (e.g., UN system or national constitutions), Maxwell (2018, p. 55) notes that “in their abstract and artificial homogeneity, [human rights] stand in tension with human difference and plurality”. This indicates a significant gap between the intention and institutionalization of rights.

One crucial practical question about human rights concerns the *executive reality of rights enforcement*. This challenges a supra-national concept such as human rights that relies on states for its enforcement. The inherent strength of human rights is their aspiration to subsume the diversity of opinions and practices under one concept. However, given the challenges in implementing this aspiration and insufficient enforceability, this also presents a weakness of human rights. On the one hand, the idea of the universalism of human rights is acknowledged as a precondition for making judgments transferrable to a global context and for communicating the responsibilities that are attached to rights

(Bartley, 2018, p. 47; Maxwell, 2018, pp. 57-58; Reinisch, 2005, p. 77). On the other hand, rights relate to the individual and thus need to be considered in their specific context (see Section 2.1.4). Consequently, the unique claim of human rights has unconditional — and universal — validity, both despite and because of human diversity.

Similarly, companies may devise their human rights policies in light of their operating environment and translate human rights into practice. However, the adaptability of policies must neither impair the fundamental core of human rights nor render it redundant (Cragg, 2009, pp. 288-289). Considering the above challenges (enforcement gap, decoupling, inequality), taken together these aspects lead to a basic dilemma, in that the universal claim of human rights contrasts (or even conflicts) with the ongoing structural challenges impeding its realization.

### *The “Right to Have Rights” as a Condition for Rights Realization*

Given the pervasive challenges to accessing human rights, the concept of the “right to have rights” once again becomes relevant. The term is attributed to and was originally coined by the political philosopher Hannah Arendt. In her work, the “right to have rights” is not proposed as a solution to the enforcement gap, but as a claim and as an appeal to the *foundations of the human rights concept* (Arendt, 2017 [1951], pp. 387-388). As it is itself conditional on citizenship, Arendt’s analysis contradicts the possibility of a full and fair guarantee of (natural) human rights.

Two principal readings of the “right to have rights” have been advanced in the literature (DeGooyer, 2018, pp. 24-25). First, the term is understood as a *normative claim* that emphasizes the first “right” in the expression. This reading, most prominently represented by Benhabib (2014), invokes the moral content of the phrase rather than the particular legal articulation of specific rights. It designates the ideal condition according to which all humans ought to have rights simply by virtue of being human (Benhabib, 2014). Considering the background against which Arendt first mentioned the “right to have rights,” the wording conveys a sense of urgency for those whose rights are being curtailed, or even beyond the scope of law, by insisting on the moral claim to “qualify” for rights.

Second, the “right to have rights” is read as a *performative right*. This interpretation focuses on the second part of the phrase and on actual access to and enjoyment of rights.

It is invoked in order to demand the actualization of existing rights and to contest perceivably unjust practices. This understanding, as evident in Butler (2015, p. 39), sees the “right to have rights” as a linguistic means for affirming validity through utterance. In other words, the “right to have rights” is a call for acknowledgment as a person and for recognition as a rights-holder, while appealing to create an enabling environment and to institutionalize political engagement for human rights.

A significant weakness of “the right to have rights” is the undefined addressee. Failing an authority that recognizes that right, the claim loses its effectiveness. This dilemma has been referred to as the “recursive logic” or “self-referential bind” of the claim (Michelman, 1996, p. 206). Arendt, to whom the “right to have rights” is credited, arrived at the concept by analyzing the impossibility to think human rights without considering the space in which they are articulated (Arendt, 2009 [1949]). More specifically, she laments the fact that human rights, which seek to enable partaking in legally assured citizenship rights, depend on precisely this citizenship.

#### *The “Right to Have Rights” and BHR*

Today, the UN system has solidified and has produced diverse engagements with substantial resources and political authority. Laws and structures are in place that define the scope of rights, that assign duties and responsibilities, that present a forum where complaints can be heard and discussed, and that have, at least in theory, a set of legal and political or social measures at their disposal to advocate adherence to human rights. This, however, remains partially dependent on the political will and cooperation of UN member states, which means human rights cannot be guaranteed absolutely (Cassese, 2005, p. 5; Ruggie, 2013, pp. 62-64).

Arendt’s skepticism in this regard rests on the assumption that if human rights lack the support of a functional enforcement system, then their claim as an individual’s possession is groundless and finds no addressee. The essential requirement, of belonging to a political community able to guarantee and protect such rights, renders arbitrary the status of human rights as natural possession. Instead, these rights require ongoing affirmation through action. Commenting on Arendt’s view, Maxwell (2018, pp. 53-54) characterizes human rights as collective, ambivalent, fragile, and limited achievements.

With enforcement being conditional, the concept of a “*right to have rights*” precedes any other rights that are devised by a designated entity (Arendt, 2009 [1949], p. 765).

This powerful statement has remained viable not least by offering the possibility to bridge theory and practice. Where the challenges to human rights enforcement appear insurmountable, the axiom of a “right to have rights” articulates the fundamental claim of human rights. The “right to have rights” pointedly summarizes the essence of what human rights stand for, both normatively and legally.

## **4.4 Analyzing the Risk for Othering in Business and Human Rights**

### **4.4.1 Exclusion from Human Rights Through Othering**

The number, scope, and persistence of human rights incidents pertaining to the underlying enforcement problems, decoupling, and growing inequality, suggest far-reaching systemic challenges in the current human rights system. Considering the systemic character of these challenges, the question arises how far these challenges are the product of a disregard of the “right to have rights” in the current structures. If this is the case, the aforementioned tensions in an incoherent regulatory context suggest that fixes in the current structures (e.g., extending legal accountability for human rights to TNCs) will only alleviate parts of the problem without addressing systemic root causes.

These developments create the significant risk of establishing a framework where the systematic disadvantage of some actors becomes either justifiable or even willful. Considering that these developments arise from increasing global exchange and expanding interdependencies, the ties between the economic and the socio-political spheres increase, as does the confrontation with difference or “the other.” Together, a systemic violation of the rights of others may — in its most severe form — constitute “othering.” This practice fosters the impression of difference and disconnect towards another group and thus involves its marginalization and potentially even denying its fundamental rights (S. Q. Jensen, 2011, p. 65; Powell & Menendian, 2016, pp. 18,30). This concerns, for instance, cases where the comparative disadvantage of some actors benefits others, as is conceivable in certain transnational supply chain constellations (see Section 2.3.2). As such tendencies may eventually result in condoning the fact that not all human rights can be realistically attained, it is necessary to be mindful of such tendencies occurring in business operations. In light of the difficulties in finding consensus on both extensive and effective BHR enforcement, addressing such tendencies becomes a question of harnessing the incentives and possibilities of the diverse parties that are involved in BHR.



### *Definition of Othering*

A severe form of restriction of rights can follow from “othering”. Although othering is not strictly speaking the absence of rights, the implications for those concerned are similar. In the context of human rights, othering may lead to being *outside the scope of rights* (Hunt, 2018, p. 89). Thus, particularly exclusionary othering is relevant in this context (Canales, 2000, p. 16; Haupt, 2015, p. 632). In contrast to inclusionary othering, which does not include an evaluative component, exclusionary othering is defined as “acts of generating deep disconnects between cultural groups versus bringing them together” that also affect relative status and power (Haupt, 2015, p. 632). It refers to a process of marginalization that pushes the othered outside social norms (Mountz, 2009, p. 328; Powell & Menendian, 2016, pp. 17-18; Xu, 2013, p. 382). It artificially creates distance, which attributes to the othered an inherent quality that removes them from society. Not only are their rights denied, but the access of the othered to their rights is prevented, both practically and normatively (Powell & Menendian, 2016, p. 25; Udah, 2019, p. 3).

As the term indicates, othering is a process, an activity of division that creates severe forms of discrimination, exclusion, and inequality (Çelik, Bilali, & Iqbal, 2017, p. 218; Powell & Menendian, 2016, pp. 17-18). Othering, as the term connotes, creates distinct categories: “us” versus “them,” “the regular” versus “the other,” “inside” versus “outside” (Fitzsimmons, 2014, p. 384; Udah & Singh, 2019, p. 846; Vinckenburg, 2014, p. 382). The result is incremental alienation (D. M. Carter, 2017, p. 24). Differences are emphasized and characterized as insurmountable. This suggests a lack of understanding toward the othered group and serves to justify differential treatment (Brons, 2015, p. 84; Stabile, 2016, p. 382; Tsouroufli, Özbilgin, & Smith, 2011, p. 501). Thereby, consciousness of what constitutes a wrongful act dwindles, moral concerns are disregarded with greater ease, and the claim for equal rights fades. This process may escalate up to a point where the stigmatization reaches a level that makes the actual differences obsolete (Link & Phelan, 2001, p. 367; Powell & Menendian, 2016, p. 24; Stabile, 2016, pp. 395-396; Udah, 2019, p. 5).

