

# **ZORGPLICHTEN VAN NEDERLANDSE ONDERNEMINGEN INZAKE INTERNATIONAAL MAATSCHAPPELIJK VERANTWOORD ONDERNEMEN**

**Een rechtsvergelijkend en empirisch onderzoek naar de stand van het  
Nederlandse recht in het licht van de *UN Guiding Principles***

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**EXECUTIVE SUMMARY**

## **Duties of care of Dutch business enterprises with respect to international corporate social responsibility**

A comparative and empirical study of the status quo of Dutch law in light of the UN Guiding Principles

### **1. Introduction**

Sneakers, fuel, coffee, smartphones. Many of (the commodities for) our daily products are being produced abroad. Sometimes this takes place under conditions, which in the Netherlands we would consider unacceptable. This raises ethical, political and legal questions. What is the scope of the social responsibility of the Western society-based internationally operating business enterprises that have these products manufactured in less developed countries, often at low cost, and put them on the market here? Are they under an obligation to prevent their own activities, or those of their local subsidiaries or suppliers, to cause damage to people and the planet in the host States involved? And if such damage does arise, under what circumstances can these internationally operating business enterprises be held liable for this before courts in their Western society home States?

The concept of corporate social responsibility (CSR) basically reflects the idea that business enterprises in their pursuit of profit should take into account the impact they have on people and the planet. The societal, political and legal debate on this matter focuses in particular on the question, under which circumstances business enterprises may be expected to let human rights and environment-related interests prevail over their business interest (people, planet, profit). Even if this would be at the expense of their returns, and even if, strictly speaking, locally applicable legal norms do not require them to do so. This question arises mainly with regard to business operations pursued in developing host States by or for Western society-based internationally operating business enterprises. The reason for this is that labour, health & safety, environmental and human rights standards in these host States are often less strict or are enforced in a less strict way than in the home States of the relevant business enterprises.

An important development in this context of international corporate social responsibility (ICSR) is the endorsement in 2011 of the '*UN Guiding Principles on Business and Human Rights*' (hereinafter: UN Guiding Principles or UNGPs). These operationalize the '*Protect, Respect and Remedy*' UN policy framework regarding business enterprises and human rights that was published in 2008. The policy framework and the accompanying UN Guiding Principles constitute an authoritative and internationally widely supported soft law instrument, which propagates the message that both States and business enterprises have a role to play in the prevention and remedy of business-related human rights abuse. They rest on three pillars: 1) the State duty to protect against business-related human rights abuse; 2) the corporate responsibility to prevent, mitigate and/or redress the negative effects of operations pursued by or for them on third parties' human rights; and 3) the need for an effective remedy for victims of business-related human rights abuse.

### **2. Structure**

This report explores in what way and to what extent a duty of care of Dutch business enterprises with regard to international corporate social responsibility has been laid down or applied in Dutch legislation and/or case law, and to what extent the present state of affairs relates to both the UN Guiding Principles and the state of affairs in our neighbouring countries. This study was carried out by researchers of the Utrecht Centre for Accountability and Liability Law (UCALL), commissioned by the Research and Documentation Centre (WODC), at the request of the Directorate for Legislation and

Legal Affairs of the Ministry of Security & Justice and the Directorate Legal Affairs of the Ministry of Foreign Affairs. Pursuant to the commission, the study describes the legal *status quo* and does not contain any recommendations.

In view of the recent emphasis on corporate social responsibility in an international context, not only in the Netherlands but also at the EU and international level, this study will focus on the duties of care of Dutch business enterprises with regard to international corporate social responsibility. It is this international context, which centres on the potentially negative impact of activities of internationally operating business enterprises domiciled in the Netherlands – or of their foreign subsidiary companies or supply chain partners – on people and the planet in host States, which presents the most urgent legal questions regarding the existence and scope of duties of care.

First, an outline will be provided of relevant legislation and case law in Dutch company law, tort law and criminal law. Subsequently, attention will be paid to the legal *status quo* in these fields in some of our neighbouring countries (Belgium, Germany, France, the United Kingdom and Switzerland). Finally, the influence of this legal *status quo* on the business climate in the countries studied will be dealt with. This will be done on the basis of the results of an empirical study with a limited scope, for which open, semi-structured interviews were held in all of the countries studied with various experts in the field of (I)CSR-related legislation and case law, and the influence thereof on the national business climate.

### **3. The UN Guiding Principles**

The UNGPs contain standards of conduct for both States and business enterprises with regard to expectations of them as to the prevention and remediation of business-related human rights abuse. They reflect existing insights and legal obligations and aim to translate this status quo into concrete standards of conduct, not to create new law. They thus remain necessarily vague on certain items, on which existing insights still diverge. The wide acceptance of the UNGPs justifies the conclusion that a certain degree of international consensus exists on the standards of conduct laid down herein.

One of the key points of the UNGPs is that business enterprises have an independent responsibility to check whether their operations entail the risk of human rights abuse, to prevent or mitigate these risks as far as possible, and to remedy possible adverse impacts. This *responsibility to respect* applies regardless of the location of these operations and regardless of the local legal context. It may also include possible adverse human rights impacts that are directly linked to the business enterprise's operations, products or services through its business relationships.

