CEUB
EDUCAÇÃO SUPERIOR
ISSN 2237-1036

REVISTA DE DIREITO INTERNACIONAL
BRAZILIAN JOURNAL OF INTERNATIONAL LAW

Rethinking corporate human rights responsibility: a functional model

Repensando a responsabilidade corporativa em matéria de direitos humanos: um modelo funcional

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VOLUME 22 • N. 1 • 2025
INTERDISCIPLINARY APPROACHES TO BUSINESS & HUMAN RIGHTS: AN ASSESSMENT OF THE FIELD 10+ YEARS FROM THE UNGPs

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doi: 10.5102/rdi.v22i1.9819

Rethinking corporate human rights responsibility: a functional model*

Repensando a responsabilidade corporativa em matéria de direitos humanos: um modelo funcional

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* Recebido em 31/10/2024
Aprovado em 11/04/2025

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Abstract

In the contemporary economic order, businesses often control key resources and services necessary for realizing human rights. However, the scope of their responsibilities, as outlined by the UN Guiding Principles on Business and Human Rights (UNGPs), remains unclear, leading to inconsistent or minimalist interpretations. Building on the academic debate on States' 'human rights jurisdiction' as a condition for the emergence of human rights responsibility, we propose a 'functional model of corporate responsibility' that focuses on companies' functions, and the resulting power relationships, as the basis for assigning responsibility for human rights, including the responsibility to fulfil under certain circumstances. The model offers a unifying theory of interpretation of the corporate 'responsibility to respect' under the UNGPs grounded in the normativity of international human rights law. In doing so, it overcomes the inconsistent normative foundations of the UNGPs, which ground the corporate responsibility to respect in the non-legal concept of 'societal expectations'. The article presents the core features of the proposed functional model and, through practical examples, it shows how the model clarifies the respective negative and positive responsibilities of States and corporations. It elaborates on the potential added value of the model and discusses its limitations.

Keywords: positive human rights obligations; functional model; duty to fulfil; responsibility to respect; UNGPs.

Resumo

No atual ordenamento econômico, as empresas frequentemente controlam recursos e serviços essenciais para a realização dos direitos humanos. No entanto, o alcance de suas responsabilidades, conforme delineado pelos Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos (UNGPs), permanece pouco claro, o que leva a interpretações inconsistentes ou minimalistas. Com base no debate acadêmico sobre a jurisdição dos direitos humanos dos Estados como condição para o surgimento

da responsabilidade em matéria de direitos humanos, propomos um "modelo funcional de responsabilidade corporativa", que se concentra nas funções desempenhadas pelas empresas e nas relações de poder daí decorrentes, como base para atribuir a responsabilidade pelas obrigações relativas aos direitos humanos, incluindo, em determinadas circunstâncias, a responsabilidade de promover e realizar esses direitos. O modelo oferece uma teoria unificadora para a interpretação da "responsabilidade de respeitar" das empresas segundo os UNGPs, fundamentada na normatividade do direito internacional dos direitos humanos. Ao fazer isso, supera as bases normativas inconsistentes dos UNGPs, que fundamentam a responsabilidade corporativa no conceito não jurídico de "expectativas sociais". O artigo apresenta as principais características do modelo funcional proposto e, por meio de exemplos práticos, demonstra como o modelo esclarece as respectivas responsabilidades negativas e positivas dos Estados e das corporações. Também explora o potencial valor agregado do modelo e discute suas limitações.

Palavras-chave: obrigações positivas em direitos humanos; modelo funcional; dever de promover; responsabilidade de respeitar; UNGPs

1 Introduction

Within the contemporary economic order, it is often business entities that supply, distribute, and control the resources and services necessary for the realization of human rights. The power of corporations to significantly influence access to essential rights became particularly evident through vaccine distribution during the Covid-19 pandemic.[1] It is also evident daily through evictions,[2] medical bankruptcies,[3] privatized social care,[4] and the global food supply.[5]

There is a gap between the reality of corporate influence over human rights and their human rights responsibility, both under the UN Guiding Principles on Business and Human Rights (UNGPs) and under international law more broadly. Corporations are not, at present, bearers of direct human rights obligations under international law, and their human rights responsibility under the UNGPs is narrowly construed as a 'responsibility to respect', or to 'do no harm',[6] obfuscating the central role of business in providing, and sometimes denying, essential resources.

In this article, we propose a re-conceptualization of corporate responsibility toward human rights to more accurately account for the role that corporations play in contemporary societies. The fundamental question is how human rights responsibility should be conceived when businesses control access to an essential resource. Is this responsibility limited to the avoidance of proactive violations of human rights, such as engaging in modern slavery, or do the standards also commit companies that control access to a resource to more fully realise access to that resource, within the scope of their authority?

Different approaches will yield different answers to these questions. Of these, three are most evident in international legal thought. First, the 'statist' approach. It is generally assumed within international human rights law, as well as the law of State responsibility more generally, that States hold the authority and the responsibility over resource distribution within their jurisdictions.[7]

1 GOLAN, Maureen S.; TRUMP, Benjamin D.; CEGAN, Jeffrey C.; LINKOV, Igor. Supply chain resilience for vaccines: review of modeling approaches in the context of the COVID-19 pandemic. *Industrial Management and Data Systems*, [*s. l.*], v. 121, n. 7, p. 1273-1746, 2021.

2 BIRCHALL, David. Human rights on the altar of the market: the Blackstone Letters and the financialisation of housing. *Transnational Legal Theory*, [*s. l.*], v. 10, n. 3-4, p. 446-471, 2019.

3 HIMMELSTEIN, David U. *et al*. Medical bankruptcy: still common Despite the Affordable Care Act. *American Journal of Public Health*, [*s. l.*], v. 199, n. 3, p. 431–433, Mar. 2019.

4 GUPTA, Atul; HOWELL, Sabrina T.; YANNELIS, Constantine; GUPTA, Abhinav. Does private equity investment in healthcare benefit patients? evidence from nursing homes. *National Bureau of Economic Research Working Paper 28474*, 2021. Available at: http://www.nber.org/papers/w28474.pdf. Access on: 20 Oct. 2024

5 ROBIN, Marie-Monique. *The world according to Monsanto*: pollution, corruption, and the control of our food supply. New York: The New Press, 2014.

6 BIRCHALL, David. Human rights on the altar of the market: the Blackstone Letters and the financialisation of housing. *Transnational Legal Theory*, [*s. l.*], v. 10, n. 3-4, p. 446-471, 2019.

7 MÉGRET, Frédéric. Are there 'inherently sovereign functions' in international law? *American Journal of International Law*, [*s. l.*], v. 115,

Distributional questions can only be answered by the comprehensive authority of the State. This view is therefore predicated on implacable responsibilities grounded in the nature of the State. Although it does not dictate a particular view of corporate responsibility, it does imply a more limited role for corporate responsibility.

Second, the traditional approach to business and human rights (BHR), evident in the UNGPs, is to focus on a negative and voluntary 'responsibility' to 'do no harm'. This is generally taken to imply non-violation of rights,[8] which is in turn generally taken to cover proactive violations, such as compelling individuals into modern slavery. According to this view, corporations, no matter their size, hold neither the power or authority, and therefore lack the moral responsibility, to fairly distribute resources.[9]

Third, some interventions have focused on the size, power, and authority of corporations to argue that this represents a new social reality to which law and regulation must respond. Corporations have been argued to have become 'quasi-governmental institutions' capable of holding the responsibility to fulfil rights within some contexts.[10] This view relates not just to rising corporate size and wealth, but also changing governance structures. The rise of privatization and market-based provision for essential goods and services has potentially changed the nature of responsibility, bringing corporations into much more direct relationships with rights-holders, and at least indicating a possible co-existence of corporate responsibilities alongside those of the State.

This paper embraces the third approach and grounds an interpretative model of corporate responsibility in international law categories, starting from the concept of 'human rights jurisdiction' as a condition for the emergence of human rights responsibility.[11] More specifically, we propose a functional model that focuses on companies' functions, and the resulting power relationships, as the basis for assigning responsibility for human rights, including the responsibility to fulfil under certain circumstances. We start with explaining the limitations of the current model, embodied in the UNGPs' corporate responsibility to respect human rights (section 2). We then proceed with presenting the key features of our proposed functional model and we show its application using practical examples (section 3). In section 4, we explore the role and limitations of the model, addressing the possible critiques. We briefly conclude in the final section.

2 A critique of the UNGPs' corporate responsibility to respect human rights

The UNGPs were endorsed in 2011, and the 'Protect, Respect, Remedy' framework that they implement was published in 2008. This framework was immediately criticized as being minimalistic, on two primary grounds: that corporations held only a voluntary 'responsibility' towards human rights grounded in 'societal expectations'; and that their responsibilities were limited to 'respecting' rights. An influential edited volume published in 2013 laid out these critiques, starting with the J non-binding framing of the responsibility to respect human rights.[12] Nolan addresses the utility of the soft-law approach, asking 'does it have the potential to generate compliance by significant stakeholders'?[13] While open to the possibility that that the approach may engender the flexibility required to target diverse business targets, Nolan also argues that 'the looseness of the language is perhaps more likely to invite inaction and a business-as-usual approach from companies that remain hesitant about their responsibility to act.'[14]

n. 3, p. 452-492, Jul. 2021.

