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‘Change here for…’: Understanding progress in business and human rights through legal entanglement

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Abstract

Progress in the business and human rights space can be quite a fickle thing to assess. Despite intensive norm development, many observers emphasise elements of stagnation within the field. This article argues that much of the frustration is caused by the dominance of a linear understanding of progress which is fixated on the dichotomy between soft and hard forms of regulation. This, in turn, obscures much of the dynamism within the field. To better account for progress within the business and human rights space, the article suggests a shift of framing from a linear conception of regulatory change to one that understands the field as an entangled normative network characterised through the connections between norms. By using the norm of human rights due diligence as an example, the article highlights the nuanced developments and linkages between various instruments, systems, and actors that evidence intense norm-making activity within the business and human rights space. The on-going normative-discursive exchange between stakeholders produces a norm that is constituted through an iterative process of entanglement.

Keywords

Business and human rights, human rights due diligence, legal entanglement, OECD Guidelines, UN Guiding Principles on Business and Human Rights

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1. INTRODUCTION

Progress in the business and human rights space can be quite a fickle thing to assess. Despite intense norm-making activity over the past decade which resulted in the proliferation of various soft norms and more conventional binding instruments, such as domestic legislation, often the overall picture painted of the field is one of stagnation. Although the field is moving in the right direction, we are not getting to our desired destination quite quickly enough. In this article, it is suggested that much of this frustration is triggered by the linear understanding of progress which is pervasive within business and human rights. It is argued that the dominant narrative characterises development within the field as the movement from soft instruments towards hard, binding, and ideally international laws. Thus, the linear progress narrative is constructed around the soft/hard dichotomy and is quite similar to the movement along a single railway track – soft law and corporate social responsibility serve as the point of departure and binding international law as the grand city terminal. Yet, just as the most direct railway route might not be the quickest, so too the exaggerated adherence to the linear progress narrative can hamstring our understanding of progress.

In this article it is argued that the linear progress narrative and the soft/hard dichotomy fail to grasp much of the dynamism within the business and human rights field. In contrast, progress within this area comes into much better view if we approach it with a frame that allows us to see the micro-level developments and linkages between various norms, systems, and actors. An approach centred around the concept of legal entanglement reconfigures the image of the field into a genuine transnational legality which is characterised through the various connections existing within the network. Instead of a single railway line, we are confronted with a complex transport system in which various lines but also modes of transport connect, intersect, or create transit hubs, thus making travel much more efficient. By linking normative and discursive elements and continuously weaving more of them in, the entangled legality of business and human rights, just as the transport network, creates a different yet powerful and expansive system.

The value of such a change of perspective is demonstrated by unpacking, in section two, the current state of the business and human rights field. The section proceeds by explaining how the predominance of the linear progress narrative and the soft/hard dichotomy is facilitating a sense of stagnation in the area, before then proposing a change of perspective to a networked rather than linear understanding of norm development. In section three, the concept of legal entanglement as a potential theoretical frame to transcend the dominant narrative is suggested. The section provides a brief introduction to the concept and identifies some ways in which it challenges our understanding of how legal norms develop. Finally, in section four a closer look is taken at how legal entanglement can be identified in the business and human rights field by zooming-in on the linkages and contestations around the norm of human rights due diligence (‘HRDD’).

2. WAITING FOR A DIRECT CONNECTION: LINEAR PROGRESS WITHIN THE BUSINESS AND HUMAN RIGHTS FIELD

One of the central hubs of interaction for stakeholders in the business and human rights community is the annual session of the open-ended intergovernmental working group on

transnational corporations and other business enterprises with respect to human rights ('OEIGWG').[1] Also known as the 'business and human rights treaty process', the overall goal of the OEIGWG is to elaborate a legally binding instrument that would regulate corporate activities through international human rights law. To this end, the OEIGWG has held nine annual sessions by the time of writing, produced five drafts of the treaty, and organised a plethora of intersessional meetings with various stakeholders, including states, civil society, and the so-called 'Friends of the Chair'.[2]

Despite this vigorous activity, the OEIGWG process has been beset by challenges and there is little indication that a legally binding instrument can be agreed on in the foreseeable future. In many ways, the points of friction are not new – the treaty negotiation process was marred by difficulties since its inception, and some authors even suggest that the friction might be an inevitable consequence of trying to resolve the issue of corporate responsibility by reliance on international human rights law.[3]

Resolution 26/9 which formally initiated the draft treaty process and set up the working group was adopted in 2014, three years after the successful passage of the UN Guiding Principles on Business and Human Rights ('UNGPs')[4] through the UN Human Rights Council. Despite this continuity, the resolution fundamentally retrenched and 'brought into the open' existing tensions between stakeholders in the business and human rights field.[5] These divisions exist – drawn roughly, and with some exaggeration – between developing states and NGOs on the one hand and developed states and corporate enterprises on the other. They manifested already at the time of the vote on Resolution 26/9 and have characterised the subsequent treaty process.[6]

The dynamics of friction and repetition were present again during the most recent, 9th Session of the OEIGWG. The session was initiated with states disagreeing about which version of the draft document to discuss.[7] Additionally, the scope of application of the binding instrument, which has polarised the negotiations ever since it was addressed in the footnote of Resolution 26/9, remained irresolvable.[8] As yet another illustration of deadlock, the language of 'obligations' of

1. Established under UNHRC Resolution 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (adopted 25 June 2014) Res 26/9, UN Doc A/HRC/26/L.22/Rev.1.
2. The term 'Friends of the Chair' refers to a group of ambassadors who have been selected to convene, lead, and facilitate consultations during the inter-sessional period in order to develop the treaty text.
3. Jonathan Kolieb, 'Advancing the Business and Human Rights Treaty Project Through International Criminal Law: Assessing the Options for Legally-Binding Corporate Human Rights Obligations' (2020) 50 Georgetown Journal of International Law 789. Kolieb suggests that underpinning the draft treaty through a more narrow framing based on international criminal law would provide a more feasible option.
4. Special Representative of the Secretary-General, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.
5. Larry Catá Backer, 'Considering a treaty on corporations and human rights: Mostly failures but with a glimmer of success', in Jernej Letnar Cernic and Nicolás Carrillo-Santarelli (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018) 91.
6. Radu Mares, 'Regulating Transnational Corporations at the United Nations – the Negotiations of a Treaty on Business and Human Rights' (2022) The International Journal of Human Rights 1, 3–4.
7. See OHCHR, 'Draft report on the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (27 October 2023) <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-report.pdf> accessed 29 November 2023 (Draft report), 3–4.
8. See UNHRC Resolution 26/9 (n 1); Draft report (n 7) 6.

business enterprises was introduced in the third draft of the treaty during the 7th session of the OEIGWG in 2021, only to again be reverted to 'responsibilities' in the most recent draft.[9] Similarly, a reference to the rights of 'peasants and other people working in rural areas' that was included in the third draft has been cut from the current text, prompting questioning and opposition from states and organisations.[10] As a result, even the most recent meetings of the working group resemble a Groundhog Day of limited engagement by states, presentation of previously rejected textual proposals for the treaty, and on-going disagreement around essential matters – such as the scope of application of the binding instrument or the inclusion of direct obligations for corporations.[11]