As a verb, *othering* means “the process that makes the other” and is negatively connoted with a divisive overtone (Mountz, 2009, p. 328). Othering derives from the concept of the “other” (Brons, 2015, p. 69). As a noun, “otherness” is not per se a degrading feature.

In the context of human rights, for instance, particularly vulnerable groups are distinguished. At the same time, the validity of human rights encompasses the other despite their differences, thus acknowledging that otherness does not contradict equal rights (see Section 2.1.2). In contrast, othering goes beyond mere otherness and difference in the sense that it involves a process of exclusion. It furthers these concepts by creating — or at least submitting to — two categories: “in-group” and “out-group” (Brons, 2015, p. 72; Powell & Menendian, 2016, p. 23).

The concept of the “other” originates in philosophical theories of identity-building conceptualizations of the self (Brons, 2015, p. 69; Hegel, 1986 [1807]; S. Q. Jensen, 2011, p. 64; Lévinas, 2008 [1987]). In this regard, othering is closely related to the political dimension and to the psychological dimension (Brons, 2015, pp. 69-70; Çelik et al., 2017, p. 218; S. Q. Jensen, 2011, p. 64). Othering takes place on both an individual and group (or societal) level (Çelik et al., 2017, p. 218; Powell & Menendian, 2016, p. 17; Udash, 2019, pp. 4-5). The other appears as a constitutive opposite to the construction of the self, and as a step in devising social norms (D. M. Carter, 2017, pp. 22-23; Stabile, 2016, p. 384). The other, in this function, promotes the definition of the self, demands a reflective component, and expands the sphere of (potential) validity of norms. In this sense, the abstract “other” can be considered as the projection of “difference” within society. Throughout history, otherness has been ascribed to groups based on gender, culture, religion, and ethnicity (Powell & Menendian, 2016, p. 17; Stabile, 2016, p. 384). Such attributions correspond to the groups identified by the UN as particularly susceptible to discrimination.

### *Othering in the Context of Human Rights*

The concept of otherness — understood as a descriptive observation without inherent evaluation — features in the discourse on realizing human rights. For instance, attempts to regionally adapt human rights standards aim to respond to cultural differences or otherness. The ambition of UN conventions to protect particularly vulnerable groups acknowledges their otherness in specific respects (see Section 2.1.3). Thus, the presence of otherness does not constitute a problem per se. Rather, once acknowledging otherness is combined with value judgments and ultimately with the denial of rights, this may lead to othering and thus pose a significant threat to realizing human rights.

Human rights offenses resulting from othering differ from human rights violations. In contrast to human rights violations, the phenomenon of othering is a particular offense against the *aspiration of human rights*. It involves systematically marginalizing particular groups of society, with a view to preventing them from accessing their rights and to effectively depriving them of their status as rights-holders (Stabile, 2016, p. 405). Examples include the othering of Jews during the Nazi period, the ongoing marginalization of the Sinti and Roma, or cases of genocide. More recently, the term has also been applied to describe the deprecatory response to migrants and refugees (Mountz, 2009, p. 332). This deprivation of status as rights-holders prompted Arendt to mention a “right to have rights” as the overriding, single most significant human right, whose absence renders all other rights meaningless (Arendt, 2009 [1949], p. 759).

Thus, in the situation of othering, realizing human rights is not possible despite the right to have those rights. This is particularly critical if enforcing human rights is not secured even by those institutions mandated to protect them. As far as human rights are part of national law, they are actionable, meaning that victims may file a claim if their rights have been violated (see Section 2.1.3). However, when structures are ineffective, they do not offer even minimum protection, making it impossible to sufficiently remedy rights violations.

#### *Constituting Elements of Othering*

The following section discusses the distinct elements that together constitute othering in the context of human rights. While the individual criteria of othering do not describe human rights violations per se, if their combined application deprives people of their rights, this constitutes othering. These elements comprise five overall characteristics of othering, four mechanisms that fuel othering, and four consequences that manifest othering (see Table 4-1).

Table 4-1 Overview of the constituting elements of othering

<b>Characteristics</b>	<b>Mechanisms</b>	<b>Consequences</b>
Systematic character	Protective measures	Moral acceptance
Non-comparability	Administrative obstacles	Manifestation
Permanence	Prejudices	Discredit
One-sidedness	Language	Dehumanization
Systemic character		

Othering has several distinct *characteristics*. First, othering is *systematic*. It involves comprehensively denying the equal worth of victims (S. Q. Jensen, 2011, p. 65). This takes shape in a stepwise refusal of access to rights (*ibid.*). Second, by marginalizing victims and pushing them beyond social norms, othering emphasizes the *non-comparability* of victims vis-à-vis the rest of society, and thereby contests their status of belonging (Ward, 1997, pp. 89-90). Third, it involves *permanence* (DeGooyer, 2018, p. 42; Tiessen, 2011, pp. 580-581). Compared to temporary incidents of human rights violations, othering has a more enduring effect (*ibid.*). Fourth, othering is *one-sided* in that a dominant group singles out a group of “others” based on criteria that do not necessarily reflect the attitude or identification of the othered (Essers & Tedmanson, 2014, p. 354; S. Q. Jensen, 2011, p. 65; Uda, 2019, p. 3; Xu, 2013, pp. 382-383). Finally, othering is a *systemic* phenomenon. A partaking of institutions, authorities, and civil society builds up the extent of rights-exclusion, including for instance the media, the law, and government officials (D. M. Carter, 2017, pp. 22-23; S. Q. Jensen, 2011, p. 63; Powell & Menendian, 2016, p. 25; Stabile, 2016, p. 392).

Different *mechanisms* feed into the process of othering. Two hard factors provide scope for differential in-group and out-group treatment. First, othering adopts and is amplified by a *protective* pretense that derives from the fear of an invasive other (D. M. Carter, 2017, pp. 22-23; Khrebtan-Hörhager, 2019, p. 126; Taylor, 2018, p. 118). Second, *administrative* obstacles delay or impede access to rights-related formalities (Hunt, 2018, p. 93; Powell & Menendian, 2016, pp. 25-26; Stabile, 2016, p. 392). The involvement of official institutions that are in a critical position to create or remove such obstacles lends credibility to the reasons underlying othering. In addition, two soft factors undermine the social standing of those who are othered. Third, and most particularly, othering draws on prevalent *prejudices* and accordingly establishes resentment, which may manifest in symbols or practices that describe a group (Çelik et al., 2017, p. 218; Stabile, 2016, p. 383). Moreover, *language*, as a supportive means of othering, strongly conveys a framed message and narrows the range of opinions (Amoroso, Loyd, & Hoobler, 2010, p. 796; Gergen, 2001, p. 186; S. Q. Jensen, 2011, p. 65).

These various characteristics and mechanisms amount to several key *consequences* of othering, which surpass those of other forms of discrimination and isolation. First, particularly through its permanent and systematic nature, othering can establish a degree of *moral acceptance* in society, leading to support for and maintenance of othering (S. Q.

Jensen, 2011, p. 65; Stabile, 2016, p. 408). Second, this process *manifests* the victims' barely reversible status (Devine, Plant, & Harrison, 1999, p. 1212; Essers & Tedmanson, 2014, pp. 362-363; Tiessen, 2011, pp. 580-581). This results not least from the different othering mechanisms, whose soft factors (in terms of their argumentative and affective elements) and hard factors (in terms of the impact of institutions and public) aggravate the situation for victims until discrimination amounts to othering. Third, othering leads to *discrediting* victims (Hunt, 2018, p. 93; S. Q. Jensen, 2011, p. 65). Similar to the state of the rightless, this deprives the othered of a voice or, in Arendt's words, of "a place in the world which makes opinions significant and actions effective" (Arendt, 2017 [1951], pp. 387-388). Finally, *dehumanization* — albeit mostly implicit and subliminal — is the gravest consequence of eroding equality (Park, 2013, p. 160; Powell & Menendian, 2016, p. 30).

### *Process of Othering*

The process of foregrounding difference, which may lead to othering, occurs incrementally (D. M. Carter, 2017, p. 24; Guttormsen, 2018, p. 316; S. Q. Jensen, 2011, p. 65):

*Tolerate.* The permanence of othering suggests that it is not a sudden, transient phenomenon but instead feeds on existing mindsets. Othering, as a socio-political and institutional phenomenon, is contingent upon both established mechanisms and the silent or explicit compliance of civil society (Tiessen, 2011, pp. 580-581; Udah & Singh, 2019, p. 847). Initially, the differences foregrounded by othering might be considered minor, just as the reasons for differentiation appear plausible. The othering process starts with a general *tolerance* for such differences and is accompanied by the differential treatment of certain groups.