8 WETTSTEIN, Florian. Normativity, ethics, and the UN guiding principles on business and human rights: a critical assessment. *Journal of Human Rights*, [*s. l.*], v. 12, n. 2, p. 162-182, 2015.

9 BRENKERT, George G. Business ethics and human rights: an overview. *Business and Human Rights Journal*, [*s. l.*], v. 1, n. 2, p. 277-306, Jul. 2016.

10 KARP, David Jason. *Responsibility for human rights*: transnational corporations in imperfect States. Cambridge: Cambridge University Press, 2014.

11 BESSON, Samantha. Due Diligence and extraterritorial human rights obligations: mind the gap! *ESIL Reflections*, [*s. l.*], v. 9, n. 1, p. 1-9, 2020.

12 DEVA, Surya; BILCHITZ David. *Human rights obligations of business*: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. On this point, see also ČERNIČ, J. Letnar. Two steps forward, one step back: the 2010 report by the UN special representative on business and human rights. *German Law Journal*, [*s. l.*], v. 11, p. 1264-1280, 2010.

13 NOLAN, Justine. The corporate responsibility to respect human rights: soft law or not law? *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? England: Cambridge University Press, 2013. p. 157.

14 NOLAN, Justine. The corporate responsibility to respect human rights: soft law or not law? *In*: DEVA, Surya; BILCHITZ, Da-

More positively, Mares highlighted the 'strategic ambiguity' of the UNGPs as a means by which to achieve both consensus and meaningful future evolution.[15] Backer, working in a transnational governance framework, highlighted methodological strengths of the UNGPs.[16] Macchi, while criticizing the normative foundations of the corporate responsibility to respect, inscribes Ruggie's approach within his constructivist project, aimed at facilitating a process of 'norm emergence' and at catalyzing an unprecedented 'overlapping consensus' over the 'responsibility to respect' norm.[17] However, the absence of a clear normative foundation firmly anchoring the UNGPs in international human rights law creates a risk of inconsistent interpretations and regulatory uncertainty. Such uncertainty could also affect those pieces of legislation that are gradually transposing the UNGPs' soft law standards into hard law at the domestic and EU levels.

The functional model proposed herein aims at providing a coherent understanding of corporate human rights responsibilities within the UNGPs framework. Before presenting the functional model, we first turn to two concrete limitations of the UNGPs, which our model will arguably address. We begin with a critique of the conceptual incoherence of the UNGPs and then focus on the conceptualization of the corporate responsibility to respect, showing how an international law-consistent reading of the UNGPs allows to go beyond a narrow understanding of 'do no harm'.

2.1 Apples without a tree: the conceptual incoherence of the UNGPs

The role of corporations in international human rights law has sparked ongoing debates in the BHR field, especially as corporate power sometimes surpasses that of states. Some scholars argue that corporations should have human rights duties,[18] potentially under a BHR treaty,[19] and point out that companies already hold international obligations in other legal areas.[20] Additionally, it is contended that corporations at least have obligations not to commit international crimes.[21] However, from a purely positivist view, human rights treaties create obligations only for states, not for corporations.[22]

The UNGPs 'are the first international document in which the corporate responsibility to respect human rights as a duty independent of the State has been expressly set forth',[23] although, as a soft-law instrument, they do not give rise to international obligations. The UNGPs recognize corporations as bearers of a human rights 'responsibility' and identify 'internationally recognized human rights' as the relevant standards.[24] Logically, then, this responsibility should be analysed and interpreted through the lens and categories of international human rights law. We can imagine human rights norms as apples that are supported by the tree of international human rights law, a tree that has developed and branched out since 1948 giving rise to a complex normative structure rooted in universal principles. The contours

vid. *Human rights obligations of business*: beyond the corporate responsibility to respect? England: Cambridge University Press, 2013. p. 158.

15 MARES, Radu. "Respect" human rights: concept and convergence. *In*: BIRD, Robert C. *et al. Law, business and human rights*: bridging the gap. United Kingdom: Edward Elgar, 2014. p. 3.

16 BACKER, Larry Cata. On the evolution of the United Nations Protect-Respect-Remedy project: the State, the corporation and human rights in a global governance context. *Santa Clara Journal of International Law*, [*s. l.*], v. 9, n. 1, p. 37-80, jan 2011.

17 MACCHI, Chiara. The normative foundation of the corporate responsibility to respect: a critical analysis. *In*: MACCHI, Chiara. *Business, human rights and the environment*: the evolving agenda. Berlin: Springer, 2022. p. 45.

18 RATNER, Steven R. Corporations and human rights: a theory of legal responsibility. *Yale Law Journal*, [*s. l.*], v. 111, n. 3, p. 443-545, Dec. 2001.

19 BILCHITZ, David. The necessity for a business and human rights treaty. *Business and Human Rights Journal*, [*s. l.*], v. 1, n. 2. p. 203-227, Jul. 2016.

20 DEVA, Surya. Multinationals, human rights and international law: time to move beyond the 'State-Centric' conception? *In*: ČERNIČ, J. Letnar; VAN HO, Tara. *Human rights and business*: direct corporate accountability for human rights. Groningen: Wolf Legal Publishers, 2015. p. 27; BERNAZ, Nadia; PIETROPAOLI, Irene. Developing a business and human rights treaty: lessons from the deep seabed mining regime under the United Nations Convention on the Law of the Sea. *Business and Human Rights Journal*, [*s. l.*], v. 5, n. 2, p. 200-220, Jul. 2020.

21 CLAPHAM, Andrew. *Human rights obligations of non-state actors*. Oxford: Oxford University Press, 2006. p. 86; HUMAN RIGHTS COUNCIL. *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*. 2007. para 21.

22 See: VAN HO, Tara. "BandAids don't fix bullet holes": in defence of a traditional State centric approach to the treaty. *In*: ČERNIČ, J. Letnar; CARRILLO-SANTARELLI, Nicolas. *The future of business and human rights*: theoretical and practical challenges for a UN treaty. Belgium: Intersentia, 2018. p. 111.

23 LOPEZ LATORRE, Andrés Felipe. In defence of direct obligations for businesses under international human rights law. *Business and Human Rights Journal*, [*s. l.*], v. 5, n. 1. p. 56-83, Jan. 2020. p. 71.

24 HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights*: implementing the United Nations "Protect, Respect and Remedy" framework. 2011.

of human rights norms (the 'apples' of this tree) and of corresponding State obligations have been interpreted and clarified thanks to the cumulative contributions of legislation, jurisprudence, and scholarly analysis. Such contributions have fed the apples of our metaphor and progressively shaped the content, scope and applicability of human rights norms, sometimes determining the emergence of new ones. The challenge, identified by several authors,[25] when it comes to the normative foundations of the UNGPs, is that, while the UNGPs deem human rights norms normatively relevant to corporations, they interpret their foundation, content and scope through concepts – such as 'societal expectations' – that are extraneous to international human rights law. In other words, while the UNGPs consider the 'apples' relevant for the definition of corporate responsibility, they do not root the interpretation of such responsibility and of its scope in international law categories, but rather in an indeterminate concept of 'societal expectations' that partly depends on the company's 'enlighted self-interest'.[26] We affirm that this disconnect between 'the apples and the tree' is incoherent at the conceptual level and fails to provide a unifying theory of interpretation of corporate responsibility. This foundational incoherence was criticized by Lopez, who pointed at Ruggie's limited engagement with ongoing debates around binding corporate obligations in international law, describing the UNGPs as 'CSR with an added element of human rights'.[27] Kolstad, too, criticized the UNGPs' anchoring of the corporate responsibility to respect into the corporate 'social license to operate' as shaped by societal expectations, instead of grounding it into the ethical principles that underlie the human rights perspective.[28] Bilchitz recalls the more rigorous and forward-looking approach taken by the UN Norms on the Responsibilities of Transnational Corporations, which combined 'the claim that corporations have existing human rights responsibilities and the proposition that the nature of such responsibilities at international law was in the process of being developed'.[29] He warns that Ruggie's lack of engagement with the moral and conceptual foundations of human rights creates a 'lacuna at the international level which has significant implications given the potential role of business in helping to address important challenges such as global poverty and environmental sustainability.'[30] Such gap, besides creating conceptual ambiguity, does not contribute to the progressive development of international law towards the emergence of 'more concrete binding legal responsibilities of corporations.'[31]

Ruggie reimagined international human rights standards to better fit the contemporary business context, a choice that was successful in ushering in a new BHR era and preparing the ground for unprecedented policy developments. However, the loss of connection, at the foundational level, to long-developed human rights standards meant that a new interpretative battle had

[25] BILCHITZ, David. A chasm between 'is' and 'ought'? a critique of the normative foundations of the srsg's framework and the guiding principles. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? England: Cambridge University Press, 2013. p. 107; CRAGG, Wesley. Ethics, enlightened self-interest, and the corporate responsibility to respect human rights: a critical look at the justificatory foundations of the UN framework. *Business Ethics Quarterly*, [*s. l.*], v. 22, n. 1, p. 9-36, 2012.; KOLSTAD, Ivar. Human rights and positive corporate duties: the importance of corporate-State interaction. *Business Ethics*: A European Review, [*s. l.*], v. 21, n. 3, p. 276-285, May 2012 LÓPEZ, Carlos. The "Ruggie Process": from legal obligations to corporate social responsibility? *In*: DEVA, Surya; BILCHITZ, David. Human rights obligations of business: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 58; MACCHI, Chiara. The normative foundation of the corporate responsibility to respect: a critical analysis. *In*: MACCHI, Chiara. *Business, human rights and the environment*: the evolving agenda. Berlin: Springer, 2022.; MCCORQUODALE, Robert. Corporate social responsibility and international human rights law. *Journal of Business Ethics*, [*s. l.*], v. 87, n. 2, p. 385-400, 2009.