The UNGPs stipulate that business enterprises should have in place policy measures and procedures appropriate to their size and operational context, in order to meet their *responsibility to respect*. These include in any case: 1) a policy commitment as regards their responsibility to respect human rights; 2) a human rights due diligence procedure; 3) procedures to remedy any adverse human rights impacts the business operations caused or to which they contributed. The due diligence procedure is first of all meant to identify, prevent and restrict, as well as – where necessary – to remedy the adverse effects of the business operations on third parties' human rights. In addition it should address the public accountability of business enterprises as regards the policies they pursue to restrict adverse human rights effects.

Beside this corporate responsibility, a State duty exists to protect against business-related human rights abuse. Under this *duty to protect*, States have a duty to ensure respect for and protection and realization of the human rights of persons within their territory and/or jurisdiction. To this purpose

proper measures are to be taken in the form of effective policy measures, legislation and regulations and legal procedures, aimed at the prevention, investigation, punishment and remedy of business-related human rights abuse. Furthermore, States should clearly express that they expect all business enterprises in their territory and/or jurisdiction to respect the human rights of third parties, also in operations undertaken abroad. States have no duty to impose measures to protect human rights elsewhere; however, this is not prohibited altogether. In the event of activities of internationally operating business enterprises in complicated operational contexts abroad, such as conflict-affected areas, the home States of these business enterprises should take on a more active role.

The *state duty to protect* and the *corporate responsibility to respect* are supplemented by the need to provide effective remedies for victims of business-related human rights abuse. In realizing *access to remedies*, on the one hand business enterprises play a role, as they are deemed, as part of their *responsibility to respect*, to provide effective claim mechanisms at an operational level. On the other hand, States play a role, as they are deemed, as part of their *duty to protect*, to investigate and punish business-related human rights abuse and offer remedy to those who within their territory and/or jurisdiction are affected by business-related human rights abuse. To this purpose they should among other things guarantee appropriate access for these victims to judicial and extrajudicial grievance mechanisms. They should take measures to ensure the effectiveness of these mechanisms and to prevent the existence of legal, practical or any other barriers that could prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy.

## **4. Findings**

### *4.1 Legal qualification UNGPs*

The UN Guiding Principles' soft law nature implies that they do not establish any legal obligations for either States or business enterprises. This means that strictly speaking, they do not entail an obligation for States to transpose them into new national legislation or to implement them in existing national legislation. The UNGPs furthermore primarily focus on the protection of human rights interests – although this is viewed as a (very) broad concept – and less on the protection of interests in the field of e.g. labour, health & safety and the environment, which are prominent in the wider CSR context. And especially with regard to ICSR issues, i.e. violations of CSR-related standards in the course of activities by or for internationally operating business enterprises in host States, the UNGPs are reluctant in imposing obligations upon the home States where these business enterprises are based.

At the same time, the legal impact of the UNGPs is much larger than their non-binding nature and limited scope might give reason to believe. Since 2011 they have strongly influenced other ICSR-related regulatory instruments. Some of these are more comprehensive than the UNGPs themselves, e.g. the OECD-Directives that cover the broader range of ICSR subjects. In addition, some of these instruments entail stronger legal obligations than the UNGPs do, e.g. the EU Directive on Non-Financial Reporting, the English Modern Slavery Act, the Swiss federal law on private military and security companies and the proposed ICSR-related legal duties of care in France and Switzerland (to be discussed later). The UNGPs also have an impact on existing domestic legal rules as they may influence the way in which certain open standards in fields such as company law and tort law are interpreted. An example from the field of company law is the concept of the corporate interest. However, the primary function of the UNGPs in this field will be as a potential tool for shareholders and investors who wish to keep the business enterprise alert as regards issues of ICSR. In the field of tort law they may play an important role in the construction of what may be expected, on the basis of

unwritten duties of due care, of business enterprises that are (in)directly involved in activities in host States with a negative impact on people and the planet.

Furthermore, business enterprises themselves may also take on a proactive attitude as regards the implementation of the responsibilities resulting from the UNGPs, such as the implementation of human rights due diligence procedures. Some business enterprises already regard this as a compliance issue, or at least a matter of risk management. However, the answers to questions in the interviews on this matter suggest that the group of companies that are forerunners as regards the implementation of the UNGPs is relatively small, and that in all countries examined there is a large rear-guard of business enterprises that have implemented few or no changes in response to the UNGPs. As a consequence, in all of these countries there seem to be advocates among the individual forerunners of a more mandatory regulatory framework, which would in any case level the national playing field in this respect. For the time being, the Netherlands are steering a middle course on this matter, as the focus is on the conclusion of ICSR covenants with (certain branches within) the corporate sector, in which an understanding is reached on objectives to be achieved. The threat of more mandatory regulations if these are not achieved functions as a deterrent.

#### 4.2 *Dutch law*

In view of these developments, there are various points that warrant attention as regards the extent to which contemporary Dutch legislation and case law in the fields of company law, tort law and criminal (procedure) law relate to the UN Guiding Principles.