*Accept.* In the next stage, the differentiation into in-groups and out-groups is furthered. Passively or actively, a sense of superiority and indifference takes hold and lowers discrimination thresholds. Othering involves underlying resentment entering mainstream discourse (Çelik et al., 2017, p. 218; Powell & Menendian, 2016, pp. 21, 24). A sense of tolerance and acceptance must be shared among broader civil society for a deep disconnect to take hold (D. M. Carter, 2017, pp. 22-23). Initial tolerance for differences thus morphs into their *acceptance*. The result is a visible decline in social status (Arendt, 2017 [1951], p. 351).

*Establish.* Finally, othering *establishes* structures that sustain this process. Setting up structures that constitute othering in the sense of rightlessness means embedding them in the system of institutions, authorities, and civil society. While traditionally, the defining entities are political, the entities classifying in-groups and out-groups may belong to different institutions (D. M. Carter, 2017, pp. 22-23; Stabile, 2016, pp. 381-382). While establishing structures that perform othering suggests a willful agenda, such escalation may progress slowly and incrementally and is not necessarily perceived as such. Such incremental progression is particularly problematic once a critical level of diffusion or power is attained and self-reinforcing processes set in.

#### **4.4.2 Possible Scenario of Othering in Business and Human Rights**

As past experience shows, despite growing awareness of and genuine engagement for BHR, human rights abuses by business persist. Enforcement problems, decoupling, and inequality remain challenges to the existing human rights system and provide evidence for structural human rights violations coupled with insufficient governance mechanisms, as for example in the case of systematic labor exploitation of the disadvantaged (Hampton, 2019, p. 240). This study investigates whether the processes leading to such severe human rights abuses amount to othering. Further, it examines in how far the current human rights system provides spaces for othering processes to occur.

##### *Risk for Parallels of Othering in Business and Human Rights*

The presence of three indications provides initial evidence for the existence of conditions that may qualify as cases of othering in the context of human rights. First, a situation in which a number of rights are affected, and which may be considered to significantly curtail realizing human rights, indicates potential othering (Çelik et al., 2017, p. 218; S. Q. Jensen, 2011, p. 65). Second, the relevant parties, implicated directly or indirectly, remain largely silent or passive, as othering may occur when these parties are either unwilling or unable to assume responsibility for the affected group (Stabile, 2016, pp. 397-398). Third, othering refers to a systematic process in which inherent structures and interests sustain the othering process. These structures and interests have severe consequences for the othered, while vice versa their absence would attenuate the situation (Çelik et al., 2017, p. 218; Khrebtan-Hörhager, 2019, p. 128). These three indications suggest, at least to begin with, that some actors' rightlessness might be tolerated,

accepted, or even established. The discussion below shows that such initial evidence can be found in the context of business and human rights.

*Effect on a number of rights.* Following the observation that the challenges to BHR are partly found in broader systemic structures, the question of rights realization exceeds individual actors. The nature of global business relations requires the coordinated, collective, and complementary efforts of multiple actors in order to realize and oversee corporate respect for human rights (see Section 2.3.4). The anonymity and interconnected nature of global market structures enable marginalizing certain groups of people and complicate the assignment of accountability. Moreover, the assertiveness of business-related human rights initiatives remains restricted by a lack of rigorous consequences in case of non-compliance. If regulation within the current system fails to protect the most vulnerable, the consequences for victims are often manifold. Those whose rights are violated are often vulnerable in more than one regard, and human rights impacts may exceed those violations attributable to direct adverse business impact or corporate complicity. Vertical and horizontal inequality correlate in a way that discrimination amplifies the marginalization of vulnerable groups (MacNaughton, 2017, p. 1055). Moreover, minimal or weak remedy mechanisms impose further obstacles on rights-holders. Limited access, unevenly distributed resources to afford legal proceedings, and unclear jurisdictional competencies prove burdens that narrow access to human rights enforcement (e.g., Bernaz, 2017, p. 290). Finally, settlements are often insufficient to fully remedy victims. Not being heard is a challenge to receiving proper acknowledgement of rights abuses by corporations (ibid.).

*Silent or passive majority.* Many business-related human rights issues do not allow a clear causal link that could ensure prosecution beyond individual offenses, while under certain conditions systemic structures diffuse responsibility within supply chains (English, 2019, pp. 93-94; Young, 2007, p. 166). As shown by the results of the meta-synthesis in Chapter 3, corporations tend to separate human rights considerations from their core business, thus avoiding connecting their operations with an impact on human rights. Even if companies aim to assume responsibility and implement measures, the presence of decoupling effects may strongly reduce their effectiveness. In global trade, and in the context of TNCs, one particular problem is the distance between the location of human rights abuses and those parties that could or even ought to take responsibility (Young, 2007, p. 164). This distance may be regarded as physical or structural distance

— geographically through the length and fragmentation of supply chains, and structurally through the accountability that stops at state borders and stand-alone subsidiaries or subcontractors (Burmester, Michailova, & Stringer, 2019, p. 140; Crane, 2013, p. 56). Also, psychological distance comes into play, which may contribute to a sense of arrangement in the face of supposedly unsolvable human rights issues (ibid.). Such distance may create a misleading sense of impersonality, which — if uncontested — may lay the ground for withdrawing into indifference or ignorance (Brons, 2015, p. 72).

*Sustaining structures and interests.* Some sectors and regions are notorious for human rights problems, often in terms of poor working conditions or regarding relations with authoritarian governments, or third-party contractors. This cannot be traced solely to a lack of legal options and limited political or corporate efforts. Rather, economic structures facilitate a neglect of human rights impacts. Such tendencies toward consolidation and monopolization may exert pressure on suppliers (see Section 2.3.2). Similarly, other reasons slowing down progress in human rights include trade mechanisms and strategic priorities, for instance of companies in the supply chain that are either unwilling to compromise on their margins or that are subject to price competition at the selling point (Phillips, 2017, p. 436). As a result, these dynamics may create conflicts with financing fair living wages in production countries (English, 2019, p. 94). Global inequality implies different cost structures. Competitive advantages may be gained in a global market from consolidating or outsourcing operational activities, especially to areas with lower cost structures. In this sense, in a globalized world, inequality may be a major contributor to economic activity, yet involves an increased risk of human rights abuses (Crane, 2013, p. 55; Marks & Clapham, 2005, p. 188; Quirk, 2006, p. 598). If economic actors benefit from inequality, this may in the worst case lead to deteriorating human rights conditions (Marks & Clapham, 2005, p. 187). Such structures prevent internalizing negative externalities, including social costs (Demuijnck & Fasterling, 2016, p. 678). Thus, inequality, as a sustaining factor of corporate human rights abuses, points to a systemic problem.

The three indicators point to the possibility for othering processes to emerge. In particular, the indicators show that the preconditions for legitimizing human rights violations in the supply chain are essentially in place. Some voices within BHR have called on politicians to regulate, for companies to step in, and for investors and consumers to engage (see Section 2.3.4). Yet, if current measures fail to effectively protect human rights



in the business context, there is a risk that the situation will be tolerated, accepted, and even established. Above all, this refers to situations of exploitation that equal the absence of access to rights. From a human rights perspective, this eventually would mean the existence of spaces in which othering-like conditions can prevail. Whether othering processes take hold and escalate depends on whether these spaces exist in the current human rights system — without effective governance.

#### *Parallels to Othering in Modern Slavery*

The effectiveness of the efforts to integrate human rights into business must be evaluated in terms of their impact on human rights. As shown, several structural phenomena impede realizing human rights in business: enforcement problems, decoupling effects, and persisting inequality. The persistence of these structural human rights challenges raises the question whether they amount to othering. This study examines if processes exist that reiterate conditions that prevent effectively integrating human rights into business and that justify speaking of “othering.”

One of the most severe business and human rights abuses is modern slavery (see, e.g., Crane, 2013, p. 49). Modern slavery encompasses “forced labour, debt bondage, forced marriage, slavery and slavery-like practices, and human trafficking [and it] refers to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power” (International Labour Organization & Walk Free Foundation, 2017, p. 16). Slavery is defined as “constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person” (Bellagio-Harvard Guidelines, 2012, p. 376). Although it has been recognized and addressed in regulatory measures, modern slavery prevails globally (Crane, 2013, p. 49). The fact that such a severe and uncontested BHR issue persists, despite ranking high on the global agenda, merits analyzing whether underlying processes, such as othering, contribute to and uphold a state in which the “right to have rights” itself is challenged.