[26] CRAGG, Wesley. Ethics, enlightened self-interest, and the corporate responsibility to respect human rights: a critical look at the justificatory foundations of the UN framework. *Business Ethics Quarterly*, [*s. l.*], v. 22, n. 1, p. 9-36, 2012. p. 13; MACCHI, Chiara. The normative foundation of the corporate responsibility to respect: a critical analysis. *In*: MACCHI, Chiara. *Business, human rights and the environment*: the evolving agenda. Berlin: Springer, 2022. p. 51.

[27] DEVA, Surya; BILCHITZ David. *Human rights obligations of business*: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 66-74-77.

[28] KOLSTAD, Ivar. Human rights and positive corporate duties: the importance of corporate-State interaction. *Business Ethics*: A European Review, [*s. l.*], v. 21, n. 3, p. 276-285, May 2012.

[29] BILCHITZ, David. A chasm between 'is' and 'ought'? a critique of the normative foundations of the srsg's framework and the guiding principles. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? England: Cambridge University Press, 2013. p. 115.

[30] BILCHITZ, David. A chasm between 'is' and 'ought'? a critique of the normative foundations of the srsg's framework and the guiding principles. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? England: Cambridge University Press, 2013. p. 108.

[31] BILCHITZ, David. A chasm between 'is' and 'ought'? a critique of the normative foundations of the srsg's framework and the guiding principles. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? England: Cambridge University Press, 2013. p. 115.

begun. Indeed, the described conceptual ambiguity reverberates further in the UNGPs' architecture. Ruggie developed a three-pillar approach grounded in the State duty to protect, the corporate responsibility to respect, and access to remedy. In doing so, he cleaved the traditional tripartite respect, protect, fulfil delineation under international human rights law to posit that, for corporations, only 'respect' is relevant, and that for State regulation of corporations, only 'protect' is relevant (at least for the purpose of the UNGPs). Additionally, he developed several entirely new concepts, such as the 'cause, contribute, linked to' framework, 'adverse human rights impacts' and 'human rights due diligence'. 'Adverse impacts' are defined in the official guidance as occurring when a 'business act removes or reduces an individual's enjoyment of his or her human rights'. For Deva, '[t]his definition clearly shows how the impact terminology shifts the focus from the breach of obligations implicit in the notion of 'violation' to companies merely affecting adversely the ability of a person to enjoy human rights.'[32] This is seen as a normative weakening of the paradigm of human rights responsibilities, away from the legal and moral firmness of 'violation' to a looser definition that may fail to engender significant social expectations even as social expectations ground the entire edifice of the UNGPs. In sum, while the term adverse impact appears to be an expansive standard – covering acts (including omissions) that 'reduce' enjoyment of rights – in reality it has most often been interpreted as covering the most paradigmatic human rights violations only. This minimalism grounded in negative responsibility was perhaps the most significant early critique of the UNGPs.

Equally, 'cause, contribute, linked to' provides a useful means by which to understand the different connections that a business may have to an adverse impact, but the lines between them are blurred, and companies have often tried to construe their involvement in harmful conducts as only 'linked to' when in fact the circumstances of the case indicated causal or contributory responsibility.[33]

We argue that this lack of clear grounding has hampered a conceptually sound understanding of the 'responsibility to respect' standard and, ultimately, an implementation of the UNGPs to their full potential. Indeed, this ambiguity leaves the door ajar to contradictory readings of the UNGPs: they can be read as ambitious; or, focusing on the term 'respect', as applying only to paradigmatic human rights violations. The indeterminacy of their normative foundation allows for exculpatory arguments from stakeholders, and where there is doubt, it is likely that the more powerful actor will determine the interpretation.

2.2 The corporate responsibility to respect as 'Do No Harm'

Almost 20 years ago, Ratner affirmed that to extend the responsibility of corporations 'away from a dictum of "doing no harm" […] toward one of proactive steps to promote human rights outside their sphere of influence seems inconsistent with the reality of the corporate enterprise'.[34] Corporations cannot be expected to fulfil rights universally, nor can they hold comprehensive responsibilities to protect rights. As mentioned above, the UNGPs define the corporate responsibility to respect human rights as the responsibility of corporations to avoid causing, contributing, or being linked to adverse human rights impacts. At first glance, therefore, they embrace the do no harm approach. This statement, however, must be nuanced. Firstly, the UNGPs do not merely commit corporations to non-interference. Two obvious sources of positive responsibilities are the commitment to undertake human rights due diligence and to publish human rights policies, as well as the responsibility that the company has, in some cases, to provide or collaborate in the remediation of adverse impacts. Secondly, we argue below that the formulation of the UNGPs clearly establishes more than a responsibility towards non-violation.

Wettstein critiques the UNGPs' separation of corporate responsibility to 'respect' rights from the responsibility to 'protect' rights. He argues that the concept of silent complicity—acknowledged by Ruggie as a significant non-legal form of complicity—implies an

[32] DEVA, Surya. Treating human rights lightly: a critiques of the consensus rhetoric and the language employed by the Guiding Principles. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 78-98.

[33] VAN HO, Tara. Defining the relationships: "cause, contribute, and directly linked to" in the UN guiding principles on business and human rights. *Human Rights Quarterly,* [*s. l.*], v. 43, n. 4, p. 625-658, 2021.

[34] RATNER, Steven R. Corporations and human rights: a theory of legal responsibility. *Yale Law Journal*, [*s. l.*], v. 111, n. 3, p. 443-545, Dec. 2001. p. 518.

obligation for companies to protect rights, which involves actively reaching out to victims, rather than merely avoiding harm.[35] This 'siloing' of State and corporate responsibility, therefore, reveals a conceptual inconsistency within the UNGPs framework.[36] Ruggie argued that corporations as 'specialized economic organs' cannot be bearers of duties akin to those of States. While this is correct, Wettstein suggests that Ruggie's focus on the corporate duty 'to do no harm' overlooks the unique, context-specific responsibilities that stem from corporations' societal roles.[37] He concludes that Ruggie missed the more complex question of how to allocate shared responsibility within society's power structures, especially given the political influence that corporations, as 'social institutions', often wield.[38]

Deva focuses instead on the narrower issue of translating the responsibilities around specific rights, asking pertinent questions about exactly what it means for a company to 'respect' the right to health. The right to health under the International Covenant on Economic Social and Cultural Rights (ICESCR) is defined as the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Deva questions whether this entails providing insurance for workers and providing adequate breaks and rest days.[39] These questions of scope, Deva notes, were almost completely avoided in the UNGPs drafting process and later documents in favour of process-oriented questions such as around human rights due diligence.[40]

However, looking in more detail at the construction of the responsibility to respect, there is certainly more to it than a mere responsibility toward non-violation. The early critics of the UNGPs focused on the phrase 'do no harm' and the reliance on negative responsibilities that it seems to suggest. In reality, the innovative, even idiosyncratic, approach that Ruggie took led to a version of a responsibility to respect that goes far beyond a traditional understanding of the term.

The basic understanding of the respect, protect, fulfil delineation in international law is that respecting rights entails non-interference (or non-violation, non--deprivation), protecting rights entails preventing interference by third parties, and fulfilling rights entails positive policies to ensure universal access to the right. But there is naturally more nuance to these standards than such brief definitions allow. The State obligation to respect under the ICESCR contains two elements, first, the prohibition on State interference with existing access or enjoyment of human rights, and second, a more positive State duty 'to ensure that existing access is not disrupted'.[41] This second element of the duty may appear similar to an obligation to protect. However, the distinction is that it does not address third party disruption, but rather disruption that may be caused by less direct State policies. For example, a State engaged in a trade war might raise tariffs on essential foodstuffs, or even on petrol or other relevant aspects of food distribution, such as to have the practical effect of restricting access to food. Here, the State has not directly interfered with any individuals access to food, but the State has implemented policies that have the effect of disrupting access. The distinction between the two could be defined as the distinction between 'direct' interference and 'effective' or a more structural form of interference. The State is obligated to avoid both directly interfering in an individual's access to rights – the general scope of legally remediable human rights violations – and the State must avoid creating laws and policies that have the effect of restricting access to rights. The former is likely to be deliberate and targeted, the latter may be no more than an unforeseen externality of a policy in a different area, such as tariffs. Both are covered by the internatio-

[35] WETTSTEIN, Florian. Making noise about silent complicity: the moral inconsistency of the "Protect, Respect, and Remedy" framework. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 243-250.

[36] WETTSTEIN, Florian. Making noise about silent complicity: the moral inconsistency of the "Protect, Respect, and Remedy" framework. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 253.