One reason why stagnation appears as such a prominent dynamic in the treaty negotiation process is the criteria that we use in assessing progress within the business and human rights field. As Deva rightly suggests, it is inevitable to ask 'whether the current business and human rights (BHR) standards – including the UNGPs – are "fit for purpose"'.[12] Unfortunately, however, responses to this question overly focus on a linear understanding of the issue framed along the soft law/hard law dichotomy. The already mentioned railway analogy is illustrative here – movement from station A to station B is direct and linear, strictly along a single track with no changes allowed. In similar terms, the amount of progress or the sufficiency of existing standards in business and human rights is then measured by the degree to which we have moved from soft normative standards towards binding, hard-law obligations, whether at the international or domestic level. The treaty process has been a prime example of this way of thinking, with much of the impetus for the treaty being borne out of the 'perceived inadequacy of the [UNGPs'] "soft law" character' and the desire for a 'harder' international legal document to address the area.[13] And although the sharp contrast between soft and hard approaches, or voluntary as opposed to mandatory regulation, and their respective supporters in many ways represents a 'false dichotomy',[14] it has nevertheless emerged as a major structuring narrative within the business and human rights movement, including in much of the academic commentary.[15]

9. Compare the textual changes in the third and fourth versions of the draft legally binding instrument, for example at preambular paragraph 12. Available at <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-track-changes.pdf> accessed 29 November 2023.
10. Draft report (n 7) 6.
11. Joe Zhang, 'Breakthrough in business and human rights binding treaty negotiation but be prepared for a bumpy road ahead', (*IISD Investment Treaty News Blog,* 20 December 2021) <https://www.iisd.org/itn/en/2021/12/20/breakthrough-in-business-and-human-rights-binding-treaty-negotiation-but-be-prepared-for-a-bumpy-road-ahead/> accessed 29 November 2023.
12. Surya Deva, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface' (2021) 6 Business and Human Rights Journal 336, 337.
13. Chiara Macchi, 'A treaty on business and human rights: Problems and prospects', in Jernej Letnar Cernic and Nicolás Carrillo-Santarelli (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018) 65.
14. There is much more nuance in the respective positions of the various actors – see, for example, Claire Methven O'Brien, 'Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention' (2020) 114 American Journal of International Law 186, 186–91; Mares (n 6) 6–7.
15. See, for example, Surya Deva and David Bilchitz, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017); Barnali Choudhury, 'Balancing Soft Law and Hard Law for Business and Human Rights' (2018) 67 International & Comparative Law Quarterly 961; Olga Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2014) 32 Netherlands Quarterly of Human Rights 44.

2.1. From soft law to hard law – the dominance of unidirectional thinking

If the soft/hard dichotomy and the linear progress narrative serve as the default position for our understanding of the field, one can justifiably feel a sense of stagnation. As already mentioned, the draft treaty process has been characterised by a weak engagement by the Global North, purportedly due to concerns about undermining the consensus built around the UNGPs,[16] and a consequent lack of support for the treaty in its current form. While the position of some states in the Global North is more nuanced, especially if we take into account their domestic regulations which I will discuss below, it is a realistic possibility that the OEIGWG process will lead to a treaty with relatively few signatories that will mostly come from the Global South. And while such an outcome can still be seen as a success for multiple reasons, it doesn't really achieve the establishment of universally binding, hard obligations under international law.[17]

Similar concerns emerge if we look more closely at the substantive content of the proposed binding instrument. Despite the fact that the future instrument has been solidified and significantly improved through its multiple drafts, it is designed as a fairly conventional treaty. Thus it does not feature some of the more ambitious provisions that are included in soft law instruments, such as direct responsibility of corporations or a more robust oversight machinery.[18] Moreover, there appears to be strong retrenchment by some states which thus far have vigorously participated in the negotiations, aimed at watering down some of the key provisions and even the scope of a future treaty.[19] As a result, legitimate concerns about what can be realistically expected from the negotiation process lead to scepticism and a widespread feeling of stagnation.[20]

The predominance of the soft law/hard law dichotomy and the attendant concerns about stagnation are not restricted to the international level, however. Multiple domestic and regional legislative initiatives have emerged around the world in order to deliver on the promise of hardening the soft law provisions of the UNGPs and other instruments, with mixed results. Arguably the major achievement in this category is the French *loi sur le devoir de vigilance* of 2017, which combines a mandatory HRDD requirement for France's largest corporations with an enforcement mechanism for cases of non-compliance and harm resulting therefrom.[21] The enforcement mechanism has already resulted in legal actions being brought against some corporations, including Total and EDF.[22] More recently, Germany has adopted a mandatory HRDD law in supply chains which came into force in January 2023, with a number of complaints being filed under that act throughout

16. Mares (n 6) 3.
17. See for example, Michael Riegner, 'A Framework Agreement in Business and Human Rights? An Interview with Surya Deva and Claire Methven O'Brien', *Volkerrechtsblog* (24 June 2022) available at <https://voelkerrechtsblog.org/a-framework-agreement-in-business-and-human-rights/> accessed 22 December 2023; Catá Backer (n 5).
18. Mares (n 6) 3.
19. Lydia de Leeuw, Maisie Biggs, 'Re-cap: 2020 negotiations over binding treaty on business and human rights', (*SOMO blog,* 5 November 2020) available at < https://www.somo.nl/re-cap-2020-negotiations-over-binding-treaty-on-business-and-human-rights/> accessed 29 November 2023; See also the daily reports from the OEIGWG session by ECCJ available at <https://www.business-humanrights.org/en/latest-news/6th-session-of-the-intergovernmental-working-group-dedicated-to-negotiations-on-the-second-revised-draft-of-the-binding-treaty/ > accessed 29 November 2023.
20. Claire Methven O'Brien, 'Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty' (2020) 5 Business and Human Rights Journal 150.
21. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre 2017 (JORF) 2017–399.
22. Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International & Comparative Law Quarterly 789, 802.

2023.[23] However, both of these laws differ in important respects from the soft law instruments on which they are based – for example, by imposing relatively high thresholds for the number of employees which a corporation needs to have in order to be covered by the laws, or by focusing only on 'tier one' relationships between corporations and their suppliers and thus excluding human rights violations happening lower down in the supply chain.[24] This indicates that the binding instruments do not follow the letter or spirit of the soft law which they are supposed to harden. Other domestic initiatives which provide for mandatory HRDD coupled with some degree of enforcement[25] often adopt a narrower, sector- and issue- specific scope – such as the Swiss Conflict Minerals and Child Labour Due Diligence Ordnance[26] or the Australian Illegal Logging Prohibition Act.[27] With these initiatives, human rights considerations are not necessarily the central focus of the provisions. Such initiatives can address a multitude of other issues at the expense of a thorough engagement with human rights matters, emphasising the limited and fragmentary nature of the hardening of soft law provisions.