Vulnerable groups (e.g., migrants, refugees, stateless people, and minorities) are particularly at risk of falling prey to modern slavery (Burmester et al., 2019, pp. 140, 152; Crane, 2013, p. 57; Quirk, 2006, p. 598). At the same time, modern slavery makes its victims highly vulnerable. As Taylor (2018, p. 116) notes:

[...] processes of appropriation, privatization, and financialization entail a massive loss of hard-won common rights — the right to a pension, to welfare, to health care, to education, to a clean environment, to labor and consumer protections, to join a union — in the name of neoliberal economic orthodoxy. Essential democratic values, such as equality and due process, are threatened by market-driven exclusions. The people, to put it more dramatically, are becoming less rights-holding citizens than imperial subjects, indebted and generally ignored [...].

Thus, caveats in economic developments in general may leave a group of people in particularly precarious circumstances. Failing realistic alternatives, this plight may lead to a situation comparable to “rightlessness.”

Due to its far-reaching scope and its relevance in BHR, what follows probes modern slavery to ascertain whether business practices contribute to a process of othering by which a group of people is restricted in its possibility to realize its basic rights and is pushed to the margins of society. The analysis focuses on cases of modern slavery that are directly related to business. Specifically, modern slavery is considered in the upstream supply chain of manufacturers. Instances of modern slavery that do not exhibit such a direct relation to companies (e.g., human trafficking, forced labor in a private context) are not considered. The analysis verifies the presence of elements of othering in the global economy, which — if present — would need to be acknowledged in comprehensive studies on the potentially discriminating or exclusionary impact of business.

The aforementioned indicators of othering are present — to varying degrees — in the case of modern slavery in business. First, workers employed under conditions constituting modern slavery face a number of rights abuses, from particular abuses through a more comprehensive deprivation of their rights or, in the worst case, even to their rights entitlement being denied (Bales, 1999, p. 32; Christ, Rao, & Burritt, 2019, p. 838; Gold et al., 2015, p. 487; Kara, 2017, p. 31). With some of their rights curtailed, the victims also suffer disadvantages in other areas of life, leaving them unable to attain allegedly non-work related rights, such as earning a livelihood or receiving an education. Second, modern slavery concerns governments, companies, and also society as a whole (e.g., as consumers), all of whom enable its persistence (LeBaron & Phillips, 2019, p. 3). Some actors that want to assume responsibility sometimes cannot (e.g., states due to their restriction to national borders), while others are either too remote or even profit from modern slavery (e.g., companies with highly complex supply chains) (Burmester et al., 2019,

p. 140; Gold et al., 2015, p. 486). The distance between these actors and the victims of modern slavery produces a situation through which modern slavery is sustained and indirectly tolerated (Burmester et al., 2019, pp. 140-141; Crane, 2013, pp. 61-62). Finally, in some instances, business-related reasons prevent some people from realizing their rights (e.g., the availability of cost savings due to labor exploitation) (Crane, 2013, pp. 54, 64; Guay, 2008, pp. 72-73). Modern slavery is a widespread phenomenon, firmly integrated into many global trade structures and involving dynamics that sustain these structures (Kara, 2017, p. 32; Oxford Brookes University, 2018).

Taken together, the existing legal, political, and economic systems are set up such that they cannot restrict modern slavery (e.g., courts), cannot effectively change it (e.g., foreign governments), or either benefit from or depend on it (e.g., companies with regard to margins and customers with regard to low prices) (Bales, 1999, pp. 9-10; Christ et al., 2019, pp. 840-841; Crane, 2013, p. 54; Hampton, 2019, pp. 262-263). This configuration upholds a system that may create room for othering-like processes that require further analysis. What follows examines to what extent modern slavery in business exhibits the elements of othering.

*Characteristics of Othering in Modern Slavery.* Most of the characteristics developed above to identify othering practices are evident in the context of modern slavery. As the terminology implies, working conditions under modern slavery amount to the severe and *systematic* infringement of rights. Merely limited ways of escaping modern slavery exist while efforts to achieve human rights are systematically suppressed (Crane, 2013, p. 54; LeBaron & Phillips, 2019, p. 6). The causes for becoming a victim of modern slavery differ. Yet, unlike typical forms of othering, a coherent criterion for justifying “otherness” rarely exists in the first place (Bales, 1999, p. 10). Often, those affected by modern slavery are foreign workers, poor, or otherwise exposed or vulnerable (Crane, 2013, p. 55; Gold et al., 2015, p. 487). For instance, where supervisory roles are fulfilled exclusively by members of a distinct group, this facilitates treating victims as *non-comparable*, thus giving rise to differential standards of treatment. Moreover, modern slavery meets the *permanence* characteristic of othering. Work relations that fall under modern slavery typically endure over a longer period, and workers frequently lack possibilities to change their situation on their own (Gold et al., 2015, p. 487). This may be due to the nature of forced labor itself, or result from system-inherent effects when entire industries are affected and forced labor becomes difficult to detect (Crane, 2013, p. 63;

Gold et al., 2015, p. 487). An external impetus for change may often not be expected as neither party is sufficiently equipped (and independent) to relieve the situation. Another element of othering is its *one-sidedness* in the sense that a particular group is singled out for exclusion. This, however, does not fully apply to modern slavery. While companies might benefit in some regards from modern slavery and are one major driver of upholding such structures, usually they do not deliberately and consciously consent to conditions of modern slavery in supply chains (Bales, 1999, p. 10; Gold et al., 2015, p. 486). The restriction of workers' rights can be considered *systemic*. Modern slavery is not only associated with specific industries or geographic regions. Rather, it is symptomatic of an economic system that relies on long international supply chains, spanning many (often remote) intermediaries (English, 2019, pp. 93-94; Kara, 2017, p. 35). It is reinforced by a legal system that cannot yet confine such conduct, and by a political system lacking sufficient power (or interest) to prohibit modern slavery (Kara, 2017, p. 33; Quirk, 2006, p. 593).

*Mechanisms of Othering in Modern Slavery.* The mechanisms facilitating othering are also found in modern slavery, with some important differences. Whereas mechanisms classifiable as hard factors and maintaining difference in practice can be detected, soft factors contributing to the process are less pronounced. *Protective measures* are in place that seek to preserve the status quo and to prevent improving exploitive work conditions. This includes practices that have been observed in supply chains, such as confiscating workers identity cards, banning unions, or lobbying against strict legal regulation (Crane, 2013, pp. 56, 62; Gold et al., 2015, p. 487). Protective measures prevail close to where modern slavery takes place, i.e., in direct employer relations, as intermediaries pass on the pressure for low costs, and for dynamic and fast work (Burmester et al., 2019, pp. 140-141). A further othering mechanism is *administrative* structures, which prevent the othered from fully enjoying their rights. In the context of modern slavery, this is reflected in inconsistent practices where agreements to eliminate modern slavery are formulated and signed by companies, yet whose effectiveness is undermined by processes such as corruption and low monitoring (Crane, 2013, p. 61; Hampton, 2019, pp. 262-263; Kara, 2017, pp. 40-41). With regard to the soft factors, the presence of *prejudices* depends on worker constellations and the particular context. Discrimination and inequality give rise to tendencies toward prejudices, which increase the likelihood that

modern slavery is tolerated (Crane, 2013, p. 57; Quirk, 2006, p. 598). Finally, a *language* that denies workers their rights is not clearly observable in the case of modern slavery (Bales, 1999, p. 10). The relevant actors do not use a language that could be considered to promote othering and to deprive workers of their rights. The same applies to the majority of actors, who contribute more indirectly to the global phenomenon of modern slavery (Guay, 2008, p. 73).

*Consequences of Othering in Modern Slavery.* A differentiated picture emerges when considering modern slavery in terms of the consequences of othering. There is little *moral acceptance* of modern slavery in today's business context. Rather, it is one of the areas of BHR that is closely regulated, for instance, by the UK Modern Slavery Act (Benstead, Hendry, & Stevenson, 2018, p. 2286; Christ et al., 2019, p. 837; Gold et al., 2015, p. 486). All parties involved in modern slavery — public or private economic actors, home or host state political actors, consumers, etc. — publicly condemn the continued existence of modern slavery (Crane, 2013, p. 49). Yet, the invisibility and ease with which responsibility is shifted between actors, together with a bias toward preserving one's own needs over those of (distant) others in concrete decision-making situations, facilitate the acceptance of modern slavery (Gold et al., 2015, p. 486; Kara, 2017, p. 33; New, 2015, p. 699). This is also reflected in the *manifestation* of modern slavery, which remains unresolved on the global scale to date. Despite the lack of moral acceptance, actions by relevant economic actors (e.g., companies and customers) at least partly maintain the current structures and thereby reinforce the exploitation of victims (Kara, 2017, p. 32; Quirk, 2006, p. 593). Thus, it appears that modern slavery results from global effects and large-scale interdependencies rather than from *discrediting* workers (Bales, 1999, p. 11; Guay, 2008, p. 73). Finally, a further consequence of othering is *dehumanization*, which is indirectly present in modern slavery to a varying extent (Crane, 2013, p. 51; English, 2019, p. 131; Kara, 2017, p. 9). Consistent with the preceding observations, workers are not explicitly and purposefully dehumanized as people. Rather, it is the circumstances arising from a global market-driven system that ultimately create working conditions where inhumane treatment prevails (Kara, 2017, p. 33; Quirk, 2006, p. 593).