Dutch law at present does not contain a legal obligation for Dutch business enterprises to implement the standards of conduct laid down as part of the *responsibility to respect*. These comprise in any case: 1) a policy commitment regarding the responsibility to respect human rights; 2) a human rights due diligence procedure; 3) procedures to enable the remediation of any adverse human rights impacts caused by the business operations or to which they contributed. Although the non-binding nature of the UNGPs strictly speaking does not entail the implementation of such an obligation, the aforementioned points do form the core components of the *responsibility to respect*. States are also expected to advise business enterprises on appropriate methods to respect human rights in all their operations, including due diligence procedures, and to indicate what results may be expected.

The present approach through the more consensus-oriented regulatory framework of the ICSR covenants does not imply that there is no need of a more binding legal framework, e.g. in certain areas or with regard to specific items, or that no need may arise, e.g. after an assessment of the effectiveness of the approach chosen. The interest of protecting the competitiveness, also on a national level, of business enterprises that actively make an effort to meet the expectations of them as part of the *responsibility to respect* also plays a role in this. The interviews held as part of this study in general show that at present only a minority of the (internationally operating) business enterprises in the countries examined has taken concrete steps toward implementing the *responsibility to respect*. It therefore seems important, also in view of legal certainty and the promotion of an equal national playing field, to elaborate in more detail both the actual implementation of the UNGPs at the corporate level and the possibilities and desirability of more binding regulations in this field.

#### *Dutch company law*

Existing provisions of Dutch company law provide certain starting points for a further elaboration of the UNGPs, more specifically the *responsibility to respect* of the second pillar. These provisions apply in principle to all Dutch corporations, regardless of the location where they carry out their operations.

An example is the requirement that directors and supervisory directors in the execution of their tasks are to focus on the interest of the business enterprise associated with the corporation. In the Netherlands a wide interpretation is given of the notion of the corporate interest, in that it may also comprise *stakeholders* such as employees and creditors, and that in principle it refers to the long-term interest of the business enterprise. At the same time it is not unlimited and in principle does not include promoting the interests of external third parties. It becomes different altogether, if an obligation to take into account the said interests follows from the law or from the articles of incorporation, or if it is in the corporation's interest to take these into account.

In this context it should be pointed out that the UNGPs state that legislation on the operation of business enterprises, such as company law, should enable – rather than hamper – respect by (the officers of) business enterprises for the human rights of others and provide guidance on how to do so. This is a point for attention, as in Dutch company law the interest of the protection of people and the planet in principle does not supersede the business enterprise's own self-interest. Unless the law or the articles of incorporation state differently, *profit* comes first and *people* and *planet* come into play only insofar as they contribute hereto or can be reconciled herewith. As a result, for directors and supervising directors of Dutch business enterprises potential (I)CSR-related obligations are in principle limited to those cases where taking into account or promoting people or planet-related interests is either required by law, permitted or required under the articles of incorporation, or in the interest of the business enterprise itself. Although this may occasionally be the case, for example in cases where there is (a risk of) financial and reputational damage resulting from potential (I)CSR-related legal proceedings, this is not likely to happen often.

Company law also has no enforcement mechanisms that enable third parties suffering damage as a result of the adverse impact of the operations of the business enterprise on people or the planet to hold (officers of) the business enterprise liable for this. It thus offers little opportunity for victims of business-related human rights abuse to obtain remediation through judicial grievance mechanisms within the meaning of the third pillar of the UNGPs. The enforcement of potential (I)CSR-related obligations in the field of company law thus depends largely on the readiness of 'activist' shareholders and investors to take action on (I)CSR-related issues. Although this readiness to take action seems to be on the increase, the application of many of the relevant instruments requires, just like the exercise of influence, that the (groups of) shareholders who wish to resort to them represent a certain part of the issued capital. Inquiry proceedings (the 'enquêteprocedure'), which may also be instituted in the general interest by for example trade unions or the Attorney-General, in theory might offer opportunities for intervention where serious and ongoing violations of ICSR standards occur as part of the activities in host States by Dutch internationally operating business enterprises and/or their foreign subsidiaries.

Under present law, (I)CSR-related themes do to a limited degree already play a role in the field of company law, especially in the form of an obligation existing under certain conditions to report on non-financial performance indicators, including environmental and personnel issues, in the annual report. However, on the basis of the present Dutch rules and regulations on reporting, business enterprises are not under any obligation to report on the human rights impact of their operations. This does not comply with the UNGP-provision stating that States should encourage business enterprises and if necessary compel them to report on the manner in which they deal with the impacts of their operations on the human rights of third parties. Furthermore, the existing transparency requirements in principle apply to large legal entities only and do not cover medium-sized or small legal entities. Finally, under present law transparency with regard to financial performance indicators is to be observed only if such is required for a good understanding of the development, the results or the position of the business enterprise.



The 2014 EU Directive on disclosure of non-financial and diversity information plays an important role in this respect, as it extends and strengthens the existing obligations of transparency, thus bringing them more into line with the UNGPs. On the basis hereof, certain large business enterprises are under an obligation to report on their business policies relating to the environment, social and personnel issues, human rights and the combat of corruption and bribery, as well as on the impacts of those policies. If the business enterprise does not pursue a policy on one or more of these subjects, it is to include a clear and reasoned explanation for not doing so (*comply or explain*). Implementation of the Directive by the Member States is to take place on December 6 2016 at the latest.