Perhaps unsurprisingly, much of the domestic effort by states to produce 'hard' law provisions has been focused on legislation imposing disclosure and transparency duties without a formal enforcement mechanism. The most well-known examples are the UK Modern Slavery Act, Section 1502 of the Dodd-Frank Act and the Californian Transparency in Supply Chains Act, but there are many more regulations falling into this category.[28] Despite taking the form of binding domestic law, it is questionable to what extent such disclosure duties deliver on the promise of hardening the field of business and human rights regulation in the absence of meaningful accountability mechanisms. Adoption of instruments without the necessary bite can further reinforce the perception that the development in this area is mired by stagnation and lack of commitment by key stakeholders. Indeed, the referendum on the Swiss Responsible Business Initiative illustrates these frustrations well – the more ambitious proposal imposing mandatory HRDD was rejected at the polls despite securing a popular majority of 50.7%, and

23. Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021 (BGBl. I S. 2959); For example, claims have been brought against IKEA, Amazon, and BMW. See for example, Markus Krajewski and Shuvra Dey, 'Effective Human Rights Due Diligence Ten Years After Rana Plaza?: Assessing the complaint against IKEA and Amazon under the German Supply Chain Due Diligence Act' (*Verfassungsblog,* 10 May 2023) available at <https://verfassungsblog.de/effective-human-rights-due-diligence-ten-years-after-rana-plaza/> accessed 24 November 2023.
24. John Ruggie, 'Letter from John Ruggie to German Ministers regarding alignment of draft supply chain law with the UNGPs' (*Shift*, 9 March 2021) available at <https://shiftproject.org/ruggie-letter-german-law-supply-chain-law/> accessed 24 November 2023.
25. Predominantly in the form of administrative, if quite sizeable, fines for failure to carry out due diligence.
26. See Arts 964*j* – 964*l* of the Swiss Code of Obligations of 30 March 1911 (SR220, Status as of 1 September 2023) and Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour of 3 December 2021 (SR221.433, Status as of 1 January 2022).
27. Illegal Logging Prohibition Act 2012 (No. 166, 2012); see also Justine Nolan, 'Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights Section II: Dossie Especial: Business and Human Rights' (2018) 15 Brazilian Journal of International Law 65; Claire Bright and others, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22 Business and Politics 667.
28. Some of these instruments have been already assessed by other authors – see for example, Nolan (n 27); Bueno and Bright (n 22); Rachel Chambers and Anil Yilmaz Vastardis, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability' 21 Chicago Journal of International Law 45; Bright and others (n 27).

Switzerland instead adopted the parliamentary counterproposal focusing on transparency and reporting duties.[29] Despite a number of ambitious proposals being in advanced preparatory stages, it is understandable that observers of the business and human rights world might feel that the 'end of the beginning' is taking far too long.

2.2. Changing track – embracing normative networks

While the challenges of achieving hard law provisions within business and human rights regulation are prominent, they are primarily characteristic of the deeper tension prevalent in our understanding of progress within this field. They therefore represent more of a symptom than a cause. Crucially, it is suggested in this article that an exaggerated focus on the adoption of hard law provisions fails to capture much of the dynamism within the field due to being constrained by the soft law/hard law dichotomy and the linear progress narrative. Zooming-in only towards one end of the dichotomy can distort the picture of emerging normativity. Again, resorting to the railway analogy used above, one might usually think that the straight connection between A and B is the quickest way to travel between the two destinations. However, what if the train runs only once a week, or arrives through a circuitous route which stops at many different stations? In that case, one ought to consider a way of travel which requires a change of trainlines, or even a change of modes of transport – say, using the bus for a section of the journey. The same is true for the business and human rights field, in which much of the progress is contingent on the operation of an interlinked network of norms, actors, and processes. In short, we should understand the field as a normative network that can be characterised not only in terms of the pedigree of its constituent parts but also through the connections that exist in-between them.

In fact, this article suggests that business and human rights is particularly amenable to such entangled thinking for a number of reasons. For one, much of the renewed momentum within business and human rights regulation is the consequence of the adoption of the soft law UNGPs which have transformed the regulatory environment. A significant reason for the success of the UNGPs has been John Ruggie's decision to go down the path of softer, more diluted responsibility for businesses in construing the UNGPs' underlying 'Protect, Respect and Remedy' Framework. Critics have rightly pointed to the cost of generating support for the UNGPs in this manner.[30] Nevertheless, Ruggie's framing of the provisions allowed the UNGPs to overcome the stalemate produced in the aftermath of the rejection of the more ambitious Draft Norms on the Responsibilities of Transnational Corporations.[31] The second reason why entangled thinking is

29. In order to be adopted, the popular initiative would have needed both a popular and cantonal majority – however, the initiative failed to gather the support of a majority of Swiss cantons. See further Laura Knöpfel and Carlos Lopez, 'Finding a silver lining in the rejection of the Swiss Responsible Business Initiative: a hope of legal accountability in the parliamentary counterproposal (Part 1)', (*OpinioJuris,* 17 December 2020) available at <http://opiniojuris.org/2020/12/17/finding-a-silver-lining-in-the-rejection-of-the-swiss-responsible-business-initiative-a-hope-of-legal-accountability-in-the-parliamentary-counterproposal-part-1/> accessed 23 December 2023.
30. Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013).
31. UN Sub-commission on the Promotion and Protection of Human Rights, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (A/Res. 2003/16, UN Doc.E/CN.4/Sub.2/2003/L.1.).

relevant is that a major part of the dissemination and implementation of the UNGPs is performed via other soft law instruments, whether this refers to global policy instruments, sectoral initiatives, or private corporate codes and corporate social responsibility policies.[32] In their empirical mapping of the regulation of business and human rights, Kirkebø and Langford have identified 98 standards which apply globally and transnationally.[33] But it is not simply a matter of numbers when it comes to the importance of soft law – such provisions have contributed to the development and interpretation of many key provisions of the UNGPs. This shall be demonstrated in the subsequent sections of this paper in the context of human rights due diligence. Overlooking the plethora of instruments on account of their insufficient 'hardness' can thus create a serious blind spot when assessing the state of business and human rights.

This entangled perspective is, of course, not intended to dismiss a critical perspective on soft law. Non-binding and voluntary normative initiatives are often used as a method of window-dressing in the human rights sphere.[34] But neither should the promise of a linear hardening narrative be overstated. Hard law provisions do not automatically translate into increased accountability or better access to remedy for victims, as the early record of the French due diligence law indicates. Although it is too early to comprehensively assess the performance of the law, the first indicators show that it has not eradicated the sort of judicial shadowboxing around matters such as jurisdiction that is common in business and human rights disputes. Even more questionable is the impact of hard law provisions without enforcement mechanisms. For example, an independent governmental report on the UK Modern Slavery Act recommended that steps should be taken to address non-compliance and provide an enforcement mechanism.[35]

What this article suggests is to look beyond the soft law/hard law dichotomy. Neither pure voluntarism nor wholesale hardening represent a silver bullet as both types of approaches have their uses depending on the circumstances and preferences of various stakeholders involved in the business and human rights discourse.[36] As a result, the true shape and the development of this field come into better view when perceived through the prism of a genuine transnational legality which is characterised through the entangled and multi-layered nature of normative elements. Other authors have used the framing of governance polycentrism or of a galaxy of