### 4.4.3 De Facto Othering in Business and Human Rights

#### *Findings of the Analysis Identifying De Facto Othering in Modern Slavery*

Overall, the previous analysis has identified several parallels to othering in the context of modern slavery. First, modern slavery exhibits the characteristics of othering. The systematic, non-comparable, permanent, systemic, and — to a certain extent — the one-sided nature of othering were found. Second, the mechanisms enabling othering are evident in the hard institutional and impersonal structures, whereas the identified soft factors do not transfer to the context of modern slavery. Protective measures and administrative obstacles were identified, while prejudices and a language that promotes othering were less observable. Third, with regard to the consequences of othering, modern slavery is embedded in self-sustaining processes so that the manifestation of othering could be observed. However, consequences that suggest a willful agenda — such as the moral acceptance of othering and the discrediting and dehumanization of victims — are barely existent. As such, the analysis suggests that the rights-violating practices found in modern slavery are a means rather than an end in themselves. Taken together, the results of the analysis show that modern slavery shares the characteristics, structural mechanisms, and manifestation of othering. Through these elements, victims' rights are severely harmed. Modern slavery does not, however, imply the act of directly and willfully marginalizing victims to the state of rightlessness, neither in terms of soft mechanisms nor in terms of purposefully pursuing the consequences of othering.

There are *three main differences* to othering. First, with modern slavery, no single group of actors has an interest in directly engaging in othering. Although othering is typically a deliberate process (Brons, 2015, p. 84), in the analyzed economic context actors *do not purposefully seek* to restrict the rights of others. Rather than being a decisive act of preventing rights attainment, exclusion to the extent of rightlessness is compounded by the interconnectedness of actors, each contributing to the resulting situation. Actions that are not intended to other per se occur through systemic effects to processes that effectively resemble othering. Second, modern slavery often involves many actors, whose disregard for human rights may stem from diverse motivations — including economic interests — that are not necessarily related to the specific group of victims (Bales, 1999, p. 10; LeBaron & Phillips, 2019, p. 5; Phillips, 2017, p. 431). Thus, from an actor perspective, human rights abuses may take an *abstract and impersonal* form. Third, in

the case of modern slavery, the attributes triggering rights violations are arbitrary. The violation is *bound to the victim's function or role in the economic system*. No other commonality exists for explaining the in-group versus out-group classification observable in modern slavery (Kara, 2017, p. 35).

In sum, the analysis shows that the effect of modern slavery resembles that of othering, where a group of people is unprotected and unable to receive proper recognition of their rights. The conscious, active, and deliberate action to exclude a group and deprive it of its rights is missing. Considering the global scale of actors involved in modern slavery, the difficulties for victims to achieve their human rights are systemic. Nevertheless, actions are not pursued with the explicit goal of depriving those affected of their rights. Thus, rather than a specific group of people engaging in othering, economic, political, legal, and societal factors allow human rights violations to amount to a situation comparable to othering. The analysis of othering in the context of modern slavery indicates a condition that can be termed *de facto othering*.

#### *Spaces for De Facto Othering in Systemic Structures*

Business plays a relevant role in facilitating conditions potentially leading to de facto othering. The business sector can influence the process of de facto othering in all stages of the supply chain. Mostly, human rights abuses are committed in the upstream supply chain or in weak governance contexts (see, e.g., Bartley, 2018, p. 67). Some companies, in particular manufacturers and intermediaries, are thus more likely to be directly involved in human rights abuses, while given the complexity of global supply chains, many other companies are complicit.

In the case of modern slavery, precedent cases of denying or obstructing workers' rights abound (New, 2015, p. 698). The phenomenon exceeds isolated cases of human rights abuses through business. As long as conditions of poor and hazardous work conditions imply economic benefits for certain actors, there is an economic incentive to exploit workers at the cost of their rights. Complex, global trade structures obscure responsibilities and create anonymity (Gold et al., 2015, p. 486). This complicates the attribution of responsibility and effective rights protection, and even more so may accelerate the tolerate – accept – establish process.

The relation between business and de facto othering becomes evident when considering the role of economic structures as opposed to the individual company's impact. Othering

is embedded in a *multi-sphere context*, where — primarily — social and political factors intertwine and isolate the other (S. Q. Jensen, 2011, p. 65; Powell & Menendian, 2016, pp. 24-25). The same holds for de facto othering in an economic context. Business processes that amount to de facto othering of a group of people do not occur isolated in the economic sphere but are enabled by the interplay of the political, legal, and societal spheres. The persistence of modern slavery despite the countermeasures adopted by each of the spheres indicates the presence of a *space for de facto othering* within the global economic order.

Cases of structural exclusion such as de facto othering can be attributed to shortcomings in systemic coordination. The fact that a phenomenon such as modern slavery exists and is integrated into global trade relations indicates a systemic failure to prevent continuous human rights abuses. Despite universal human rights agreements and legal action against modern slavery, modern slavery permeates many supply chains to a degree that exceeds discrimination and isolated human rights abuses.

Each of the spheres may to varying degrees either promote or mitigate processes of de facto othering. Ideally, the different spheres would foster balance and control within their systemic co-existence. Thus, the different spheres influence whether de facto othering can effectively take hold and deprive people of their rights. Regarding modern slavery, for instance, the options available to states range from regulation through monitoring to sanctions (see Section 2.2.3). Companies can use their leverage over the supply chain and commit to specific human rights standards, while civil society and consumers can demand transparency or make conscious purchasing decisions (Crane, 2013, pp. 57-58, 63).

The likelihood of processes of de facto othering increases when inherent, sustaining structures dominate within the system, while systemic failures persist. To date, no concrete case of substantial othering exists in modern slavery. Nonetheless, there is a risk that business practices and interdependencies — also with other spheres — are reinforcing mechanisms that ignore human rights in the name of economic arguments. This enables debating restrictions to the enforcement of human rights and introducing a perspective that attaches a *conditionality* to human rights and eventually makes them negotiable.



For BHR, the analysis shows that economic activity may cause processes of de facto othering and that spaces for de facto othering exist in the current system. Only when these processes are identified and the spaces are acknowledged can they be effectively regulated.

## **4.5 Implications for the Governance of Business and Human Rights**

### **4.5.1 Navigating Corporate Conduct in the Human Rights System**

Spaces for de facto othering exist within business and human rights. Before concrete othering processes become established, several factors need to converge that span the defining elements of othering in terms of its characteristics, mechanisms, and consequences. Such processes are shaped by systemic interdependencies between economic, political, legal, and societal spheres. Companies' human rights conduct relates to the conditions that facilitate othering in two ways. On the one hand, companies are an active part of the system, and variations in their business model, supply chain management, or human rights policies translate into more or less strict monitoring of their human rights impacts. On the other hand, companies are also influenced by the systemic context, for instance, by being subject to regulation and societal pressure and market dynamics. Awareness of interaction effects enables countering othering tendencies by establishing respective practices or a strong culture. As the analysis of company frames in Chapter 3 has shown, companies tend to assume a business logic when framing human rights. Hence, they may not be fully aware of the systemic effects they are both impacting and being influenced by. However, to effectively integrate human rights into business, these interdependencies need to be accounted for.

Strengthening BHR governance may improve the current system. While current *regulatory initiatives* address system-inherent tendencies (such as modern slavery), the structures fueling these developments are neither fundamentally affected nor reversed. Regulation may reduce the effects of systemic flaws, but may not change the underlying mechanisms. Put differently, to have the desired impact, BHR initiatives need to explore the deeper causes of the continued challenges to human rights. When the enforcement gap is not accounted for and a specific group of people is effectively prevented from realizing its rights, this is problematic as it paves the way for consolidating exclusionary

structures. As othering processes reproduce inequalities, they thereby reinforce the conditions that weaken the realization of human rights (Powell & Menendian, 2016, p. 25; Stabile, 2016, p. 408). Structures that amount to a state of de facto othering are produced by the systemic exploitation of some people and their simultaneous social exclusion. In light of de facto othering, the conditions for potentially exclusionary processes are currently in place. These conditions, however, do not deliberately target a particular group of people. Nevertheless, already depriving actors of selective rights may have severe and far-reaching effects, as it impacts the victims' ability to exercise other rights.