An interesting aspect of this Directive is that transparency regarding the impact of the business enterprises' activities on (I)CSR-related interests is regarded as an objective in itself. Its precise effect and impact, however, will ultimately also depend on the way it will be implemented in the national law of the Member States, including the Netherlands. The possibilities for enforcing the said obligations of transparency will be one of the important issues in this respect. In the Netherlands a dominant part in this is played by shareholders and investors. In addition, the criminalization of the violation of obligations of transparency under the Economic Offences Act enables the Dutch Public Prosecutor to institute criminal proceedings on account of violation of these obligations. As this is regarded as a minor offence, however, the prosecution interests will not be substantial and a resulting conviction is not likely to have a strong normative effect.

Finally, the notions of separate legal personality and of limited liability are seen as fundamental in the field of company law, which means that in principle legal persons cannot be held liable for the actions of other legal persons. These notions also apply to corporations belonging to the same group of business enterprises; from a legal point of view they are viewed as separate entities and may only be held liable for debts or actions of other group entities in exceptional cases. This means that the present state of affairs in the field of company law leaves little room for the elaboration of the UNGP provision that the *responsibility to respect* of business enterprises also extends to the potential negative human rights impacts that are directly linked to their activities, products or services through their business relationships, such as foreign subsidiaries or supply chain partners.

#### *Dutch tort law*

Existing provisions of Dutch tort law also offer possibilities for a further elaboration of the standards of conduct of the UNGPs, including the *responsibility to respect*. Tort law specifically aims to protect third parties' interests against the harmful effects caused by the activities of (legal) persons. In case of harmful events it may be invoked at the initiative of the injured parties in order to obtain compensation for the damage suffered by them as a result of the (in)actions of the (legal) persons responsible for those events. Moreover, unlike company law, it offers possibilities to institute legal proceedings against business enterprises that are capable of exerting a certain measure of influence on the activities of other (legal) persons or on the consequences thereof, where those activities (threaten to) result in harm to people and the planet.

As such, the field of tort law plays an important role with regard to the third pillar duty of states to provide those affected by business-related human rights abuse access to effective remedy through judicial grievance mechanisms. It may to a certain extent also play a role in the first pillar of the UNGPs, as it simultaneously constitutes a regulatory instrument that may be invoked at the initiative of the injured parties to investigate and redress business-related human rights abuse. It also has a preventive effect on account of the possibility to institute civil liability proceedings with the aim of preventing further or potential damage. Liability (or the threat thereof) and the accompanying

financial and reputational damage may constitute incentives for enterprises to adopt compliant conduct. The fact that such civil liability proceedings may, on a case-by-case basis, contribute substantially to the implementation and elaboration of the *responsibility to respect*, renders the field of tort law relevant with regard to the second pillar, as well.

The possibilities that tort law offers to hold (officers of) business enterprises liable for violations of unwritten duties of due care is of particular importance in the ICSR context. In proceedings against Dutch business enterprises regarding their involvement with activities that resulted in damage to people and the planet elsewhere, this open standard offers the opportunity to include generally accepted non-legal standards of conduct in assessing what measure of care could have been expected of the business enterprises involved. In this way, the responsibility imposed by the UNGPs on business enterprises to identify whether their activities entail risks of human rights abuse and to prevent or mitigate these risks as far as possible, may become a determining factor in court decisions on whether and to what extent the business enterprises involved are legally bound to remedy the resulting harm suffered by third parties in the event of materialization of these risks.

Under tort law, a business enterprise is generally expected to take more, better and more expensive preventative measures as and when the reasonably foreseeable risks of violations of ICSR-related interests of third parties increase, for example in case of activities in conflict-affected areas, and/or the damage to be expected is more severe. Just like in the UNGPs, business enterprises here are also expected to act proactively. Unlike company law, tort law offers the possibility to hold a business enterprise liable for harm caused not by its own activities but by the activities of others, such as foreign subsidiaries or chain partners. Determining factors are to what degree the risks of harm to people and planet related to these activities could have been foreseeable for the business enterprise, and to what degree it could have prevented or restricted those risks on the basis of its *de facto* influence on the relevant actors and activities.

Despite the wide range of options that the Dutch field of tort law offers for the operationalization and further elaboration of the standards of conduct of the UNGPs, no relevant case law as yet exists. One explanation for this may be the fact that the UNGPs are a relatively recent phenomenon. On the other hand, impediments also exist with regard to the potential role that Dutch (or any other home State's) tort law may play in this respect. As issues in the ICSR context typically involve business enterprises' activities that resulting harm to people and the planet in a host State, it is the host State's tort law and not Dutch tort law that will as a rule be applicable to the case. There are some exceptions to this general rule. However, the main restrictions to the possibilities for the victims of ICSR-related norm violations to institute civil liability proceedings before a Dutch court result from practical and procedural barriers, such as high costs, restrictive rules as regards the production of evidence and limited options for the institution of collective actions.