32. See for example, Choudhury (n 15); Enrico Partiti, 'Polycentricity and Polyphony in International Law: Interpreting the Corporate Responsibility to Respect Human Rights' (2021) 70 International & Comparative Law Quarterly 133; Elise Diggs, Milton Regan and Beatrice Parance, 'Business and Human Rights as a Galaxy of Norms' (2019) 50 Georgetown Journal of International Law 309; Karin Buhmann, 'Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions' (2015) 6 Transnational Legal Theory 399, 246.
33. Tori Loven Kirkebø and Malcolm Langford, 'The Commitment Curve: Global Regulation of Business and Human Rights' (2018) 3 Business and Human Rights Journal 157.
34. See for example, Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013); Sarah Joseph and Joanna Kyriakakis, 'From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power' (2023) 36 Leiden Journal of International Law 335, 357–61.
35. Secretary of State for the Home Department, 'Independent Review of the Modern Slavery Act 2015: Final Report' (May 2019) 24–25.
36. Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421; Kishanthi Parella, 'Hard and Soft Law Preferences in Business and Human Rights' (2020) 114 American Journal of International Law 168; Choudhury (n 15).

business and human rights norms, but this article relies on the concept of legal entanglement which was recently coined in a volume edited by Nico Krisch.[37] Legal entanglement gives both a valuable way of describing the structure of the business and human rights field but, more importantly, provides a theoretical framework that brings into focus the importance of organic, discursive linkages and overlaps between laws and norms of different kinds and of different origins. Such an understanding of the business and human rights area transcends the soft/hard dichotomy by emphasising the interconnected manner in which both these types of norms operate, often travelling between distinct bodies of norms and influencing how these develop. As the notion of entanglement is not frequently used in the context of international law, the next section is dedicated to a brief overview of the notion and how it provides a conceptual framework for the approach adopted here.

3. HOW TO READ THE MAP OF THE NETWORK: DISENTANGLING THE CONCEPT OF LEGAL ENTANGLEMENT

Although we often talk about business and human rights regulation as a distinct field of governance, in reality it represents a loose assemblage of norms, legal instruments, cases, recommendations, reports, and corporate guidelines which can be traced back to a variety of normative systems. Some of these normative systems are conventionally conceived of as legal and some are less so. In such circumstances, adopting an analytical lens that focuses predominantly on the 'hardness' of existing and developing norms makes little sense. It ignores the messy ways in which business and human rights regulation comes into being: the cross-references between soft law instruments, mobilisations around particular rules by activists and affected rightsholders, uptake (or ignorance, or reinterpretation) of definitions in binding domestic laws and court proceedings, and many others. The resulting picture of the field is rather limited, with many interesting dynamics and developments being left out of sight.

Instead, this article suggests that the concept of legal entanglement can be used as an analytical tool to better understand the networked nature of business and human rights regulation by accounting for the linkages and overlaps between laws and norms of different kinds and of different origins. Although the concept has been coined in the context of international law only recently by Nico Krisch, it has been successfully used in other disciplines, notably history, to study processes of mutual influence and linkage in which different objects of inquiry interact, potentially transforming these objects themselves.[38] In legal use, it is intended to refer to 'a situation in which law is constituted by the ways in which norms from different origins are linked with one another without being integrated into a common order (or being entirely separated into different, parallel orders)'.[39] Although such entanglements can be very strong and lead to a situation of enmeshment, where the state of each norm or body of norms cannot be described

37. Larry Catá Backer, 'Governance Polycentrism or Regulated Self-Regulation: Rule Systems for Human Rights Impacts of Economic Activity Where National, Private, and International Regimes Collide' in Kerstin Blome and others (eds), *Contested Regime Collisions* (Cambridge University Press 2016); Diggs, Regan and Parance (n 32); Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021).

38. Nico Krisch, 'Framing Entangled Legalities beyond the State' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021) 3. See also the work of Shalini Randeria on the topic.

39. Nico Krisch, 'Entangled Legalities in the Postnational Space' (2022) 20 International Journal of Constitutional Law 1, 12.

without reference to others, they do not reach a state of full integration within a separate legal or normative system.[40]

One can clearly see conceptual affinities between legal entanglement and other pluralist approaches to law, particularly those which analyse the complex interactions between various spheres of legality in spatial rather than systemic terms, such as interlegality.[41] Legal entanglement certainly shares the key premise of the concept of interlegality in seeing law in terms of 'different legal spaces superimposed, interpenetrated, and mixed in our minds, as much as in our actions'.[42] The characteristic porosity of this space allows norms to travel and interact more freely than is usually the case with state-inspired visions of legal orders.[43] However, where interlegality has primarily been used to 'describe and perhaps explain legal relations',[44] the concept of entanglement moves beyond recognition in an attempt to theorise the interactions which produce such legal relations.[45] As will be explained further below, this entails paying attention not just to the fact of entanglement and linkage, but also to the discursive constructions which accompany entanglements.[46] Legal entanglement thus provides a robust theoretical framework for the analysis of transnational governance spaces which are characterised by polycentricity.

One way in which the notion of entanglement can be used is as an empirical question about the nature of the legal phenomena which we are observing – can we see legal orders which are interconnected in the ways described above, or norms which 'travel' between orders? Historically, entanglement between legal orders appears to have been a common practice. We can see it in the juris-generative practices of local dispute settlement in the Byzantine Empire in the 6th Century CE but also in various medieval codices which contained elements from many different bodies of norms.[47] Indeed, Krisch argues that entanglement has been 'a defining feature of many legal orders before the emergence and consolidation of the modern state'.[48] The predominance of the idea of the modern state and its law arguably embedded the vision of separate, territorial legal orders (mutually managed through an overarching law of nations) as the main legal paradigm in the twentieth century.[49] Yet, the onset of contemporary trans- and post-national legal constellations attests to a re-emergence of polycentric governance characterised by multiplicity and linkages between diverse normative systems. Business and human rights regulation is an obvious example of

40. Krisch (n 38) 6.
41. Dana Burchardt, 'The Concept of Legal Space: A Topological Approach to Addressing Multiple Legalities' (2022) 11 Global Constitutionalism 1; Boaventura de Sousa Santos, 'Law: A Map of Misreading – Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 1279–302; Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press 2002); Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019).
42. De Sousa Santos, 'Law: A Map of Misreading' (n 41) 297–8.
43. ibid, 298; Krisch (n 38) 5.
44. Jan Klabbers and Gianluigi Palombella, 'Introduction: Situating Inter-Legality' in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019) 10–11.
45. Sanne Taekema, 'Navigating Law's Complexities: Concepts for Postnational Law—A Reply to Nico Krisch' (2022) 20 International Journal of Constitutional Law 514, 515.
46. Krisch (n 38) 5.
47. Caroline Humfress, 'Entangled Legalities beyond the (Byzantine) State: Towards a User Theory of Jurisdiction' in Nico Krisch (ed), *Entangled Legalities Beyond the State*, (Cambridge University Press 2021); Krisch (n 38) 7.
48. Krisch (n 38) 7.
49. Krisch (n 39) 6–9. However, compare Jan Klabbers, 'Dystopian Legalities: A Reply to Nico Krisch' (2022) 20 International Journal of Constitutional Law 507.