[37] WETTSTEIN, Florian. Normativity, ethics, and the UN guiding principles on business and human rights: a critical assessment. *Journal of Human Rights*, [*s. l.*], v. 12, n. 2, p. 162-182, 2015. p. 170.

[38] WETTSTEIN, Florian. Normativity, ethics, and the UN guiding principles on business and human rights: a critical assessment. *Journal of Human Rights*, [*s. l.*], v. 12, n. 2, p. 162-182, 2015. p. 170.

[39] DEVA, Surya. Treating human rights lightly: a critiques of the consensus rhetoric and the language employed by the Guiding Principles. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013.

[40] DEVA, Surya. Treating human rights lightly: a critiques of the consensus rhetoric and the language employed by the Guiding Principles. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 88-89.

[41] NOLAN, Aoife; DUTSCHKE, Mira. Article 2 (1) ICESCR and states parties' obligations: whither the budget? *European Human Rights Law Review*, [*s. l.*], v. 3, p. 280-289, Jan. 2010. p. 282-3.

nal legal definition of 'respect'. This is coherent both on the grounds that such structural interferences can make a significant impact on access to rights, and that preventing such interferences neither protects rights--holders from third parties nor further realizes access to the right.

UNGPs' Principle 13, described by Ruggie as 'the central Guiding Principle regarding the corporate responsibility to respect human rights',[42] defines that the responsibility of businesses is to '[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur [and] [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations'.[43] The corporate responsibility to respect is therefore defined by 'human rights impacts', which themselves are defined as occurring 'when an action removes or reduces the ability of an individual to enjoy his or her human rights.'[44] Principle 13 thus appears to encompass both forms of respect. A company could breach its responsibility to respect either by proactively violating a human right, breaching its negative responsibility to avoid harmful acts, or it could cause a human rights impact via disrupting access to a right on the grounds that this equally 'removes or reduces' rights enjoyment. The UNGPs in this sense accurately follow international human rights law and present a comprehensive version of the corporate responsibility to respect. A company can directly interfere with individuals rights in a variety of ways, from modern slavery to privacy violations at work. But companies with structural control over resources, or online speech, or over individuals in private detention facilities, can create policies that restrict individuals' access to rights in more structural ways. So long as such a policy can be shown to 'remove or reduce' individuals' enjoyment of rights, that policy is covered just the same as a more direct violation.

As stated above, corporations, as economic entities, cannot owe universal responsibilities to protect or to fulfil rights. A corporation cannot be expected to guarantee a fair wage to a national population. But all corporations have certain individuals within their functional ambit, and this, in domestic law and international human rights law, obligates them to guarantee fair wages to their employees, including that they do not deprive individuals of fair wages by, for example, demanding unpaid time to go through security checks. This second meaning of 'respect' however, also suggests that other corporate policies may be relevant. Today, countless individuals rely on corporate-controlled food supplies, corporate-owned housing, and corporate health insurance policies. These companies hold a responsibility to ensure that their policies do not 'remove or reduce' access to rights. Thus, a corporation would appear to meet the doctrinal standard of causing an adverse human rights impact if a change in production schedule or pricing caused a reduction in enjoyment of rights for some individuals. We now turn to proposing a unifying theory of interpretation of the corporate responsibility to respect with the goal of grounding such responsibility in international law in a way that captures its nuances beyond a narrow and arbitrary focus on negative responsibilities.

3 Corporate responsibility: a functional model

It has been argued that human rights jurisdiction always originates in a *de facto* power relationship between the State and an individual or group thereof.[45] Such power relationship, in turn, can be determined by either the State's exercise of a lawful competence or by the commission of an unlawful act under international law – in other words, by the exercise of a function.[46] This debate has largely revolved around the extraterritorial reach of States' human rights obligations (ETOs), and has developed around the need to develop a coherent

[42] RUGGIE, John R. Comments on thun group of banks: discussion paper on the implications of UN guiding principles 13 & 17 in a corporate and investment banking context. *Harvard Kennedy School Discussion Paper*, [*s. l.*], Feb. 2017.

[43] HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights*: implementing the United Nations "Protect, Respect and Remedy" framework. 2011.

[44] OHCHR. *The corporate responsibility to respect human rights*: an interpretative guide. 2012. p. 5.

[45] AUGENSTEIN, Daniel; KINLEY, David. When human rights "responsibilities" become "duties": the extra-territorial obligations of States that bind corporations. *In*: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business*: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 271.

[46] KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [*s. l.*], v. 9, n. 4, p. 521-556, 2009. p. 522; SHANY, Yuval. Taking universality seriously: a functional approach to extraterritoriality in international human rights law. *The Law and Ethics of Human Rights*, [*s. l.*], v. 7, n. 1, p. 47-71, 2014. p. 56.

legal justification for the existence and scope of such obligations. According to the functional model, a State issuing a passport, administering an occupied territory or killing an individual abroad through its own agents establishes a factual power relationship that generates corresponding human rights obligations. Importantly, while this article will refer to some judgments, legal frameworks and scholarly works that embrace a functional approach to human rights jurisdiction, this model is not, as yet, consolidated under international law. However, since this model captures all rights-impacting activities – whether lawful or unlawful – and provides a limiting principle for the corresponding positive responsibilities, it offers, by analogy, a useful interpretative lens for the corporate responsibility to respect under the UNGPs.

Under the functional model, human rights jurisdiction attaches to all State functions that concern the protection of human rights,[47] while positive obligations will vary depending on the extent of the State's lawful competence under international law and on the factual circumstances of each case.[48] This paradigm is also consistent with EU law, under which fundamental rights obligations attach to all actions exercised by EU institutions as well as to Member States' actions aimed at the implementation of EU law.[49] Importantly, what grounds the State's obligations is not its generic 'capacity' to protect or realize human rights, but the exercise (or non-exercise)[50] of a function that, in turn, establishes a power relationship.[51] When it exercises effective control over a territory, in addition to the duty to respect, the State holds extensive 'protect' and 'fulfil' obligations. When it detains an individual outside its own territory, the State bears a more limited catalogue of positive obligations towards the concerned individual.[52] We argue that it is possible to look at the human rights responsibilities of corporations through the same paradigm.

'Function', in this model, is intrinsically linked to the notion of 'power', defined by Byers as follows:

> Power is the ability of one actor to compel or significantly influence the behavior of another. It may be applied through the use or threat of force, through economic incentives or penalties, or through a variety of social pressures. It may be derived from a number of different sources, including military capabilities, wealth or moral authority. It may be augmented or constrained by concepts, values, institutions and rules.[53]
>
> Power, in this definition, is a matter of fact, not of law.[54] We would add to Byers' definition that power is not only the ability to compel or influence another's behaviour, but also to impact another's human rights. Power is also a 'relational concept':
>
> It is above all a relational concept, in that the ability to compel or influence always depends on the relative abilities of the different actors concerned either to apply or resist pressure.[55]

Power is not here conceived as an intrinsic, subjective characteristic of an actor, but as an objective and relational element. Both States and corporations exercise functions that, in turn, create a power relationship with other actors. These functions can take the shape of both actions and omissions and can amount to lawful or unlawful conduct. In the case of States, as in the example provided above, the power relationship could

[47] EUROPEAN COURT OF HUMAN RIGHTS. *Case of Al-Skeini and others v. the United Kingdom*: (App No 55721/07). ECtHR, 7 July 2011. p. 11.

[48] KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [*s. l.*], v. 9, n. 4, p. 521-556, 2009. p. 545-7.

[49] MACCHI, Chiara. With trade comes responsibility: the external reach of the EU's fundamental rights obligations. *Transnational Legal Theory*, [*s. l.*], v. 11, n. 4, p. 409-435, 2020.; MORENO-LAX, Violeta; COSTELLO, Cathryn. The extraterritorial application of the EU charter of fundamental rights: from territoriality to facticity, the effectiveness model. *In*: PEERS, Steve; HERVEY, Tamara; KENNER, Jeff; WARD, Angela. *Commentary on the EU Charter of Fundamental Rights*. Londres: Hart Publishing, 2014. p. 1657.

[50] In Judge Bonello's words, 'A "functional" test would see a State effectively exercising 'jurisdiction' whenever it falls within its power to perform, or not to perform, any of these five functions', namely, the five ways in which states ensure the observance of human rights: 'firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. […]' (*Al Skeini*, Concurring Opinion of Judge Bonello, para 10). Importantly, the notion of 'power' in this citation indicates a *de facto* condition that exists independent of a lawful entitlement.

[51] KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [*s. l.*], v. 9, n. 4, p. 521-556, 2009 p. 538.

[52] KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [*s. l.*], v. 9, n. 4, p. 521-556, 2009. p. 548.

[53] BYERS, Michael. Custom, power, and the power of rules. *Michigan Journal of International Law*, [*s. l.*], v. 17, n. 1, p. 109-180, 1995. p. 113.

[54] BYERS, Michael. Custom, power, and the power of rules. *Michigan Journal of International Law*, [*s. l.*], v. 17, n. 1, p. 109-180, 1995. p. 121-22.