In view of the UNGPs' emphasis on the duty of States to provide for effective remedies this is a point requiring attention. According to the UNGPs, States should ensure that no legal, practical or other relevant barriers exist for those harmed to address the court in legitimate cases where judicial recourse is an essential part of accessing remedy. This is a clear call for the Dutch government to check whether, in present and future proceedings against Dutch internationally operating business enterprises with regard to domestic or foreign violations of CSR standards, Dutch private international law and/or civil procedure pose(s) barriers for claimants with legitimate claims. If (further) liability proceedings concerning violations of ICSR standards fail to materialize in a time in which this type of proceedings is on the increase worldwide, this might indicate that the hurdle is too high.

*Dutch criminal law*

Dutch criminal law and criminal procedure offer a range of possibilities to remedy violations of (I)CSR-related standards, also where the violation has in whole or in part taken place abroad, as the following will show. Various general and/or specific criminal law provisions cover the protection of people and planet-related interests and impose obligations on business enterprises accordingly.

On the basis of the 'perpetrator' concept for legal persons in Dutch criminal law and its potential interpretation and application within the context of a corporate group, violations of (I)CSR-related standards by foreign subsidiaries of a Dutch parent company can still be subsumed under Dutch criminal law. Furthermore, various types of involvement by business enterprises in criminal acts committed by other (legal) persons can result in criminal liability through specific criminal provisions, such as money laundering and participation in a criminal organisation, as well as through participation forms such as complicity.

Criminal procedure may further fulfil an autonomous role on account of the normative effect that a prosecution and/or public trial and/or conviction in conjunction with a punishment may have. Criminal procedure may also support as well as supplement a civil procedure.

The said criminal provisions and the criminal liability of business enterprises may also play a role when it comes to the protection of people and planet-related interests, including human rights that form the central theme of the UNGPs. After all, the principle of legality requires the existence of such criminal provisions in order to criminally sanction behaviour that harms people and planet-related interest. Dutch criminal law plays an important role in the first pillar of the UNGPs, as it forms a regulatory instrument that the State may invoke to investigate and redress business-related human rights abuse. The simple fact of criminalization of certain actions with a negative impact on people and the planet also has a strong preventative effect. By making violations of human rights standards and/or environmental norms punishable, the legislature sets a standard indicating what is expected of business enterprises in the context of respecting human rights and the environment. As in Dutch law the criminal liability of managers (including CEOs and other superiors) is linked to the legal person's capacity of being a perpetrator, these natural persons may also be prosecuted on account of managing prohibited conduct within the setting of the business enterprise.

As part of the *duty to protect* the UNGPs provide that States are under an obligation to implement and enforce criminal provisions on business-related human rights abuse that make it possible to prosecute one's 'own' business enterprises by virtue of the nationality principle for conduct outside the State's borders, regardless whether this conduct is a crime in the place where the conduct is performed. For a limited number of Dutch criminal provisions that attempt to prevent severe human rights abuse, extraterritorial jurisdiction is provided for by virtue of the nationality principle. This concerns offences that involve abuse of office, such as corruption by officials, having labour performed by undesired foreign nationals, and the international crimes of the International Crimes Act (*Wet Internationale Misdrijven*). These specific criminal provisions have already implemented the UNGPs. However, the international crimes only encompass very severe human rights abuses, but do not cover less severe human rights abuses like child labour or environmental crimes. It is therefore important to examine whether extraterritorial jurisdiction should be established in more instances for crimes that encompass human rights abuses. In addition, in conformity with the UNGPs, an enhanced use of criminal law might be considered for the actual enforcement of ICSR-related statutory obligations existing in other areas of the law.

In the Netherlands the Public Prosecutor's Office has the exclusive power to initiate criminal proceedings. From the very limited number of criminal cases in the ICSR context that the Public Prosecutor's Office has decided to prosecute, it seems to follow that the Public Prosecutor's Office does not opt for the prosecution of business-related human rights abuses in prioritizing the types of cases for which to deploy the scarce means for criminal investigation and prosecution. Existing criminal law instruments for the redress of business-related human rights abuses are thus not taken advantage of. This is a point of attention in light of the UNGPs. It clearly shows that an adequate legislative framework does not suffice; the actual investigation, prosecution and punishment of business-related human rights abuses also matter. An adequate policy in this respect should be developed. This seems to be lacking in the Dutch ICSR context.

In view of the fact that in the Netherlands the Public Prosecutor's Office, as an administrative body with a statutory duty of law enforcement, has exclusive and discretionary prosecutorial powers, it seems logical that change should be initiated by this body. The expediency principle allows the Public Prosecutor's Office to prioritize the investigation and prosecution of cases relating to violations of ICSR standards higher and to also start an investigation *ex officio*. Victims of human rights abuses and NGOs can only force the Public Prosecutor's Office to conduct an investigation – and after that initiate prosecution – by officially reporting the crime at the Police (Station). The possibilities for these victims or for NGOs to contest a decision not to prosecute are limited under Dutch criminal law to filing a complaint with the Court of Appeal (*Gerechtshof*), which will only summarily assess the reasonableness of this decision. It should be borne in mind that the UNGPs as part of the third pillar impose the obligation upon States to ensure that Public Prosecutor's Office receives sufficient means, expertise and support required in order to, in conformity with the State's duties, investigate the involvement of persons and business enterprises in cases of human rights abuses.