The analysis has identified two interrelated aspects. First, a key problem lies in *systemic structures and mechanisms* that while being vital drivers within globalized business structures are not necessarily involved in individual human rights issues. Second, this addresses a matter of *priorities and capacity*. Examining current approaches to integrating human rights into business may create the impression that attempts to strengthen BHR regulation are at least met with reservation. Solutions to complex and interconnected human rights issues tend to be slow and, in many cases, involve multi-actor effort. A lack of progress may lead to detachment while disagreement about who owes primary accountability further defers action.

In light of the identified systemic interdependencies, developing a *BHR treaty* that is binding for all actors presents an opportunity for fostering equal conditions on the systemic level. Such a treaty could disrupt structures currently causing de facto othering. Given that establishing such othering tendencies is a gradual process that evolves over time, a treaty may be particularly effective once the process begins to consolidate and the conditions for othering are tolerated or accepted. The results of the analysis suggest that a treaty could strengthen companies' responsibility toward human rights in their function as contributors to the system, as well as provide rules (and sanctions) that regulate the systemic context to which companies are subject.

*Human rights due diligence*, including the HRIA requirement, is compatible with a systemic perspective. The findings emphasize the need for due diligence, in order to acknowledge and incorporate systemic factors that interact with human rights conduct, so that companies critically reflect on their leverage over business and human rights in this context. Moreover, the results indicate that human rights due diligence needs to be informed by the fundamental aspiration to achieve human rights. Unless this forms the

core understanding informing human rights conduct, companies can support tendencies toward othering, either directly through their conduct or indirectly through systemic effects, thereby narrowing the definition of human rights commitments.

Finally, the results indicate shortcomings of the *governance structures* within the current human rights system, which is unable to effectively prevent or remedy adverse human rights impact in business. In particular, the shortcomings are situated amid the interplay of regulatory initiatives and standards, social systems, and market dynamics, among others, all of which affect companies' human rights impact.

#### **4.5.2 Approaches to Counter De Facto Othering**

Regarding the integration of human rights into business, system-immanent dynamics were shown to impact the role of companies in preventing or contributing to de facto othering. The economic, political, legal, and societal spheres each assume a central role in detecting de facto othering processes early on and in preventing their escalation into othering processes. In order to address tendencies that qualify access to rights, this study proposes two focus areas. First, impulses can come from values and social norms. A notion of individual responsibility and immediateness that gains hold supports a strong civil society and corporate culture. Second, institutional design must be adapted to counter shortcomings in current human rights protection.

The first approach addresses the dimension of *values and social norms*. These form the social foundation that is essential to influencing systemic structures and political priorities. Othering is a comprehensive phenomenon that is marked by exclusion on different levels, including political recognition. At the same time, it crucially also depends on society participating in this social exclusion. Correspondingly, this social foundation may counteract such tendencies and preserve the fundamental aspiration to human rights. On an individual level, strong values support integrity and serve as guidance. Individuals have both the relevance and ability to affirm the importance of human rights and, for that matter, of responsible business (Arnold, 2016, p. 260; Brenkert, 2016, p. 288). Such values can be cultivated, among others, in the form of business ethics in education and moral courage, in order to support an informed, morally aware, and active civil society. This concerns different roles, including as consumers, as employees, as managers, as investors, as regulators, or as citizens. However, while values may be

bound to a shared cultural context in form of social norms, they may find no consensus in differently socialized environments (Donaldson, 1989, p. 56).

One specific countermeasure to othering is to heed *otherness*. The other is an integral object of protection under existing human rights principles. Heeding otherness is thus one way of embedding difference in universalism. It helps to reconcile the status of universality with implementation in practice. Whereas othering uses difference for further division, otherness is a starting point to account for ethical differences in situations where the “other” should not be excluded, yet is also difficult to integrate. Acknowledging otherness helps to cope with the complexity of human rights issues while emphasizing its moral foundation. Following this argumentation, a prospective BHR treaty would need to embrace otherness (as the acceptance of diversity) while condemning othering (as the denial of fundamental rights), thus following the path of previous UN initiatives. If this understanding guides decision-makers, ideally, it will facilitate informed legal and ethical assessment in conflict situations. How difference is treated is closely related to framing and is determined on both an individual and an organizational level (see Section 3.5). Sensitive recognition of otherness may benefit individual engagement and provide the institutional prerequisites for implementing human rights-compatible policies.

The second approach refers to the *institutions and structures* governing human rights. On the one hand, this refers to institutions in the sense of organizational set-up. Dynamic forms of cooperation, and even new forums, could be conceived of to enable progressive advances when multilateral conventions become improbable (Maxwell, 2018, p. 53). Positive experiences are recorded with the formation of new unconventional coalitions between partners while at the same time, in some contexts, the timeliness and functionality of UN structures have been questioned. On the other hand, the structural circumstances for human rights protection need review. Companies are confronted with complex regulatory environments. Autocracies and weaker governments are integrated into global trade, and even democracies face allegations of unequal representation with substantial concessions to industry lobbyism (Kuwali, 2015, p. 217). Thus, ways need to be developed that respond to changes in the assumptions that framed the original state-centric conception of human rights protection. Where established structures do not — and cannot — sufficiently guarantee human rights, developing alternative ways of distributing and allocating accountability and of overseeing remedy provisions might offer a feasible solution.

## 5 Conclusion

Fostering a strong integration of human rights considerations into business requires a comprehensive approach. The following sections consider the contributions and implications of the preceding analyses for the academic discourse on BHR and for companies and the business sector. Based on the results, an agenda for further research is proposed.

### 5.1 Research Contribution

#### 5.1.1 General Discussion of the Findings

The discourse on BHR has reached a momentum, both in theory and in practice, that holds strong potential for further integrating human rights into business. One key objective in this respect is to engage in close dialogue with the business sector, so as to leverage its potential to positively affect human rights, and to ensure that harmful action is effectively prevented. Thus, integrating human rights considerations into business means providing readily accessible, well-targeted approaches, while taking care that human rights issues are neither compromised nor suppressed by broader corporate responsibility endeavors (Obara & Peattie, 2018, p. 790). In order to achieve this objective, this study has identified and sought to understand the dynamics influencing the integration of human rights into business. These dynamics involve both the company's internal framing of human rights and the systemic interdependencies in which companies are embedded when pursuing such integration. Addressing this challenge raised the following research question: *“Which company-related and systemic dynamics influence the integration of human rights into business?”*

In order to assess company-related dynamics, a metasynthesis was performed to investigate how companies frame human rights. The results show that the different framings and related emphases brought into the discourse create realities and thus can be decisive, among others, in mobilizing actors or in steering the debate and its likely solutions to an issue (Benford & Snow, 2000, p. 163). The companies in the sample applied eight recurring dimensions when characterizing human rights issues (see Section 3.4.1). These dimensions reflect a strategic, technological, economic, legal, citizenship, social, cultural, or political perspective on the nature of human rights. They form an integral part

of companies' sensemaking and sensegiving processes and were applied selectively to different contexts, and presumably, at least in some cases, also consciously (see Section 3.4.4). For other companies, a learning process was observed that indicated how the understanding of human rights changed over time, and thus also the company's acceptance of responsibility and respective approach. Aggregating how companies view human rights revealed four company logics, each indicating a particular perspective (see Section 3.4.2). Overall, while the results represent the perceived meaning of human rights, they do not allow drawing conclusions on the action thereby triggered. Within the studies, the same frame dimension was found to prevail both for arguments for and against corporate responsibility for human rights. Notably, a strategic frame dimension dominated companies' human rights understanding. The findings also revealed that human rights remain a sensitive topic, also for companies actively engaging with human rights issues. However, despite initial reluctance, confronting human rights issues (mostly as a result of external triggers) led companies to proactively engage in the discourse with a view to shaping its outcomes for the company.

Concerning the systemic dynamics, the analysis began by demonstrating that the governance gap in BHR leads to adverse human rights impacts for some actors more than for others (see Sections 4.2.4). It was investigated whether complex global trade structures amplify this effect and whether, as a result, these might eventually lead to othering in the process of maintaining global trade. Originally, othering refers to a group of people being framed as the "other," which implies a sense of inferiority and entails permanent discrimination, two factors that violate human rights by negating access to rights (DeGooyer, 2018, p. 22). Othering, as a severe form of exclusion, affects a person's rights in general and thus is distinct from individual human rights abuses (which are commonly reflected on in the context of BHR). Given an environment where inequality prevails in combination with decoupling effects and limited options for rights enforcement, the analysis found that the resulting outcome of these effects resembles a state of rightlessness, which draws attention to the foundation of individual rights (see Section 4.4.2). Since exclusion of a particular group of people is mostly not pursued deliberately, this study suggests a space for de facto othering in the context of global business dynamics, as has been underlined by the case of modern slavery (see Section 4.4.3). This process occurs incrementally and manifests in the course of its toleration and — possibly covert — acceptance and establishment among relevant actors. In order to interrupt this

process, two complementary approaches were discussed: first, counteracting such dynamics within companies by emphasizing responsible conduct based on values and social norms; second, by adapting relevant institutions and processes to counter tendencies capable of depriving some actors of their rights as a by-product of global trade (see Section 4.5.2).