[55] BYERS, Michael. Custom, power, and the power of rules. *Michigan Journal of International Law*, [*s. l.*], v. 17, n. 1, p. 109-180, 1995. p. 113.

be created by the State's exercise or non-exercise of its passport-issuing function (lawful competence), but it could also be created by the exercise of a function amounting to an unlawful act under international law (e.g. the unlawful apprehension of an individual in the territory of another State).

To apply this model to the understanding of human rights responsibilities of corporations means considering the immense variety of rights-relevant functions (in the sense explained above) that the latter exercise. Transnational corporations, in particular, are global actors capable both of facilitating and of hindering the realization of human rights, based on their economic dimension, but also on other factors such as the sector and contexts in which they operate, their market share, the nature of their operations, their level of collaboration with public authorities, etc. Corporations can create *de facto* power relationships with certain individuals and communities through the exercise of their functions, not only when they cause a negative human rights or environmental impact, but also when their products, services and activities contribute to the realization of human rights. A company providing an essential service – e.g. the supply of staple food – in a country through its global supply chain, for instance, clearly affects a number of human rights in said country, contributing to the State's ability to ensure the right to food, the right to health and, for instance, to maintain public order amidst pandemic-induced panic shopping. In line with a functional paradigm, human rights responsibilities attach to all rights-impacting functions exercised by corporations. This reasoning does not rest on a 'can implies ought' principle, rejected by Ruggie as too broad.[56] Companies owe human rights responsibilities only to the individuals with whom they establish a *de facto* power relationship, and the corresponding positive obligations vary in each case based on legal and factual elements.

3.1 The scope of positive human rights responsibilities under the functional model

Under a functional understanding of corporate responsibility, the scope of a company's positive human rights responsibilities will be delimited by considerations of law and of fact. As concerns the relevant considerations of law, an upper limit to the positive human rights responsibilities of corporations will always be constituted by international law. Indeed, if we accept that international human rights law constitutes the normative foundation of the corporate responsibility to respect under the UNGPs, in spite of the current lack of a formal recognition of such international responsibility in positive (hard) law, then it follows that corporations cannot be required by international human rights norms to perform acts that would be unlawful under public international law if committed by a State. Another upper limit might be constituted by applicable domestic law, at least when not manifestly contravening international human rights law. As concerns the relevant factual considerations, the extent of a corporation's positive responsibilities will depend on a plethora of factors that are well exemplified by the human rights due diligence standard of conduct contained in the UNGPs, namely, the seriousness of the human rights impacts/risks at issue, the company's size and sector, the context and nature of operations, etc. Particularly important among these factors will be the level of control or influence that the company exercises over a territory or individuals.[57]

Two observations are in order. Firstly, it is important to stress that a functionalist approach to corporate human rights responsibilities does not ground human rights 'jurisdiction' in a territorial factor: territory might come into the picture solely as one of the limiting factors to the corporation's positive responsibilities. Secondly, as specified above, a corporation's 'capacity' to determine human rights-relevant outcomes does not constitute the foundation for the company's responsibilities. However, such capacity could become relevant as one of the factors limiting the extent of its positive responsibilities.[58] In other words, a company cannot hold a positive responsibility to take actions that clearly exceed its capacity. For instance, a company might not have sufficient actual leverage to influence the human rights-conduct of a business partner, especially when

[56] RUGGIE, John R. Comments on thun group of banks: discussion paper on the implications of UN guiding principles 13 & 17 in a corporate and investment banking context. *Harvard Kennedy School Discussion Paper*, [*s. l.*], Feb. 2017. para 13.

[57] ETO CONSORTIUM. *Maastricht principles on extraterritorial obligations of States in the area of economic, social and cultural rights*. 2011. Available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23. Access on: 16 Oct. 2024.

[58] KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [*s. l.*], v. 9, n. 4, p. 521-556, 2009. p. 546-547, 556.

such partner is a government with which it has a commercial relationship. Such factual lack of capacity constitutes an upper limit to its positive obligations – i.e. that corporations does not have a positive responsibility to bring the government's violations to an end. In such circumstances, however, the company will still retain a due diligence responsibility to take action within the limits of its capacity, for instance, by teaming up with other corporations doing business with that same government in order to increase its leverage over it, or ending the business relationship when no other options are viable.[59]

There are not many examples of companies exercising some degree of territorial control. Perhaps one such cases concerns United Fruit Company (now Chiquita) which was known to exercise a high level of control over portions of territory in several Latin American countries around its own plantations, building villages for its workers and providing services such as schools, aqueducts, electricity and even hospitals, to the extent that it was referred to as a parallel government.[60] The company had taken over the provision of services that normally pertain to the State, exercising extensive human rights-impacting functions in a portion of territory over which it exercised a high degree of authority (albeit not to the entire exclusion of the State's own authority). It can be argued that the corresponding positive human rights responsibilities were consequently quite broad, and the company could be said to hold a responsibility towards the concerned individuals (e.g. Chiquita's workers and their families) to 'fulfil' the relevant rights (e.g., the right to water). Similarly, a private company running prison facilities will have a responsibility (which does not displace the primary responsibility of the State) to fulfil the right to water, health or food of the inmates to the extent that the inmate's access to such rights depends on the company, because of the factual power relationship it entertains with the concerned individuals.

According to a 'gradual approach' to human rights jurisdiction,[61] positive obligations, albeit more limited, can also emerge in cases that do not involve such a high level of control or influence exercised by a company over territory or individuals. A corporation taking over the privatized water service in a country, for instance, has a negative responsibility not to limit access to it on a discriminatory basis, but it also has a positive responsibility to ensure that the water is "acceptable" and 'safe'. A company that exercises a decisive influence over a business partner (e.g. a foreign supplier), might have a 'duty to protect' human rights from the harmful conduct of that partner by actively exercising its leverage over it.[62] In line with what the UNGPs themselves posit, the higher that leverage, the wider the company's duty to take steps. A big retailer selling essential goods through its stores arguably might have a responsibility, during a crisis such as the Covid-19 pandemic, not to unreasonably discontinue the distribution of those goods, in spite of the increased logistical hurdles.

3.2 Distinguishing the functional model from other approaches

The functional model for corporate responsibility that we propose should be distinguished from two other similar but distinct approaches: the capacity approach and the publicness approach as developed by Karp. In 2009, Meckled-Garcia explained that 'the capacity approach holds that having the least burdensome capacity to protect or advance any human rights--relevant outcome is sufficient for an agent to have a moral obligation to protect or advance that outcome.'[63] Adapted to the business and human rights context, the capacity approach thus involves assigning responsibility to those corporations who have the capacity in a given context to respect, protect and even fulfil human rights. Karp developed and ultimately rejected this approach as

[59] HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights*: implementing the United Nations "Protect, Respect and Remedy" framework. 2011. Commentary to Guiding Principle 19.

[60] BARTEL, Constantine; SOLDATI, Veronia. Embeddedness of Chiquita's banana production in Panama: the potential to mitigate social and ecological problems. *African Technology Development Forum Journal*, [*s. l.*], v. 9, n. 1, p. 32-47, 2017. p. 33; BURGOS, Maria Jose. Banana road. *CBC News*, 2 Dec. 2018. Available at: https://newsinteractives.cbc.ca/longform/banana-republic. Access on: 16 Oct. 2024.

[61] KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [*s. l.*], v. 9, n. 4, p. 521-556, 2009. p. 552.

[62] MARES, Radu. "Respect" human rights: concept and convergence. *In*: BIRD, Robert C. *et al. Law, business and human rights*: bridging the gap. Cheltenham: Edward Elgar, 2014.; HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights*: implementing the United Nations "Protect, Respect and Remedy" framework. 2011. Guiding Principle 19.

[63] MECKLED-GARCIA, Saladin. Do transnational economic effects violate human rights? *Ethics and Global Politics*, [*s. l.*], v. 2, n. 3, p. 259-276, 2009. p. 268.

a way to conceptualize corporate human rights responsibility on two grounds. First, he argued that the capacity approach should be discarded because it does not assign a specific human rights responsibility on corporations but could instead be used to assign other forms of responsibility, particularly in tort and criminal law. Second, and more importantly for this article, he rejects the capacity approach on the grounds that this would create excessive agential costs for companies. Agential costs are defined as 'costs to moral agents' legitimate values, ends and projects'. Assigning responsibility based on capacity, or on determining which agent 'can most effectively protect and provide for individuals' human rights', he argues, is not suitable because of the possibility of such excessive costs.[64] Beyond Karp's compelling critique, we argue that the capacity approach leaves out a central element: power relations. A company providing an essential service – e.g. the supply of vaccines during a pandemic – exercises a function which, in turn, establishes a form of power over rights-holders. It should hold responsibility for human rights because of this power, which should also inform the contours of such responsibility. In our view, the capacity approach's neutral foundation that 'can implies ought' is therefore misleading. In the proposed functional model to corporate responsibility, agential costs cannot be considered excessive because they depend on the intensity of the power relationship.