such entanglement, but we can also see it as a prominent dynamic in international trade law or the regulation of global finance.[50] Hence, Krisch's call for entanglement to be seen as the 'normal state of law' is compelling.[51]

However, Taekema is right in saying that the empirical aspect of the entanglement thesis, albeit persuasive and important, 'seems not to be the only ambition for the concept, or if it is, *it should not be*'.[52] Although there is value in mapping the business and human rights space through the lens of entanglement, the framing is primarily utilised in this article because it can raise questions about how we understand the development of (legal) norms, how certain documents, rules, or their interpretations gain traction, and how this consequently affects their effectiveness. This article focusses on three ways in which legal entanglement challenges the conventional way in which these issues are understood, and which, as will become clear in the next section, are particularly compelling for the business and human rights field. First, entanglement occurs not only as a matter of fact but is also pursued through discursive constructions by different actors.[53] Norms of various origin are brought into a relationship, often in a haphazard or seemingly unsystematic manner, redefining their relative weights and mutual interconnections when applied in a particular context.[54] This process of discursive relationing also determines the extent to which the norms form part of a particular assemblage, such as business and human rights.[55] Paying attention to such discursive entanglement enables a much more nuanced understanding of the dynamics which are involved, especially if a field is subject to intense and on-going contestation. Second, it follows from the previous point that a legal entanglement outlook pushes us towards a conception of law as a social practice. It requires paying attention to the practices of actors which make norms work, whether this means creating, interpreting, criticising, contesting norms, or other examples of how actors engage with them.[56] It is through such micro-practices of relevant actors that the relations between norms, and the shape of the overall legal space, are defined.[57] The picture of law that emerges will be 'far more disorderly' than the one suggested by systemic accounts which 'rely on doctrinally and judicially consolidated rules'.[58] However, and this is the third point to emphasise, contestation around which norms count ought not be seen as something inherently negative, or something that necessarily leads to fragmentation. Entanglement of different norms through

50. Tomáš Morochovič and Lucy Lu Reimers, 'Hidden in the Shades: Patterns of Entanglement within the Web of Corporate Social Responsibility Law' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021); International trade law is an interesting example as it represents an area which is characterised by the significant 'hardness' of its norms. Yet, as Reimers persuasively argues in relation to linkages between trade norms and environmental norms, entanglement is a common reality even in this context. See Lucy Lu Reimers, 'International Trade Law: Legal Entanglement on the WTO's Own Terms' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021); Francesco Corradini, 'The Social Life of Entanglements: International Investment and Human Rights Norms in and beyond ISDS' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021).
51. Krisch (n 39) 12.
52. Taekema (n 45) 518. Emphasis added by author.
53. Krisch (n 38) 5.
54. For example, as demonstrated by Julia Eckert in the context of mobilisations of norms by social movements in environmental cases; see Julia Eckert, 'Entangled Hopes: Towards Relational Coherence' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021).
55. Krisch (n 39) 13.
56. Taekema (n 45) 518.
57. Krisch (n 39) 11.
58. ibid.

discursive contestation can also lead to consolidation around norms which govern interactions.[59] Indeed, it can operate as a type of coping mechanism for situations where a systemic approach to the resolution of legal conflicts is not feasible. In order to illustrate how legal entanglement and these characteristics operate within the business and human rights field, the next section focusses on the norm of HRDD and the various linkages which it has attracted since its adoption in the UNGPs.

4. A STUDY OF A TRANSPORT HUB: HUMAN RIGHTS DUE DILIGENCE AS A FOCAL POINT FOR LEGAL ENTANGLEMENT

Although the field of business and human rights regulation in general shows strong signs of legal entanglement, in this article the focus of the analysis lies on one particular norm – the norm of human rights due diligence. One would be forgiven for finding this decision quite odd. After all, how can a single norm exemplify linkages and networks between normative systems? Yet, as the analysis will show, HRDD has become an important normative node within the business and human rights field. As such, it attracts engagement by a wide variety of governance actors and is increasingly embedded across a range of normative systems, spanning the full range of the soft/hard spectrum.[60] This, in turn, facilitates linkages between bodies of norms and the creation of an entangled regulatory network.

As already highlighted in section two of this paper, HRDD is one of the provisions of the UNGPs which has enjoyed significant uptake in a variety of other instruments, both at the harder and softer ends of the regulatory spectrum. Similarly to the other provisions of the UNGPs, it was intended that the norm would 'travel' and would be implemented through uptake by actors and other bodies of norms – ultimately, the UNGPs represent 'a common global platform for action, on which cumulative progress can be built, step-by-step'.[61] But the success of the norm in performing this function is not simply due to the framing of the UNGPs – indeed, many other provisions included in the document have failed to accumulate the same amount of momentum.

Several attributes of the norm facilitate its operation as a 'straddling practice' under the entanglement thesis. Straddling practices are predominantly open concepts, including both norms and social practices, with roots in different contexts which straddle the boundaries of multiple legalities, blurring these borders and creating ad hoc linkages between norms and systems.[62] One attribute of HRDD that allows for it to operate as a straddling practice is the fact that it does not represent a wholly new, unfamiliar concept, as the notion of due diligence already exists in the vocabularies

59. Krisch (n 39) 29. See also Nico Krisch, Francesco Corradini and Lucy Lu Reimers, 'Order at the Margins: The Legal Construction of Interface Conflicts over Time' (2020) 9 Global Constitutionalism 343.
60. Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman, III' (2017) 28 European Journal of International Law 929; Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 Leiden Journal of International Law 389. For an exploration of provisions of the draft legally binding instrument which complement HRDD, see also Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 Business and Human Rights Journal 41, 53–54.
61. UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2021) UN Doc A/HRC/17/31, para 13.
62. Krisch (n 38) 24–25; Krisch (n 39) 16 and 20–22.

of (international) lawyers and corporate actors.[63] While Ruggie was at pains to differentiate the norm from existing conceptions of due diligence and emphasise its *sui generis* nature, it would be hardly possible for actors to put them completely to the side and develop the concept in a vacuum.[64] Another aspect of HRDD which facilitated its entanglement with other normative orders is the context-contingent nature of the norm. Depending on the operational context in which HRDD is being performed, the steps required by a business enterprise will be different.[65] Coupled with the lack of much substantive prescription in the UNGPs as to how HRDD should look like in different contexts, this provided an opening for extensive entanglement and subsequent development. Through these attributes, the norm of HRDD is imbued with a degree of hybridity, 'not entirely belonging to one or the other order but leading an in-between existence'[66] across multiple systems which make-up the business and human rights regulatory space.

The consequence of straddling boundaries is that HRDD actively contributes to the constitution of the field by facilitating linkages. Indeed, these linkages are only possible *because of* HRDD's positioning in the in-between space between normative orders, whether soft or hard, at a general level but also within specific sectors. Seeing the resulting space as a networked web of normativity rather than as separate instruments or processes can shine a light on the complexity of norm-development within business and human rights. The connective force of HRDD comes across most strongly when we look at the discursive level – as actors engage with the norm, particular interpretations are crystallising and gaining traction.