With regard to the third pillar of the UNGPs Dutch criminal (procedural) law plays only a modest role as concerns the access of victims of business-related human rights abuses to effective remedy through judicial grievance mechanisms. In Dutch criminal law the victim's role is limited. The victims of ICSR-related criminal conduct by a business enterprise are entitled to join criminal proceedings as an injured party by submitting to the criminal court a civil claim for compensation of the damage that is directly caused by the crime. Criminal proceedings thus offer a relatively simple way to obtain a judicial order to pay damages at no high cost and relatively quickly. An important limitation however is that under Dutch criminal law processing the injured party's claim should not impose a disproportionate burden on the criminal trial and thus hindering the trial. More complex civil claims for damages will often meet this criterion. As a consequence, the victim will then be forced to find recourse in tort law.

#### *Comparative law and business climate*

How does the legal status quo in the Netherlands compare to those in our neighbouring countries in light of promoting the *responsibility to respect* and in light of the possible consequences for the business climate?

As regards ICSR-related legislation and case law the general conclusion is that the Netherlands, compared to the other countries examined, is not lagging behind, although they certainly are no forerunner. For the time being the Dutch government, with its focus on ICSR covenants with (certain branches of) the business sector, has chosen an approach that fits in with the Dutch culture of negotiation and cooperation. The possibility of imposing more binding rules on Dutch internationally operating business enterprises in relation to the possibly negative impacts of activities carried out by

or for them on people and the planet in host States, at present thus only functions as a deterrent, if it eventually turns out that set goals are not achieved.

### *Legislation*

On the basis of its current company law, tort law and criminal law provisions, the Netherlands as yet have no general legal obligation for Dutch business enterprises to meet the core elements of the *responsibility to respect* of the UNGPs. By contrast, in various neighbouring countries such obligations do already exist in certain fields or serious proposals are being discussed for the introduction of such an obligation within the wider ICSR-context, which does not only involve human rights but also labour, health & safety and the environment.

France through the *Loi Grenelle II* has for some time yet known farther-reaching reporting obligations with regard to the environmental impact of business enterprises' activities, also within a group of companies. The United Kingdom recently adopted the *Modern Slavery Act*, which contains a further-reaching reporting obligation with regard to labour exploitation in the production chain. Furthermore, there has been a lot of discussion in France recently with regard to a legislative proposal on a legal duty of care (*devoir de vigilance*) for large French business enterprises with regard to people and planet-related risks connected with the activities of their subsidiaries, subcontractors and suppliers. Switzerland recently adopted the *Loi fédérale sur les prestations de sécurité privées fournies à l'étranger*, which contains a legal obligation for private military and security companies (PMSCs) and their officials and employees to prevent direct participation in armed conflicts abroad and certain severe human rights abuses as part hereof. In Switzerland there also is a popular initiative on the introduction of a legally binding '*responsabilité des entreprises*' for Swiss business enterprises, which relates to the impact on people and the planet of their own activities and of activities of business enterprises controlled by them.

The traditional message, expressed especially by umbrella organisations representing the business sector with regard to this type of ICSR-related legislative initiatives, is that increasing the regulatory burden at the national level is undesirable, as this will result in higher costs and thus in a deterioration of the international competitiveness of the national business sector. In this context this does not primarily involve competition with local businesses from less developed host States, but relates to competition with internationally operating business enterprises from other Western and non-Western home States. Simultaneously individual business enterprises, especially the forerunners in the ICSR-field, stress the other side of the coin, i.e. that regulation, on condition that it is clear and consistent, levels the national playing field and at the same time stimulates innovation, which in the long run will result in a competitive advantage on the international playing field. An important message emerging from the interviews is that lagging behind comparable countries with stricter ICSR regulations may sometimes in the long run be more disadvantageous to competitiveness at the international level than being a forerunner.

It is also important to stress that there is no evidence that stricter ICSR regulations are a decisive factor for internationally operating business enterprises in the countries examined in taking establishment or investment decisions. Legislation such as the former Belgian Genocide Act and, more recently, the French *Loi Grenelle II*, the English Modern Slavery Act and the Swiss legislation on PMSCs, has not resulted in a relocation of business enterprises away from the relevant countries to other home States, at least not according to the judgment of the respondents in this limited empirical study. The same applies to the current ICSR-related legislative proposals submitted in France and in Switzerland. Although opinions on this differ somewhat, the large majority of Dutch respondents also indicates not to believe that stricter ICSR-regulations, comparable to the developments in this field in

our neighbouring countries, would cause internationally operating business enterprises to leave the Netherlands or to avoid it. The question is even raised whether the Netherlands should wish to attract or hold on to business enterprises that consider this to be a decisive factor.