### **5.1.2 Integrating Human Rights into Business: Considering Companies**

#### *Framing Effects Contributing to De Facto Othering*

Companies' understanding of human rights, and projecting this understanding through frames, has significant effects on shaping their human rights conduct in practice. The emphasis in the current discourse on BHR in practice, against the backdrop of the governance gap, creates the impression that human rights are mostly treated symbolically or on a very abstract level, which cannot, however, do justice to the significance of these rights for individual lives (see Section 2.3.4). Human rights advances hinge on assigned and accepted responsibility. In this regard, framing performs a crucial bridging function.

Othering is based on framing one group of society as "other" (see Section 4.4.1). This is not the case with de facto othering. De facto othering differs by involving no deliberate exclusionary framing of another party (see Section 4.4.3). The frames of human rights applied by the business sector, however, contribute to the emergence of circumstances that closely resemble the outcomes of othering. Two aspects in particular of predominant human rights frames in business are crucial. First, companies mostly frame human rights problems, actions, and decisions in accordance with a business logic (see Section 3.4.3). Since these are not framed in terms of human rights in the first place (and often not even primarily on a social dimension), human rights issues might not be recognized as such. Consequently, adverse impacts on human rights are not anticipated by companies. Instead, they only surface later and are not perceived as immediately related to corporate actions or decisions. Second, companies employ frames that are bound to their specific perspective. It is difficult for actors to assume the perspective of other actors, and to question their own frames or acknowledge their particular biases. Within the business sector, human rights frames tend to build on a business logic and thus emphasize economic considerations. Systemic effects, which result from the interplay of

different spheres (e.g., economic, political, legal, societal) and create processes potentially contributing to de facto othering, are overlooked when only considering the role of business.

Overall, the predominant frames restrict the ability of companies to recognize and to act on potential human rights issues, which may also lead to neglecting contextual processes and thus lead to de facto othering (see Sections 3.5 and 4.5.1).

### *Reframing the Debate on Human Rights in Business*

A core objective of BHR is to answer the question about how good human rights conduct can best be achieved in business. So far, however, the answers to this question appears incomplete and the goal of enabling the realization of (and commitment to) human rights in business has not yet been achieved (not least due to prevailing governance gaps; see also Section 2.3.4). The enforcement of human rights currently strongly relies on the codification of fundamental human rights claims, for example, as standards and guidelines (see Section 2.2). The shortcoming of such an approach is that breaking down an issue, such as human rights, to standards and guidelines only ever represents part of the original issue. For instance, those aspects of the aspiration of the human rights claim that cannot be codified are lost when represented as a list of individual rights. This problem is exacerbated by the tendency to predominantly frame human rights in terms of a business perspective (see Section 3.5). Doing so further restricts understanding relevant human rights considerations and responses within the company.

The BHR debate thus needs to find ways to more completely represent and possibly even reclaim the aspiration of human rights where it becomes engrossed in other concepts (e.g., CSR or other thematic interpretations of sustainable business). The results suggest a complementary, value-based approach. Such an approach emphasizes the underlying purpose of human rights, which is to protect human dignity (see Section 2.1.2), and includes the equal recognition of otherness (see Sections 4.3 and 4.4.1). This approach introduces — complementary to codifying rights — a reframing of the BHR debate in the business sector, with the goal of enhancing company understanding of human rights, for instance, as an attitude instead of a mere compliance target.

Representing the meaning of human rights through both a hard and a soft approach would ideally shift the frames applied by business. Specifically, the aim is to shift the focus from viewing BHR as an additional requirement for business operations toward a



view that makes BHR a question of corporate identity and thus helps integrate human rights into business. While the current codification approach has been shown to support a predominant framing mostly in terms of a business logic, starting from the fundamental aspiration of human rights would mitigate this limitation. It would help to acknowledge a company's role in the larger system and to assume a more holistic perspective on human rights responsibility.

### **5.1.3 Integrating Human Rights into Business: Considering Context**

#### *Globalization as a Challenge to Universality*

Globalization demonstrates a particularity of the universality claim of human rights. Human rights are meant to have universal validity, and the rights that are set forth in the International Bill of Human Rights aim to create a common frame of reference (see Section 2.1.4). Despite a similar connotation, globalization puts the universality claim of human rights to the test. Globalization could be considered as predestined to support the universality claim of human rights. However, whereas in a trade context, globalization fosters standardization and assimilation, this cannot be achieved in the same way for elevating human rights standards to the same level globally (see Section 2.3.3). In terms of human rights, local influences have a major impact on human rights implementation. Evidence shows that companies transfer norms and standards from international codes of conduct throughout their supply chains (Bartley, 2018, pp. 47, 61-62; Pariotti, 2009). If, however, these chains collide with local customs, norms, and practices, the latter mostly persist and override international norms, even if the power of TNCs and the influence of governments might play a mitigating role (ibid.).

This study emphasizes the need to acknowledge systemic interrelations between the different actors involved in protecting and enforcing human rights (see Section 4.4.3). On the one hand, this requires a certain degree of consistency in human rights implementation across the entire system in order to reliably and collectively fulfill the premises for the realization of human rights. At the same time, differences between the actors in the system make it difficult to find a consistent representation of the aspiration and the universality claim of human rights. This is supported by the metasynthesis conducted here, which shows that companies pursue a context-specific approach to human rights, particularly within global operations (see Section 3.4.3).

Thus, in order to meet the universality claim, the implementation of human rights needs to respond to the local context. A key challenge is to balance the need for flexibility in approaches, while ensuring consistency in the focus on human rights. One approach is providing more leeway and competence for problem-solving, involving those who are affected locally, in combination with international rules and binding standards that ensure transparency and fair and equal proceedings.

#### *Relevance of Stakeholders Regarding Systemic Effects*

In seeking to anchor human rights considerations in business, current measures rely primarily on direct influence, e.g., in form of regulations and guidelines. The systemic effects analyzed in this study reveal the indirect influence through particular stakeholders. The analysis of corporate framing has shown that particularly customers and society strongly impact companies' positioning toward human rights (see Section 3.4.3). Therefore, companies adapt their human rights frames so as to forestall any potential negative sentiments among stakeholders (see Section 3.4.4). Whereas companies apply selective framing to interact with their stakeholders, this influence may also be effective in the opposite direction. Through systemic interdependencies, the influence of one group of stakeholders may affect companies' human rights conduct and produce more comprehensive results.

Addressing other stakeholders in global supply chains in addition to the focal company may significantly increase the scope of influence on BHR. Several stakeholder groups are particularly relevant (see Section 2.3.4). First, intermediaries in the supply chain occupy a key position to effect change. On the one hand, this includes their own business conduct, such as their code of conduct, sourcing strategy, or choice of business partners. On the other hand, intermediaries are well-placed to monitor potentially critical human rights conditions in the upstream supply chain. Overall, while intermediaries may serve as facilitators of standards, they are susceptible to the targets of and the assistance received from either end of the supply chain. Second, while consumers and civil society may influence companies, they can merely make demands rather than directly implement responsible BHR practices. Finally, also governments, investors and financial institutions are in a unique position to apply leverage to advance the BHR agenda. Advances specifically addressing these stakeholders are important in order to weaken processes that impede realizing human rights in business.

## 5.2 Theoretical and Managerial Implications

The results of this study have several implications for integrating human rights into business. First, a potential conflict becomes apparent between companies' understanding of human rights and the cause of many challenges in BHR. On the one hand, companies have a selective view on human rights, one that follows a particular interpretation and explanation of problems (based on merely a single or very few frame dimensions) (see Section 3.5). On the other hand, the analysis has indicated that severe human rights abuses through business must be considered holistically within the broader context, as they may result from interdependent effects beyond any individual company's impact (see Section 4.4.3). While this does not constitute a dilemma per se, it suggests that the dynamics on the company side (e.g., applying selective frames, focusing on individual rights, avoiding responsibility) and on the systemic side (e.g., not anticipating the full impact of corporate conduct, interrelatedness of human rights, spaces allowing for de facto othering) may reinforce each another. This becomes relevant with regard to effectively addressing BHR issues, for instance, when companies neglect the interrelations between rights, or when their policies do not suffice to offset the impact of other actors (in response to Deva et al. (2019, p. 204)).