One normative regime which has done this extensively in the years following the adoption of the UNGPs is the OECD system of corporate governance, in ways that both reiterate existing interpretations but also 'irritate' and contest them. This pushes HRDD into new directions. The OECD has extensively focused on the implementation of responsible business conduct through a multitude of non-binding documents, with the most central being the OECD Guidelines for Multinational Enterprises ('the Guidelines').[67] While the Guidelines have been influential in their own right, they are interesting from an entanglement perspective because of the linkages with other normative instruments (and systems) which are embedded within them, such as the UNGPs, the ILO Tripartite Declaration, or various international human rights treaties.[68] This means, for example, that HRDD

63. See for example, Bonnitcha and McCorquodale (n 60); Holly Cullen, 'The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond' (2015) 48 George Washington International Law Review 743.
64. Given the trajectory of development of the HRDD norm over the past decade, it is feasible to say that the norm has become a standalone concept. However, the role played by existing conceptions of due diligence in facilitating this process cannot be underestimated – on this, see the exchange in Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 European Journal of International Law 899; John Gerard Ruggie and John F Sherman, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 European Journal of International Law 921.
65. UNGPs, Art 17(b).
66. Krisch (n 39) 20.
67. OECD, 'Decision of the Council on the OECD Guidelines for Multinational Enterprises' (adopted 27 June 2000) OECD/LEGAL/0307. The original version of the OECD Guidelines has been updated on a number of occasions, with the norm of human rights due diligence being included as part of the 2011 revision of the Guidelines. The most recent update occurred in 2023. For a brief history of the Guidelines and their linkages to other business and human rights instruments, see Tomáš Morochovič and Lucy Lu Reimers, 'Hidden in the Shades: Patterns of Entanglement within the Web of Corporate Social Responsibility Law' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021) 322 et seq.
68. Morochovič and Reimers (n 67).

is explicitly mentioned as a detailed recommendation within the Guidelines, despite the fact that it originates in a completely different document adopted through the UN system. This entanglement is by no means accidental. As an example, the alignment between the Guidelines and the UNGPs has been openly pursued and has enabled the implementation and dissemination of some of the concepts of the UNGPs (including HRDD).[69] Moreover, the Guidelines are only one part of the picture when it comes to the implementation of HRDD within the OECD system, with a multitude of specific guidance documents and policy papers being produced by the organisation on the operation of the concept in both sectoral and general settings. Thus, entanglement of HRDD within the OECD system takes the form of specific normative recommendations and also as a lively discursive practice which further develops and clarifies the meaning of the norm in particular situations.

If we look at the OECD regulations on corporate governance in closer detail, we can notice that the discursive entanglement of HRDD means a number of different things. In the first place, it refers to the transposition of the concept into a new body of norms where it is posited as a crucial tool 'through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts' relating to human rights.[70] Where the transposition of elements of HRDD within the OECD Guidelines accords with the language of the UNGPs, we can see this as a sign of affirming existing interpretations of the norm but also, at a network level, of entanglement in a way which increases the proximity between the two bodies of norms.[71] Many elements of HRDD have been repeated and affirmed in this way within the Guidelines – for example, its context-specific nature and the need for HRDD to be an on-going process.[72] However, OECD documents also went beyond the UNGPs by substantively developing the concept. The OECD Due Diligence Guidance for Responsible Business Conduct ('OECD General Due Diligence Guidance') provides detailed insight for corporations on what substantive actions are required by the somewhat loosely defined provisions of the UNGPs, such as what it means to 'identify and assess actual and potential adverse impacts' or to be 'communicating how impacts are addressed'.[73] Beyond the OECD General Due Diligence Guidance, the organisation has also produced sector-specific HRDD policy documents for the mining and extractives sector, finance, and the garment and footwear industry.[74] Such developments would be difficult to account for under the linear progress narrative, especially since they take the form of non-binding recommendations and guidance documents. Yet, the shift in perspective prompted by the entanglement thesis allows us to appreciate the linkages as substantive developments of the HRDD concept.

69. John F Sherman, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' in Rae Lindsay and Roger Martella (eds) *Corporate Social Responsibility - Sustainable Business: Environmental, Social and Governance Frameworks for the 21st Century* (Wolters Kluwer 2020); Ruggie describes this as the notion of distributed networks. See John Gerard Ruggie, 'The social construction of the UN Guiding Principles on Business and Human Rights' in Surya Deva and David Birchall, *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020).
70. OECD Guidelines, Chapter on General Principles, para 14 (p 23). Note the fact that it is not only human rights issues to which due diligence is applicable under the OECD Guidelines, but also labour and corruption.
71. Proximity is identified by Krisch as one of the dynamics of entanglement – see Krisch (n 38) 16.
72. Compare language used in UNGP Principle 17 (b) and (c) and OECD Guidelines, paras 15 and 45 of the Commentary.
73. UNGP Principle 17, compare with language of OECD Due Diligence Guidance, pages 25 and 35.
74. OECD, 'OECD Due Diligence Guidance for Responsible supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (3rd edn, 2016); OECD, 'Due Diligence for Responsible Corporate Lending and Securities Underwriting' (2019); OECD 'OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector' (2017).

There is another part of the OECD system which facilitates the development of the HRDD norm – National Contact Points ('NCPs'). NCPs are set up domestically and are tasked with hearing complaints brought by a variety of interested parties relating to the implementation of the OECD Guidelines, including those concerning HRDD. NCP statements can thus be used 'to gain insights into human rights due diligence through the ongoing elaboration, explanation and construction of what the concept entails'.[75] In other words, NCPs are often involved in specifying the content of the norm in various contexts. In a study on the impact of NCP statements in developing the norm, Buhmann identifies multiple aspects of HRDD which were subjected to interpretation by NCPs, such as the notion of leverage, the meaning of 'business relationship' or 'stakeholder consultation and engagement'.[76] What is notable from the entanglement perspective is that NCPs rarely perform this task in a closed normative space. There is a willingness to create discursive linkages with bodies of norms which have seemingly no relation to the OECD Guidelines in interpreting norms for responsible business conduct.[77] Bodies of norms which have no formal connection to neither the OECD Guidelines nor the UNGPs are thus relied on to interpret the concept of HRDD. The decision in *Rabobank* is a good example of this dynamic, with the Dutch NCP referring to the Roundtable for Sustainable Palm Oil ('RSPO') as a good practice for HRDD within the palm oil industry.[78] In particular it praised the way the private standard generates leverage and engages stakeholders.[79] In cases such as *Rabobank*, NCPs become focal points for legal entanglement of different bodies of norms which can all bear a stamp on how HRDD is interpreted and developed.