The functional model also needs to be distinguished from Karp's central proposition, the publicness approach to responsibility for human rights. When a company provides collective goods such as health or security or when it exercises a public role, he argues, the company can be considered 'relevantly public', and as such be assigned responsibility for human rights despite being a private actor distinct from the State. Karp's publicness approach overlaps with the functional model we are proposing in that it is role-based, rather than simply actor-based, and it connects to the idea that companies exercise some form of authority in some contexts. But Karp's publicness approach is relatively narrow in that it rests on the idea that private actors 'need to accept their public role and the responsibilities that go along with it, even if this acceptance is tacit'.[65] If they do not accept this role, companies can abandon it, leaving individuals' human rights to be violated 'in the short term', which would be acceptable under this approach pending 'the establishment of robustly "public" institutions, which accept the responsibility to protect and provide for rights in the medium to long-term.'[66] This important caveat makes the publicness approach unsatisfactory from the perspective of international human rights law, which places the non-violation of rights-holders' rights above other considerations.

4 Applying the functional model to concrete scenarios

To test what corporate responsibility under the functional model means in practice, we next turn to some examples based on business provision of essential resources along the interrelated metrics of affordability and/or guaranteed supply. This metric is relevant to all rights resources with a cost component, and is cited in relation to housing, healthcare, food, and water in the relevant General Comments.[67] This is also one of the hardest BHR-related problems, where States and businesses rely on free market arguments to justify non-intervention and profit-levels, despite ostensibly free markets being the creation of malleable legal constructs and despite the market often working to the detriment of access to rights.[68] It is also not a problem that BHR theory has seriously addressed, despite the integral role of markets in shaping, particularly, access to socio-economic rights.

First, some of the simpler cases where functional control is easy to define. Privatized water is a natural monopoly and private water suppliers should, under international human rights law, be under a legal obliga-

64 KARP, David Jason. *Responsibility for human rights*: transnational corporations in imperfect States. Cambridge: Cambridge University Press, 2014. p. 108, 115.

65 KARP, David Jason. *Responsibility for human rights*: transnational corporations in imperfect States. Cambridge: Cambridge University Press, 2014. p. 150.

66 KARP, David Jason. *Responsibility for human rights*: transnational corporations in imperfect States. Cambridge: Cambridge University Press, 2014. p. 150.

67 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. *General comment n. 4*: the right to adequate housing (Art. 11 (1) of the Covenant). 1991. para 8(c).

68 BIRCHALL, David. Human rights and political economy: addressing the legal construction of poverty and rights deprivation. *Journal of Law and Political Economy*, [*s. l.*], v. 3, n. 2, p. 393-416, 2022. p. 408-410.

tions to ensure affordable access to all. [69] This is because the private supplier has total functional control. Minimum wage is similar. The absolute functional control that an employer has over an employee's salary means that, to ensure a decent salary, the employer must be subject to direct regulation of wage levels. Private prisons also feature absolute functional control invoking absolute regulatory requirements. This absolute functional control entails that the corporate responsibility to respect has the same scope as State obligations in respect to the individuals falling within the company's functional 'jurisdiction'. Rights enjoyment will be reduced or removed if private water suppliers fail to supply water, employers fail to pay a decent wage, or if private prisons restrict access to any number of possible human rights. These businesses hold a responsibility to fulfil access to the right for those over whom they have functional control of access to the right on the grounds that anything less than this 'removes or reduces' access to the right. Therefore, where a business has functional control of access to an essential resource, that business should be regulated 'so as to ensure access'.[70]

At the other extreme, producers of consumer food items generally have no cost regulation or supply guarantee responsibilities, because the market is so full of different producers that no single supplier has a functional control over access to food. If one drops out, there is still ample choice and supply. These businesses retain some degree of responsibility to the extent that, for instance, they should not imperil the right to health of consumers by marketing unsafe products, but their responsibility in terms of ensuring affordability and supply is very limited (with caveats possible for ensuring the affordability of healthy foods). A corporation's human rights responsibilities therefore align with its functional power over that human right within a given context.

4.1 Applying the functional model to 'hard' cases

In between the two extremes illustrated above are two hard cases, where varieties of oligopolistic control create a confusion as to the bearer of functional control. First, private rental properties. Rent control by the State is advocated by the CESCR on the basis that private rental costs can restrict access to housing and the State has the ability to regulate these costs.[71] Equally the ex-UNSR on the right to housing, Leilani Farha, has advocated greater business human rights responsibility from housing providers,[72] while the current UNSR, Balakrishnan Rajagopal, has argued for 'accountability of public and private actors' arguing that 'the time is ripe for a re-evaluation of the role of public and private actors to make sure that housing remains affordable and accessible.'[73] Rental costs are complicated for at least four reasons. Firstly, individual landlords may be responding to, not setting, market prices; secondly, affordable privatized housing is more difficult to define and enact than a minimum wage; thirdly, market prices are the product of numerous factors; and fourthly, unlike free market consumer goods, a home is essential and subject to serious supply-side limits.[74]

The functional approach clarifies responsibility by asking, 'who has functional control over housing prices?'. In an ideal free market, where no landlord monopolizes properties, landlords lack control over market prices, which are determined by factors like location, size, and condition. This creates a practical barrier to targeting landlords to price responsibly. While rent control is one potential solution, the State has broader tools, such as promoting social housing, adjusting tax incentives, and regulating investment properties. In this idealized scenario, the State shapes the market and should act as regulator, while landlords are only responsible towards their own tenants.[75]

In practice markets are complicated, containing both small-scale landlords and, increasingly, large corporate landlords. Where large private equity investors purchase homes *en masse*, including entire apartment blocks, it becomes more reasonable that they themselves have func-

[69] OHCHR. *General Comment No. 15*: The Right to Water (Arts. 11 and 12 of the Covenant). 2003. para 27.

[70] OHCHR. *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*. 2017. para 18.

[71] OHCHR. *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*. 2017. para 19.

[72] UN GENERAL ASSEMBLY. *The financialization of housing and the right to adequate housing*. 2017. para 60.

[73] UN GENERAL ASSEMBLY. *Twenty years of promoting and protecting the right to adequate housing*: taking stock and moving forward. 2021. para 78.

[74] HEARNE, Rory. *Housing Shock*. Bristol: Bristol University Press, 2020.

[75] Generally, they enjoy freedom to raise rental costs assuming the individual will not be made homeless by the increase.

tional control.[76] Blackstone's purchase of Stuyvesant Town in New York, comprised of 11,000 apartments with expiring rent control agreements, is one example where a private company may have functional control.[77] Despite a trend towards large-scale corporate landlords, the rental housing market remains diversified enough that in most situations landlords do not control enough housing to hold functional control over pricing. This means that the regulatory State, not landlords, has functional control of pricing.

This is a vital insight of the functional approach, allowing responsibility for harms that occur through the 'free market' to be mapped. The free market often serves as a means to disavow responsibility, because it splits responsibility, and deniability, between State and business.[78] In the example here presented, by asking the question 'who controls the price?', one better knows whom to challenge. For housing, the State is in the best position to control prices, with numerous levers for doing so. This explains the CESCR's rent control argument and provides justification for it, coherent with applied human rights standards. It also invokes a significant challenge to governments that rely on the free market, suggesting that they are denying their own functional control, indeed their overt construction, of the market, to the detriment of access to housing and indeed causing human rights violations.

Global agribusiness provides a second hard case, made more difficult by the lack of State jurisdiction. Three companies control 75 per cent of the world's grain production.[79] Profit-motivated production changes can, and have, resulted in dramatic reductions in access to food in difficult to predict areas around the world.[80] These companies have demonstrable functional control over access to essential (irreplaceable, at least in the relevant short-term) food. These companies produce food globally, meaning that they do not operate within the confines of a single jurisdiction. Oligopolistic agribusiness production appears to be the more natural realm of corporate responsibilities as it is not within the remit of individual State regulation but is sufficiently dominated by a small number of firms that do have functional control. To avoid causing an adverse human rights impact, these companies should manage supply so as to keep it stable and predictable and to ensure that no one's access to food is reduced through their actions.

The functional approach helps to answer difficult questions of who should bear responsibility, and whether responsibility is needed in a specific context. Private water and minimum wages we designate as 'dual' responsibility. This designation covers that the State can and should regulate the private supplier and the business obey the rules, but if the State fails to do so the business is also in a suitable position to take on the proactive responsibility. Rental prices we designate generally as a matter of State responsibility, on the grounds that the State has the macro-view necessary to make correct judgments, and insofar as no single landlord has any macro-effect on pricing. Global food prices we designate as a corporate responsibility (an international treaty could also do the job) on the grounds that no State has control, and that the oligopolistic nature of the market means that individual company actions make a difference and makes it easier for these companies to collaborate.

5 The functional model: role and limitations

Applying a functionalist reading to the responsibilities of corporations does not in any way displace or subordinate the human rights obligations of the State, whose role remains primary. We may rather speak of 'shared accountability',[81] looking at the distinct but complementary responsibilities of subjects – States and corporations – that hold different status and roles under international law, but that are bound, at the normative level, by the same system of universal principles. In

[76] BIRCHALL, David; BERNAZ, Nadia. Business strategy as human rights risk: the case of Private Equity. *Human Rights Review*, [*s. l.*], v. 24, p. 1-23, Mar. 2023.

[77] BLACKSTONE GROUP. Reply to the Mandate Holders. *OTH 17/2019*. 2019. p. 3.

[78] BIRCHALL, David. Reconstructing State obligations to protect and fulfil socio-economic rights in an era of marketisation. *International and Comparative Law Quarterly*, [*s. l.*], v. 71, n. 1, p. 227-243, Jan. 2022.