Second, the results point to the opportunity of responding directly to companies' framing of human rights. To the extent that a frame likely affects companies' human rights policies, it would seem beneficial to address, or even expand, companies' human rights understanding in order to encourage improved proactive engagement (see Section 3.2.1, in response to Obara and Peattie (2018, pp. 791-792)). Companies' framing could be targeted directly, for instance, in face-to-face conversation or other forms of direct interactions within the discourse, or indirectly, for instance, by devising guidelines and regulations (e.g., a BHR treaty). Purposefully designed measures could take up companies' existing frames and build a case for increased derivative responsibility. Alternatively, complementary messages could be defined to diminish the effect of impeding company frames.

Third, while companies might at first perceive focusing greater attention on systemic effects as increasing their expected responsibilities, doing so might lower the threshold for approaching human rights, provided no direct causal link with their operations is established. For companies, acknowledging forces beyond their immediate impact and

direct responsibility could therefore facilitate identification with a human rights issue and defer the risk of unwanted (negative) association with human rights. As the latter has proven to be a crucial consideration for companies (see Section 3.4.2), this approach could enhance their commitment. One concern might be that orienting the discourse strongly toward companies will potentially affect the framing of human rights themselves throughout interaction. The intention, however, is to respond to companies' frames and to consider flexible options for engaging in dialogue without changing the focus of the discourse, i.e., the aspiration of human rights and the goal of ensuring human rights protection in business (in response to Methven O'Brien and Dhanarajan (2016, p. 555)).

### **5.3 Limitations and Opportunities for Further Research**

#### **5.3.1 Limitations**

This study has provided insights into both the company-internal and systemic dynamics that need to be considered in order to sustainably integrate human rights into business. The results should be seen in the context of the chosen approach, while the limitations should be noted with a view to suggesting avenues for further research.

First, this study has focused on critical cases in order to analyze the core internal and systemic dynamics. To investigate the human rights frames commonly applied within companies, a metasynthesis of existing frame studies in the broader field of BHR was conducted. The underlying studies concentrated mostly on companies that had already experienced a specific human rights incident. Similarly, for the analysis of the effects of systemic dynamics, othering presents an extreme case of human rights violations. Whereas critical cases provide valuable insights, further research should consider whether the results could be transferred to other contexts.

Second, metasynthesis served to survey companies' human rights frames across different contexts. While this allowed identifying more general framing patterns, the results rely on secondary data. Thus, the focus of the individual studies was chosen by the respective authors, meaning that possible biases could not be reconstructed nor could interview settings be controlled. No quantitative content analysis was conducted, due to the small sample size and the specific research focus and selective case sample. Future research ought to consider a larger number of companies in order to validate the frame

dimensions identified here. Moreover, primary data would enable drawing more inferences, and investigating the possible impacts of companies' different human rights frames would also be of interest.

Third, the possibility of systemic dynamics creating a space for othering was analyzed from a BHR perspective. The aim was to examine the extent of human rights impacts on those adversely affected by business. The study revealed various parallels to the particular circumstances of othering and validated the existence of several elements of othering. Future research might explore this phenomenon from an economic perspective and further investigate the conditions and mechanisms leading to de facto othering.

Finally, a dual approach was adopted in order to consider the context of integrating human rights into business. The focus was on company-internal and systemic dynamics, i.e., a micro- and a macro-perspective. One interesting area for future research would be the meso-perspective, for instance, the industry-level effects influencing options for effective human rights integration. This might provide a viable complementary approach to the current state-centric structures of human rights enforcement.

### **5.3.2 Future Research**

The results of this study open up several avenues for further research.

Regarding the *framing* of human rights in business, previous research has shown that frames significantly impact discourse, especially when actors with different frames refer to the same issue, yet have an opposing underlying understanding about its meaning (McBeth & Joseph, 2005, p. 109). The present analysis has identified recurring patterns of eight corporate frame dimensions of human rights. In order to further understand how these dimensions penetrate companies' human rights policies and practices, they need to be empirically validated in further research. Differences in framing between actors and in particular in the emphasis of frame dimensions often remain unarticulated. The results of this research show that corporate framing adapts to context. Further research could explore the factors driving such changes in framing. In addition, understanding the contextual factors determining the dominance of one frame dimension over another would shed light on the factors within human rights policies that foster or impede the realization of human rights.

The results of this study suggest further opportunities for research on *human rights due diligence*. The effectiveness of due diligence for human rights depends on the requirements of the due diligence process (Palombo, 2019, p. 270). The results of the metasynthesis in Chapter 3 have shown that companies differ in their understanding of what constitutes an adequate response to human rights challenges. As a selective framing approach was identified among companies, further research could investigate to what extent selective framing introduces a bias into the due diligence process. This includes, for instance, in how far the focus on particular frame dimensions omits relevant human rights aspects and undermines efforts to enhance the integration of human rights into business.

Concerning *company-internal processes*, the relation between potential positive and negative effects of strategically applying frame dimensions should be further investigated. Particularly regarding companies' selective framing approach, it would be valuable to analyze whether focusing on connecting to a dominant frame (e.g., the business logic) or on complementing corporate frames through articulating additional perspectives is more effective for integrating human rights into business. Concerning the *systemic perspective*, market conditions (e.g., the regulatory environment or trade mechanisms) and business models affect one another, so that the availability and demand for low production costs reinforce processes that might unfold at the expense of human rights protection (Kara, 2017, p. 33). This study has found that there is a risk that these systemic interdependencies foster processes of de facto othering. Acknowledging the identified spaces for de facto othering in future research would add an important dimension to implementing effective measures aimed at anchoring human rights within corporate policies and culture and at detecting othering tendencies early in the process, i.e., before they become established.

Finally, additional research opportunities arise from pursuing approaches designed to close the *governance gap* and to strengthen the protection of human rights in business. Research has identified a linkage between framing and decoupling (e.g., Fiss & Zajac, 2006, p. 1175). In order to advance the integration of human rights into business, further research should explore approaches that would allow overcoming differences in frames between actors in order to bridge the governance gap. The frame dimensions that have been identified in this research may serve both as a reference point and as a means of

characterization that would help define the frames to be bridged. In this regard, the interaction between company-specific framing and systemic de facto othering also merits further investigation. Among others, this might include studying how far the dominance of particular frames is related to the presence of de facto othering processes and whether governance structures relying on the complementary contributions of diverse stakeholders are sufficiently interlinked to challenge or critically reflect dominant frames.

## **5.4 Outlook**

The overarching aim of BHR is to ensure the protection of human rights in business. If, however, structural factors change in a way that human rights can no longer be guaranteed, this requires the attention of all implicated actors and stakeholders. Regarding the effective integration of business and human rights, integration does not require a universal solution. Rather, the results of this study indicate that human rights are best protected by pursuing diverse complementary measures.

This study has analyzed company-internal and systemic dynamics for changing the status quo and that hold the potential to advance the integration of human rights considerations into companies and to improve human rights protection in today's global business. The analysis has investigated the dynamics affecting the integration of human rights into business. These dynamics can be both negative (e.g., systemic de facto othering or companies using particular frames to justify non-accountability) and positive (e.g., by mitigating the pressure that companies often associate with a human rights focus). This study has identified initial options for countering or reinforcing these dynamics. Given that companies largely pursue a selective approach to human rights issues, and considering the existence of spaces for potential de facto othering, the overarching aim of integrating human rights into business should be to engage companies in a way that encourages them to focus on maximizing their contribution to human rights in some instances, while urging them to ensure minimum human rights standards everywhere.





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## Curriculum Vitae

Berit Knaak was born on March 25, 1989, in Braunschweig, Germany. In 2006, she began her studies in International Business at *Maastricht University*, The Netherlands. After completing her Bachelor of Science in International Business, she graduated in 2012 with a Master of Science in International Business. During her studies, she spent an exchange semester at the *National Chengchi University* of Taiwan. As a recipient of the Huayu Enrichment Scholarship from the Taiwanese Ministry of Education, she devoted a year to Mandarin Language and Cultural Studies at the *National Chengchi University*. In 2012, Berit Knaak joined the postgraduate program at the Irish Center for Human Rights at the *National University of Ireland Galway*, Ireland, where she earned an LL.M. with First Class Honours in International Human Rights Law. Afterwards, she started her Ph.D. in Business Administration at the *University of St. Gallen*, Switzerland, in 2014, supervised by Prof. Dr. Florian Wettstein (IWE-HSG) and Prof. Dr. Günter Müller-Stewens (IfB-HSG). Since 2015, she has been a Research Associate at the Institute for Business Ethics at the *University of St. Gallen*, Switzerland. She has been Fellow of the *Business and Human Rights Journal* since 2018.