One more element of the NCP statement in *Rabobank* merits attention – the assertion by the NCP that the RSPO's approach was 'in line with the due diligence approach envisaged by the Guidelines'.[80] It underlines that normative alignment is not occurring only between the UNGPs and the OECD Guidelines but also in relation to other types of standards and instruments. The multi-directionality of the linkages is brought to the fore, with the relationship between the OECD Guidelines and the UNGPs representing merely the tip of the iceberg. Many other instruments adopt the concept of HRDD in ways which are, as will become clear further below in the analysis, (mis)aligned with the UNGPs and develop the concept further. Some examples are the ILO Tripartite Declaration, the ISO 26000 social responsibility standard, the IFC Performance Standards, the RSPO, and binding domestic instruments. However, the purpose here is not to identify all the instruments which have adopted the concept of HRDD but rather to emphasise that the norm itself is construed through this process of entanglement between bodies of norms. Shifting our perspective in this manner allows us to re-evaluate how we understand the development of norms in a polycentric setting. Thus, when the ISO 26000 standard works with HRDD, it draws on the UNGPs but also emphasises, in a document on the alignment of the ISO standard and the OECD Guidelines, that the two instruments crucially have a shared

75. Karin Buhmann, 'Analysing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findings and Outlook' (2018) 36 Nordic Journal of Human Rights 390, 393.
76. ibid 403–6.
77. Morochovič and Reimers (n 67). Indeed, it is easy to forget that the norm of HRDD is not really 'proprietary' to the OECD Guidelines, in the sense that it did not originate within the Guidelines but rather in the UNGPs.
78. Netherlands NCP, *Friends of the Earth v. Rabobank (Final statement)* (15 January 2016); The Roundtable for Sustainable Palm Oil is a global multi-stakeholder sustainability initiative.
79. ibid page 4.
80. *Friends of the Earth v. Rabobank* (n 78) page 4.

understanding of HRDD.[81] In the same vein, and beyond the linkages already highlighted, the OECD evaluates multistakeholder initiatives in the garment and footwear sectors on their alignment with the OECD's HRDD guidance within these industries,[82] assessing how particular elements of HRDD are interpreted and making recommendations on how alignment could be improved. The effect of such an entangled approach to human rights due diligence is the discursive accumulation of authority for particular interpretations of the norm, positing them as dominant within the discourse of business and human rights, while also strengthening the authority of particular institutional regimes and bodies of norms (in this case the OECD system).[83]

This sense of a 'snowball effect' is further reinforced when we consider another strand of entanglement around the norm, which is represented by recent regional and domestic legislative initiatives focusing on mandatory due diligence. Some of these were already identified in the first part of this paper; and the French due diligence law is a good example in terms of legal entanglement. Throughout its preparatory documents, there are references to the UNGPs and the OECD Guidelines as the 'underlying philosophy' of the law.[84] Similarly, the recently adopted German Act on Corporate Due Diligence Obligations derives the substantive obligations which it imposes from the UNGPs and the OECD Guidelines.[85] In the draft Dutch Bill for Responsible and Sustainable International Business Conduct the due diligence obligation is directly modelled on the OECD Guidelines.[86] At the EU level, a proposal for a corporate sustainability due diligence directive has been progressing through the legislative system, with draft texts and negotiating positions being produced by the European Commission, the European Council, and the European Parliament. The text of the proposal builds directly on the UNGPs and the OECD Guidelines, and references both documents as well as OECD sectoral guidance documents within the preambular text of the directive.[87] Interestingly, a number of amendments suggested to the text, which was originally proposed by the European Commission, feature language that further emphasises linkages to OECD documents and the UNGPs. These have been adopted by the European

81. International Organization for Standardization, 'ISO 26000 and OECD Guidelines – Practical Overview of the Linkages' (ISO, 7 February 2017) available at <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100418.pdf> accessed 29 November 2023, 13.
82. This has happened vis-à-vis the Dutch Agreement on Sustainable Garment and Textile, German Partnership for Sustainable textiles, and Sustainable Apparel Coalition; see <https://mneguidelines.oecd.org/alignment-assessment-garment-footwear.htm> accessed 29 November 2023.
83. On how linkages between bodies of norms can construe space but also authority, see Krisch (n 38) 14.
84. Cannelle Lavitte, 'The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence', (*Verfassungsblog,* 16 June 2020) available at <https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/> accessed 29 November 2023.
85. Mentioned in the background documents to the German law, available at <https://www.rph1.rw.fau.de/files/2020/06/key-points-german-due-diligence-law.pdf> accessed 29 November 2023; see also Robert Grabosch, 'The Supply Chain Due Diligence Act – Germany sets new standards to protect human rights' (Friedrich Ebert Stiftung, December 2021) available at <https://library.fes.de/pdf-files/iez/18755.pdf> accessed 29 November 2023.
86. The draft bill is available at <https://www.mvoplatform.nl/en/wp-content/uploads/sites/6/2021/03/Bill-for-Responsible-and-Sustainable-International-Business-Conduct-unofficial-translation-MVO-Platform.pdf > accessed 29 November 2023.
87. See for example preambular paras 5, 6, 16, 22 of the draft, available at <https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF > accessed 29 November 2023.

Parliament in its iteration of the negotiating text.[88] What is particularly notable is that the draft explicitly states that the 'concept of human rights due diligence was *specified and further developed* in the OECD Guidelines',[89] recognising that the development of the norm is occurring in a networked fashion as suggested under the entanglement thesis. The cross-linkages of binding regulatory initiatives with voluntary standards from various sources are thus openly acknowledged, which is an indication that legal entanglement relating to HRDD is by design rather than by accident.

Thus far within this section, the entanglement around the norm of HRDD has been demonstrated through a focus on examples which highlight proximity between understandings of the norm. Illustrations have shown how interpretations coalesce within the entangled network or how standards are strengthened through mutually reinforcing linkages. However, as noted in the previous section of the paper, entanglement often manifests through contestation around the meaning of a norm and about the authority of interpretations by different actors who engage with the norm. Divergence and the creation of distance between norms are also part of the dynamics which are present when norms become entangled.[90] Indeed, such a dynamic is also visible in the transposition of HRDD within the OECD system, which would appear to be closely aligned with the UNGPs. In his excellent contribution to the debate, Partiti maps the polycentric governance involved in the dissemination of HRDD and notes a number of discrepancies between the UNGPs and other documents which proclaim to be aligned with them, especially in relation to the issue of attribution.[91] For example, the OECD due diligence guidance documents appear to require a higher level of contribution to adverse human rights by a corporation to trigger responsibility in comparison to the UNGPs.[92] Other instruments which engage HRDD, such as ISO26000, 'depart even further from the UNGP main features' by operationalising concepts that have been explicitly rejected throughout the UNGP drafting process, such as the notion of 'sphere of influence'.[93] The issue of distancing and divergent interpretations of HRDD between the UNGPs and other bodies of norms has been further exacerbated recently through the various binding initiatives which I discussed above. Both the German Act and the proposed EU directive have been criticised by multiple stakeholders for departing from established interpretations of HRDD on matters such as scope of applicability across the value chain.[94]

88. See European Parliament, 'Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022–2022/0051(COD))' (June 2023) document no. P9_TA(2023)0209, available at <https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html> accessed 29 November 2023.
89. ibid, preambular para 6 (emphasis added by author).
90. Krisch (n 38) 18. Partiti in his article on polycentric governance focuses mainly on such divergent interpretations, see Partiti (n 32) 147–53.
91. Partiti (n 32) 147–53. Similarly, Van Ho points to the inconsistency and confusion which are implicit in the varying interpretative guidance in relation to the terms 'cause', 'contribute', and 'directly linked' – see Tara Van Ho, 'Defining the Relationships: "Cause, Contribute, and Directly Linked to" in the UN Guiding Principles on Business and Human Rights' (2021) 43 Human Rights Quarterly 625.
92. 'Substantial' was added as a qualifying term, whereas no such term is mentioned in the UNGPs. Partiti (n 32) 149–50.
93. ibid 150.
94. See for example, John Gerard Ruggie, 'Letter from John Ruggie to German Ministers regarding alignment of draft supply chain law with the UNGPs' (*Shift*, 9 March 2021) available at <https://shiftproject.org/ruggie-letter-german-law-supply-chain-law/> accessed 29 November 2023.