[79] CLAPP, Jennifer. Concentration and crises: exploring the deep roots of vulnerability in the global industrial food system. *Journal of Peasant Studies*, [*s. l.*], v. 50, n. 1, p. 1-25, Oct. 2022. p. 14.

[80] DE SCHUTTER, Oliver. The green rush: the global race for farmland and the rights of land users. *Harvard International Law Journal*, [*s. l.*], v. 52, n. 2, p. 503-559, Jul. 2007.

[81] NOLKAEMPER, Andre; JACOBS, Dov. Shared responsibility in international law: a conceptual framework. *Michigan Journal of International Law*, [*s. l.*], v. 34, n. 2, p. 359-438, 2013. p. 369.

fact, the functional model, by clarifying the normative underpinning and the scope of corporate responsibilities, also contributes to better defining the contours of the State duty to protect, and, in doing so, it could help respond to some challenges identified, particularly by the TWAIL and Global South literature, in the prevalent BHR paradigm.

Pahuja and Saunders note that the early discourse around the impacts of transnational corporations and foreign direct investment in the Global South, captured by States and organizations in the Global North after the 70s, gradually lost the political and radical connotation that had animated it in the years of the New International Economic Order, shifting towards an increasingly technical approach.[82] The authors claim that this discursive shift, in which debates about regulation were 'conducted among gatherings of experts and business leaders, and cloistered from political scrutiny', led to an 'internationalization of the protection of private property through an emerging regime of "international investment law"', but failed to equally internationalize the regulation over corporate conduct, which remained confined to the domestic sphere.[83] Questions remain, even after the breakthrough represented by the UNGPs and subsequent developments, as to whether the BHR movement is able to engender transformative processes and stave off the risk of inadvertently legitimising the *status quo* by proposing legal and policy solutions that do not challenge the structural power asymmetries of the global economy.[84] A TWAIL critique to current legislative initiatives around mandatory human rights and environmental due diligence, while recognizing them as important developments, indicates that they do not suffice to rebalance the disconnect between the rights that corporations enjoy under international law and the lack of recognition of corresponding international human rights obligations.[85] These laws, while referring to international standards and instruments, do not reconstruct the international human rights responsibility of corporations at the normative level, leaving once again the regulation over corporate conduct to the domestic sphere (or partially to the supranational sphere, as in the EU), and particularly to the legal systems of States in the Global North.[86] The transformative potential of these laws is further hindered by flaws in their engineering, which sometimes encourages a box-ticking style of compliance.[87]

Admittedly, the functional model here presented for the interpretation of the corporate responsibility to respect under the UNGPs cannot on its own realize the needed transformation. The model, however, constitutes a step towards grounding this responsibility in international human rights law, rather than in the non-legal concept of 'societal expectations'. By aligning corporate responsibilities with established human rights categories and linking them to the State's duty to protect, this model suggests that international law could eventually confer both rights and duties on corporations, as it does, for instance, under international investment law.[88] It could be argued that without concrete legal me-

[82] PAHUJA, Sundhya; SAUNDERS, Anna. Rival worlds and the place of the corporation in international law. *In*: VON BERNSTORFF, Jochen; DANN, Philipp. *The battle for international law*: South-North perspectives on the decolonization era. Oxford: Oxford University Press, 2019. p. 141, 172.

[83] PAHUJA, Sundhya; SAUNDERS, Anna. Rival worlds and the place of the corporation in international law. *In*: VON BERNSTORFF, Jochen; DANN, Philipp. *The battle for international law*: South-North perspectives on the decolonization era. Oxford: Oxford University Press, 2019. p. 174.

[84] BADER, Michael. Toward a strategic engagement with the question of the corporation. *In*: SAAGE-MAAß, Miriam; ZUMBANSEN, Peer; BADER, Michael; SHAHAB, Palvasha. *Transnational legal activism in global value chains*: the Ali Enterprises factory fire and the struggle for justice. New York: Springer, 2021.; DEVA, Surya. From business or human rights to business and human rights: what next? *In*: DEVA, Surya; BIRCHALL, David. *Research handbook on human rights and business*. Cheltenham: Elgar Publishing, 2020.; OMARI LICHUMA, Caroline. (Laws) made in the "First World": a TWAIL critique of the use of domestic legislation to extraterritorially regulate global value chains. *Heidelberg Journal of International Law*, [*s. l.*], v. 81, n. 2, p. 497-532, 2021. p. 513.

[85] OMARI LICHUMA, Caroline. (Laws) made in the "First World": a TWAIL critique of the use of domestic legislation to extraterritorially regulate global value chains. *Heidelberg Journal of International Law*, [*s. l.*], v. 81, n. 2, p. 497-532, 2021.; BOSE, Debadatta. Decentring narratives around business and human rights Instruments: an example of the french Devoir de Vigilance law. *Business and Human Rights Journal*, [*s. l.*], v. 8, n. 1, p. 18-42, Feb. 2023.

[86] OMARI LICHUMA, Caroline. (Laws) made in the "First World": a TWAIL critique of the use of domestic legislation to extraterritorially regulate global value chains. *Heidelberg Journal of International Law*, [*s. l.*], v. 81, n. 2, p. 497-532, 2021.

[87] DEVA, Surya. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders? *Leiden Journal of International Law*, [*s. l.*], v. 36, n. 2, p. 389-414, Jun. 2023.; MAK, Chantal. Corporate sustainability due diligence: more than ticking the boxes? *Maastricht Journal of European and Comparative Law*, [*s. l.*], v. 29, n. 3, p. 301-303, 2022.

[88] GONZÁLEZ, Erika; VARGAS, Monica; HERNÁNDEZ ZUBIZARRETA, Juan. Business and human rights: the failure of self-regulation. *TNI*, Oct. 2016. Available at: https://www.tni.org/en/article/business-and-human-rights-the-failure-of-self-regulation. Access on: 21 Oct. 2024.

chanisms, the model remains largely symbolic. Indeed, no human rights treaties directly bind corporations, nor do customary law or any general principle of international law recognize corporations as bearers of human rights obligations, despite existing corporate responsibilities in areas like environmental law, anti-corruption, and humanitarian law.[89] Therefore, the interpretation of corporate human rights responsibilities according to the functional model might be seen as purely theoretical. However, we posit that the existence of responsibility should not be confused with the mode of implementing it.[90] The functional model lays the conceptual foundations for a *de lege ferenda* reasoning that might, on the one hand, prepare the ground for international law developments and on the other, independent of any positive law developments, supports a coherent interpretation of the corporate responsibility to respect under the UNGPs. In the medium to long term, a coherent unifying interpretation of corporate responsibility could be picked up by courts and policymakers, informing legislative processes at the international level or contributing to the emergence of a new customary law norm. In the short term, instead, a functionalist understanding of the corporate responsibility to respect and of its scope, including the positive responsibilities it implies, allows for a principled critique of relevant legislations, for instance, of emerging human rights and environmental due diligence laws.

Another objection that could be raised to the functional model is that it places excessively wide positive responsibilities on corporations. While agreeing with Ratner that corporations do not bear across-the-board human rights responsibilities tantamount to those of States, we also argue that boxing corporate human rights responsibilities, *a priori*, in a narrowly defined responsibility 'to respect' category would be an arbitrary choice disconnected from the reality of functions that corporations exercise.[91] To recognize that corporate responsibilities can, in some circumstances, include positive ones, and even resemble 'fulfil-like' responsibilities, does not entail placing corporations on equal footing with States. In fact, such positive responsibilities are always limited by legal and factual considerations, such as the corporation's lawful competence to act and its actual capacity to influence the enjoyment of human rights in the specific circumstances of a case. As this concept of responsibility arises from an existing (factual) power relationship, and entails positive responsibilities that are never broader than the company's capacity, there is no disproportionate burden placed on companies, including smaller ones.

A specular objection could be that the functional model, by grounding corporate responsibility in international law and recognizing the theoretical possibility of a future recognition of direct human rights obligations, unduly empowers corporations, especially the largest ones, as subjects of the international community.[92] However, this concern is misplaced. Transnational corporations already have disproportionate influence over policymaking, independent of any formal recognition in international law. Indeed, while the international business and human rights debate stagnated at the turn of the century due to irreconcilable differences as to the attribution of direct human rights obligations to corporations, powerful businesses strengthened their positioning in crucial international *fora* and their protection under international investment law.[93] It was, arguably,

[89] BLAIR, Cherie; VIDAK-GOJKOVIC, Ema. The medium is the message: establishing a system of business and human rights through contract law and arbitration. *Journal of International Arbitration*, [*s. l.*], v. 35, n. 4, p. 379-412, 2018. p. 380; LOPEZ LATORRE, Andrés Felipe. In defence of direct obligations for businesses under international human rights law. *Business and Human Rights Journal*, [*s. l.*], v. 5, n. 1. p. 56-83, Jan. 2020.; BERNAZ, Nadia; PIETROPAOLI, Irene. Developing a business and human rights treaty: lessons from the deep seabed mining regime under the United Nations Convention on the Law of the Sea. *Business and Human Rights Journal*, [*s. l.*], v. 5, n. 2, p. 200-220, Jul. 2020. p. 211-213; DEVA, Surya. The human rights obligations of business: reimagining the treaty business. *Workshop on Human Rights and Transnational Corporations*, Geneva, Mar. 2014. Available at: https://media.business-humanrights.org/media/documents/files/media/documents/reimagine_int_law_for_bhr.pdf. Access on: 21 Oct. 2024.