Each of the ICSR-related legislative initiatives discussed hereinbefore shows a number of factors, that seem to be relevant for on the one hand the expected effectiveness thereof (i.e. the effectiveness in view of the stated objective) and on the other hand the 'palatability' thereof for the business sector. These factors among other things relate to the question as to which business enterprises the alleged obligations apply (the horizontal scope), and the question as to what extent they also apply inside the group or in the production chain (the vertical scope). It is also important whether the obligations ultimately envisage the protection of the business interest or the protection of people and planet-related interests (the interest to be protected). Another relevant factor is whether the obligations have been delineated clearly and/or whether they show a certain degree of flexibility with regard to the way in which the objectives stated herein may be achieved by the relevant businesses (the nature). And finally, it is important who enforces the imposed obligations and in what way (enforcement).

It is noteworthy that almost all examples of ICSR-related rules and regulations that have been adopted or that are currently being discussed in our neighbouring countries have (in part) taken the shape of transparency obligations for internationally operating business enterprises with regard to the impact of their activities on people and the planet. Reference should be made here to the aforementioned new EU Directive on Non-Financial Reporting. It is remarkable that the interviews contain hardly any references to the potential impact hereof on the business climate of the countries where it will be applicable. One explanation for this may be the *comply or explain* status of the Directive, giving business enterprises some leeway in meeting the obligation imposed, another the fact that the Directive has not yet been implemented in national law and consequently is not yet real. A more plausible explanation may be that the said obligation will be imposed on business enterprises in all EU member States, which considerably reduces the risk of the obligation constituting a competition disadvantage in relation to other European business enterprises. This illustrates the advantage of a European or at least a multilateral approach in this context, although the reservation should be made right away that the possibilities of realizing ICSR rules and regulations at the EU level are quite limited and thus do not present a real alternative for national legislation and a national policy as regards this subject.

#### *Case law*

With regard to ICSR-related case law the Netherlands, compared to the other countries examined, again is not lagging behind, but is no forerunner either. With a sum total of four lawsuits, comprising two tort law cases and two criminal law cases, the Netherlands are in the rear as regards the number of claims brought here. However, with at least two lawsuits ending in a final reasoned judgment on the duties of care of internationally operating business enterprises with regard to people and the planet in host States (the Dutch Shell Nigeria case and the Trafigura case, although this latter case resulted in a settlement after appeal), the Netherlands is in the forefront all right. Next to that, the Netherlands has seen one criminal conviction of an internationally operating business enterprise for criminal actions that eventually resulted in environmental harm and personal injuries in a host State (also Trafigura case).

The total number of ICSR-related proceedings instituted in the countries examined in this study as of 1990 at present amounts to 35, although one might arrive at a somewhat smaller or a considerably larger number, depending on definitions and counting. What is important however is that according to the method used here, 15 years ago the number amounted to just 5, which means that the number of

proceedings in absolute figures might not be that large, but percentagewise it has risen considerably. An international trend exists, not only in Europe but also in other Western countries, toward legal proceedings against internationally operating business enterprises before courts in their home States on account of harm inflicted upon people and the planet in host States. Although this is definitely not a development that is acclaimed by the business enterprises sued, these legal proceedings are understood by many, not only NGOs and academics but also politicians, policymakers and to a certain degree also people from the business community themselves, as a crucial development in the further elaboration and recording of the duties of care of business enterprises as part of ICSR.

Interestingly, these proceedings seem to raise much more societal and political discussion in some countries, such as the Netherlands and Switzerland, than in other countries, such as Germany, France and the United Kingdom. It is noticeable that in those countries in which they raise a lot of discussion, the number of proceedings instituted is very small, whereas in those countries in which they raise little discussion the number of proceedings started is much higher, viz. France and the United Kingdom. It is also remarkable that as part of this discussion there are some respondents from the Netherlands and Switzerland who see a negative interrelation between this type of proceedings and the national business climate, while the large majority of respondents indicate that in their opinion this type of ICSR-related legal proceedings has no influence upon the business climate. As mentioned before, none of the respondents have any concrete examples of business enterprises having left the country on account of (the threat of) this kind of proceedings. Some respondents, including respondents from the business sector, even mention a positive influence.

With regard to the creation of a 'US-style litigation culture' (i.e. a legal culture where too many claims are brought too easily) in general, respondents in several countries indicate that this might be unfavourable to the business climate. However, according to the respondents no such litigation culture exists in any of the countries examined. This is in line with the picture that emerges from the comparative law research into procedural and practical circumstances that influence the possibilities for those harmed to initiate tort law proceedings against internationally operating business enterprises on account of violations of ICSR-related standards. In almost all countries examined, including the Netherlands, rules on legal costs, the possibilities of instituting collective actions and/or the production of evidence constitute potential barriers, complicating or preventing access to a court in ICSR-related legal proceedings, even for claimants with legitimate claims.

As regards access to effective judicial remedy as advocated in the UNGPs, a substantial disparity thus exists between that which should be possible according to the UNGPs and that which is possible on the basis of the present legal status quo, not only in the Netherlands but also in many of the other investigated countries. The only country that is an exception to this, compared to the Netherlands and the other countries examined, is the United Kingdom. Interestingly, it is precisely the respondents from the United Kingdom, where so far proportionately the highest number of tort claims was brought, who fail to see a negative interrelationship between ICSR-related legal proceedings and the business climate, and who even regard the former as a means to keep business enterprises sharp.