This type of contestation about the meaning and content of norms is often seen as destabilising, or as a trigger for fragmentation. However, there are currently few indications that the varying interpretations of HRDD would have such effects – in fact, contestation in this case can be quite productive in the long-term. One reason that underpins this perspective is the contention that not every norm collision or interpretative contestation necessarily implies conflict.[95] Differing interpretations of the HRDD norm do not automatically represent a bone of contention among governance actors. Instead, the ad hoc linkages which HRDD facilitates can be seen as openings for negotiation among institutions.[96] As Partiti's analysis indicates, this appears to be at least partially the case with regard to HRDD, as actors have been engaged in a lively global conversation concerning aspects of the UNGPs which pertain to the norm.[97] It will be interesting to see the results of this discursive contestation around the norm in the longer term. Given that no single actor has overall interpretative control over the HRDD norm, pushback against the EU proposals from those who can be perceived as authoritative norm-interpreters – whether it is the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, the OECD, or Shift, the consultancy firm which the late John Ruggie has been affiliated with – can be productive.[98] The mutual contestation of interpretations can perform an 'irritative' function, pursuing mutual convergence of the content of HRDD rather than institutional rivalry, and can produce a recursive effect which will mobilise actors around commonly-shared interpretations of the norm.[99]

Analysing HRDD as a norm created through entanglement allows us to see how dominant interpretations of the norm have come about as the result of a continuous discursive exchange between various actors. The concept has straddled the bodies of norms created by these actors, and in the process, a network of business and human rights regulation was created between the diverse systems. Notably, these developments have occurred with relatively little 'hardening' of the norm, and the various recent legislative initiatives which have been mentioned above appear to build on, rather than initiate, the refinements to HRDD produced through entanglement. As with the business and human rights sphere more broadly, the entangled space significantly narrowed the scope of possible interpretations of the norm that are available to actors.[100] One example of such narrowing is the dilemma whether HRDD represents more of a standard of conduct which corporations owe to others or rather a business practice for managing risks to the company. As Bonnitcha and McCorquodale noted throughout their exchange with Ruggie and Sherman, if HRDD was understood in terms of a business process, it might lead corporations to simply assess and address risks in a company's own interest.[101] While such a misinterpretation of HRDD might appear unfeasible, a recent study by McVey *et al.* points to the possibility of such unwanted 'resonance' when human rights are translated into the corporate

95. Christian Kreuder-Sonnen and Michael Zürn, 'After Fragmentation: Norm Collisions, Interface Conflicts, and Conflict Management' (2020) 9 Global Constitutionalism 241, 244.
96. Krisch (n 39) 28.
97. Partiti (n 32) 155–59.
98. Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Letter to Commissioner Reynders' (22 October 2020) Ref SPB/SHD//NF/GF/ff, available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/RecommendationsLegislativeProposal.pdf> accessed 29 November 2023; Shift, 'The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive – Shift's analysis' (*Shift*, March 2022).
99. Krisch, Corradini and Reimers (n 59); Krisch (n 39) 29–30.
100. Krisch, Corradini and Reimers (n 59) 356–57.
101. Bonnitcha and McCorquodale (n 60) 901–02.

context.[102] Sometimes, the need to make human rights norms more accessible and understandable might require a change to their substantive form and content, so as to resonate better with business actors.[103] However, when we analyse the recent hard law proposals, we see that HRDD is discursively construed as a way to monitor and address risks which a company *poses to* the human rights of others, and thus is construed more as a standard of conduct than a corporate risk-management practice. And while such an understanding of the norm might appear obvious to international lawyers, it is not necessarily the straightforward option for other, more corporate-minded stakeholders within the business and human rights space. We can notice that the accumulation of authority for particular interpretations or actors is a result of the entangled nature of HRDD. Thus, while certain entities (such as the OECD) have assumed a more dominant role in the discourse around HRDD, this has come about because of the entanglement around the norm rather than despite of it. While such a system of entangled governance will necessarily feature some dyssynchronous interpretations and contestation, the on-going discursive engagement between the various parts of the entangled network operates as a limit on how much traction such interpretations can gain.

5. CONCLUSION

More than 12 years have now passed since the UNGPs were adopted, and the forthcoming session of the OEIGWG will mark 10 years from the start of the treaty negotiation process – highlighting the challenges of searching for rather conservative solutions to vexed transnational issues. In this article, it has been demonstrated how an exaggerated focus on the hardening of soft law norms can fail to account for the actual developments in this area. This is particularly problematic in a field such as business and human rights, which is characterised by a multiplicity of governance actors and other stakeholders who engage in the development of norms. The analogy about railways and transport systems used across the article proved productive – one can hardly imagine a contemporary urban transport system where the majority of effort would concentrate on one single line or one single mode of transport.

Instead, the dominant image is one of networks – connected and co-ordinated modes of transport, stations which enable easy interchanges between lines, and a focus on density and linkages. It is suggested that the same image also exists within the business and human rights field if we adjust our perspective and use the notion of legal entanglement to conceptualise the normative space. By centring our inquiry on the linkages which exist between norms and systems rather than on their formal status, a radically different field comes into view. It is one in which actors construe meaning through discursive engagement with rules and interpretations, and development accrues through an on-going process of contestation about which norms and interpretations are dominant.

In the article, the norm of human rights due diligence was used as an example of how the entanglement thesis can operate in practice. Even in the relative absence of binding laws which operate with the concept, the HRDD norm has been intensively substantiated and developed further for application in various contexts. Much of this development is attributable to

102. Marisa McVey, John Ferguson and François-Régis Puyou, '"Traduttore, Traditore?" Translating Human Rights into the Corporate Context' (2023) 182 Journal of Business Ethics 573.

103. McVey, Ferguson and Puyou (n 102) 588.

on-going discursive contestation and practices around soft norms, such as the UNGPs or the OECD Guidelines. Although contestation around norm interpretations is necessarily open-ended and can lead to divergence, the creation of meaning through legal entanglement is a possibility – even a necessity – for actors striving to create links that can transform the existing legal landscape. In that case, the most direct route to unlocking the transformative force of business and human rights norms might not necessarily be the fastest, and we might need to change lines to get there quicker.

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