[90] RATNER, Steven R. Corporations and human rights: a theory of legal responsibility. *Yale Law Journal*, [*s. l.*], v. 111, n. 3, p. 443-545, Dec. 2001. p. 481; CLAPHAM, Andrew. *Human rights obligations of non-state actors*. Oxford: Oxford University Press, 2006. LOPEZ LATORRE, Andrés Felipe. In defence of direct obligations for businesses under international human rights law. *Business and Human Rights Journal*, [*s. l.*], v. 5, n. 1. p. 56-83, Jan. 2020. BILCHITZ, David. The Ruggie framework: an adequate rubric for corporate human rights obligations? *International Journal of Human Rights*, [*s. l.*], v. 7, n. 12, p. 199-229, Jun. 2010. p. 222; ROCHA, Armando. *Private actors as participants in international law*: a critical analysis of membership under the Law of the Sea. Londres: Bloomsbury, 2023. p. 34-36.

[91] LOPEZ LATORRE, Andrés Felipe. In defence of direct obligations for businesses under international human rights law. *Business and Human Rights Journal*, [*s. l.*], v. 5, n. 1. p. 56-83, Jan. 2020. p. 80.

[92] DURUIGBO, Emeka. Corporate accountability and liability for international human rights abuses: recent changes and recurring challenges. *Journal of Human Rights*, [*s. l.*], v. 6, n. 2, p. 222-261, 2008. p. 252.

[93] DRUTMAN, Lee. How corporate lobbyists conquered amer-

the *de facto* power exercised by corporations and its coincidence with the interests of some States that enabled their ascension as influential global actors. The adoption of legal frameworks (in the realms of lobbying or investment protection, for instance) that facilitated the consolidation of such 'corporate capture' was the result of existing power relationships. Arguably, such power relationships influenced international legal developments more than the other way around. Corporate influence in policymaking *fora* engendered the emergence of legal rights that contributed, in turn, to crystallizing such influence. At no stage in this process was there a formal recognition of an international legal personality of corporations nor of direct corporate human rights obligations.

In this scenario, some considerations are in order. Firstly, the functional model is not concerned with a formalistic top-down conferral of international legal personality to corporations, but rather aims at a human rights law-consistent interpretation of the corporate responsibility to respect under the UNGPs. It stems from the recognition that corporations *de facto* exercise functions that engender power relationships with individuals and communities and that, in turn, have a bearing on the enjoyment of human rights. In this model, responsibility attaches to functions and is commensurate to the lawful and factual capacity of a corporate actor to impact human rights. As a consequence, the model cannot confer to corporations a power that they do not already exercise. For the same reason, grounding corporate responsibility in international law does not automatically put corporations on equal footing with States and does not imply the attribution to them of state-like powers, such as the right to stipulate international treaties.[94] Peters et al, recalling the rights that corporations enjoy under international law, underline how it is instrumental 'to make corporate legal personality become an issue only because now, rather than profiting from human rights, corporations are held accountable to them'.[95] However, they also underscore 'the difficulty of identifying and circumscribing a sphere of obligations of a concrete business actor which would be functionally equivalent to the sphere of jurisdiction of a State in which the human rights obligations apply.'[96] We agree that the concept of 'sphere of influence' is too broad and vague for this purpose, and we propose an alternative model based on the notion of 'function'. Such model might contribute to a more coherent and granular interpretation of corporate human rights obligations that might, in time, be translated into positive law.

6 Conclusions

Historically, the debate around the human rights responsibilities of corporations under international law has run aground because of a lack of consensus around the attribution of international legal personality to corporations, the fear of overextending the responsibilities of corporations transferring to them part of the State's own human rights obligations, or concerns about allowing corporations to achieve an international status that would allow them to 'sit at the table' and be allowed to shape relevant laws and policies. The need to avoid a polarizing debate around these contentious issues preempted a full recognition of international human rights law as the legal foundation for the corporate responsibility to respect, theorized in the UNGPs not as a legal concept, but as the result of evolving 'societal expectations'. Attributing human rights responsibilities to corporations while refusing to interpret their content and scope through the categories of international law led to incoherence at the normative level within the UNGPs. It also risks giving rise to artificially narrow interpretations of the 'do no harm' responsibility of corporations, overlooking the role that corporations play in the realization of human rights and failing to provide

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94 ROCHA, Armando. *Private actors as participants in international law*: a critical analysis of membership under the Law of the Sea. Londres: Bloomsbury, 2023. p. 23-24.

95 PETERS, Anne; GLESS, Sabine; THOMALE, Chris; WELLER, Marc-Philippe. *Business and human rights*: making the legally binding instrument work in public, private and criminal law. [*S. l.*]: MPIL Research Paper Series, 2020. Available at: https://gedip-egpil.eu/wp-content/uploads/2020/08/Business-and-Human-Rights-MPI-M.-Ph.-Weller.pdf. Access on: 21 Oct. 2024. p. 23.

96 PETERS, Anne; GLESS, Sabine; THOMALE, Chris; WELLER, Marc-Philippe. *Business and human rights: making the legally binding instrument work in public, private and criminal law*. [*S. l.*]: MPIL Research Paper Series, 2020. Available at: https://gedip-egpil.eu/wp-content/uploads/2020/08/Business-and-Human-Rights-MPI-M.-Ph.-Weller.pdf. Access on: 21 Oct. 2024. p. 24.

a legally-grounded paradigm for the definition of their negative and positive responsibilities under international law.

It is a matter of fact that corporate actors are already actively and deeply involved in the realization of human rights, and often essential to it. In addition, they are receiving increasing legitimization by the international community as subjects endowed with a share of responsibility for the achievement of global objectives with far-reaching human rights implications, such as the Sustainable Development Goals (SDGs), of which they are considered key enablers, or the Paris Agreement. To disregard this reality, dodging relevant questions around corporate responsibilities for the protection and fulfilment of human rights, leads to an internally inconsistent, and ultimately unsatisfactory, theoretical underpinning of corporate responsibility for human rights. In this paper, starting from concepts developed in scholarly debates around the human rights jurisdiction of States, we have proposed a functional approach to corporate responsibility that grounds the human rights 'jurisdiction' of corporations in their exercise of rights--relevant functions. By linking human rights responsibility to power, and in particular to the functions that generate such power, the functional model can make major inroads in understanding some of the most difficult human rights issues of our time. The model can help redesign the BHR agenda, for instance suggesting increased attention within BHR practice toward distribution. With the exception of wages, this area is largely excluded from BHR initiatives. The role of housing companies and State regulation thereof in distributing access to housing, for instance, is not covered in National Action Plans, whereas the leading benchmarking initiative, the CHRB, covers agribusiness but does not include distribution of food that these companies control.

Some multinationals today do control access to rights for some groups. They have voluntarily taken on this position, and with it the correlative responsibility. Where States are unwilling or unable to regulate these corporations, the responsibility to respect must be taken at face value. It encompasses all actions that risk 'removing or reducing' individuals' rights enjoyment. For those corporations that control access, this is a demanding responsibility in line with their authority. The model does not displace the State as primary bearer of human rights responsibility, but it does provide a coherent conceptual framework through which the existence and scope of corporate responsibility for human rights can be identified in concrete cases, particularly in cases where the respective responsibility of States and businesses are not immediately obvious. The model also allows for a principled critique of emerging due diligence legislations when the obligations they impose on businesses do not match the extent of corporate responsibility under international human rights law. For instance, due diligence legislations over-relying on narrowly-defined technical steps (e.g. contractual obligations) might not reflect the extent of such responsibility. More importantly, as commented by Deva, due diligence legislations are only one among many tools on the 'regulatory menu', and must not be the only item on it.[97] The principled interpretation of corporate responsibility provided by the functional model can help shape policies that reflect the reality of corporate power and the influence that businesses often have on access to essential resources.

We argue that the corporate responsibility for human rights is not only an issue for domestic legal systems (of Global North countries, in most cases), but must be brought back as an important item in the international law debate. The functional model allows our conceptualization of corporate human rights responsibility under the UNGPs to go beyond a formalistic subjects-objects dichotomy around the notion of international legal personality, a dichotomy that serves 'no functional purpose'.[98] We have argued in this paper that the corporate responsibility to respect is grounded in international law regardless of the current absence of its clear codification in positive law. The proposed interpretation of corporate responsibility provides a conceptual counterbalance to the extensive rights that multinational corporations already, unquestioningly enjoy under international law. By affirming that the normativity of international human rights law creates legal responsibility for businesses, the model does not bestow on corporations a power they do not currently enjoy. Quite on the contrary, it conceives responsibility as a necessary corollary of power, recognizing the rights-relevant functions that corporations already exer-

[97] DEVA, Surya. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders? *Leiden Journal of International Law*, [*s. l.*], v. 36, n. 2, p. 389-414, Jun. 2023. p. 414.

[98] HIGGINS, Rosalyn. *Problems and process*: international law and how we use it. Oxford: Oxford University Press, 1994. p. 49.

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