The Netherlands do not distinguish themselves from the other countries examined with regard to the role and the possibilities of criminal law. Some foreign criminal law regulations may provide inspiration for a further application of Dutch criminal law in the ICSR context. This includes the Bribery Act 2010, having extraterritorial effect, which assumes criminal strict liability of business enterprises that do not take adequate measures to prevent active corruption, supplemented by a statutory possibility of a so-called *due diligence defence*. The aforementioned Swiss Act on PMSCs stipulates that the prohibitory provisions laid down herein are also applicable to business enterprises that are not domiciled in

Switzerland, however are supervised by Swiss PMSCs. For the purpose of this Act subsidiaries are also equated with the parent company.

So far, the Netherlands is the only country where an internationally operating business enterprise was convicted in an ICSR-related criminal case. Just like in the other countries examined (with the exception of the United Kingdom) Dutch criminal law may supplement and support civil proceedings by means of the possibility to obtain civil compensation as a victim in criminal proceedings, by contributing to the concretization of a duty of care where a criminal provision is applicable, and by the evidential weight of a criminal judgment in civil proceedings.

Up to now relatively little use has been made of the possibilities offered by Dutch criminal law to take action against Dutch business enterprises involved in severe human rights or environmental abuse elsewhere. As we mentioned earlier, this is a point of attention in light of the UNGPs. Another fact worth mentioning is that the interviews show that criminal (procedural) law is hardly ever taken into account when internationally operating business enterprises take establishment or investment decisions. Another question is to what degree a country should want to attract or retain business enterprises that are deterred by the strictness of criminal standards or of their enforcement.

Several of the other countries offer more possibilities for those harmed by violations of ICSR standards and for NGOs to initiate criminal proceedings by themselves. The French *action civile* should be mentioned here. It should however be noted that, although this possibility has resulted in a considerably higher number of ICSR-related criminal investigations and proceedings started in France than in the Netherlands, so far these investigations and proceedings have not led to any convictions. In a majority of the cases, the French Public Prosecutor has discontinued the criminal investigations and/or proceedings; in three cases NGOs have raised objections, as a result of which the relevant investigations and/or proceedings are still pending. Although the *action civile* in theory offers possibilities to strengthen the role of criminal (procedural) law in operationalization the *responsibility to respect*, this concept would be an alien element within the system and organisation of Dutch criminal procedure.

The limited number of criminal cases and their outcome seem to justify the conclusion that in all countries examined the Public Prosecutor's Office apparently has not made the criminal law enforcement of violations of ICSR standards a priority. In all these countries (with the exception of the United Kingdom) the said Public Prosecutor's Office however either forms the exclusive gateway to criminal law or is the party that takes over the prosecution following a private party's initiative. As a result, the role of criminal law in the enforcement of ICSR-related criminal provisions remains restricted for the time being, both in the Netherlands and abroad.

## **5. Conclusion**

Many branches of Dutch law contain specific statutory standards that aim to protect people and the planet against the harmful effects of activities by business enterprises in the Netherlands. But what is to be expected of Dutch internationally operating business enterprises that carry out activities (or have them carried out) in less developed host States, where the legal protection of people and planet-related interests is (considerably) less strict?

According to the UNGPs, States are under a duty to state clearly that they expect all business enterprises within their territory and/or jurisdiction to respect the human rights of third parties, also where activities take place abroad. In the event of activities of internationally operating business enterprises in difficult operational contexts elsewhere, such as conflict-affected areas, the home States



of these business enterprises are under a duty to take on an even more active role. Business enterprises have an independent responsibility to prevent their activities from having negative consequences for the human rights of third parties as far as possible, and to remedy possible violations. This responsibility applies regardless of the location of the activities and of the local regulatory context; it also covers the negative human rights consequences that are linked directly to the activities, products or services of the business enterprise through business relationships. Those affected by business-related human rights abuses should have adequate access to effective remedies, including judicial grievance mechanisms.

Neither the Netherlands nor its neighbouring countries under present law have a specific statutory provision to the effect that business enterprises are under a general obligation to exercise due care toward people and the planet in host States with regard to their own activities or with regard to those of their subsidiaries or supply chain partners. General provisions of tort law enable those harmed to hold the business enterprises involved legally responsible if damage has already been caused or a concrete threat thereof exists. This type of civil liability proceedings may also be instituted against internationally operating business enterprises in their Western society home States, including the Netherlands. Although the number of ICSR-related legal proceedings in the countries examined has risen considerably in the past two decades, the total number remains insignificant. This stresses the need, as stated in the UNGPs, to remove the practical and procedural barriers that *de facto* make it impossible for aggrieved parties to bring their legitimate claims against Dutch internationally operating business enterprises before a Dutch civil court.

Criminal law already offers possibilities to hold business enterprises responsible for severe violations of people and planet-related interests, also if these occur abroad. In the Netherlands, unlike in some of our neighbouring countries, the Public Prosecutor's Office in principle has exclusive prosecutorial discretion. So far this has resulted in only a small number of ICSR-related criminal cases in the Netherlands, including one criminal conviction of an internationally operating business enterprise. An active prosecution policy with regard to the involvement of Dutch internationally operating business enterprises in severe human rights and environment-related abuse seems to be lacking as yet. This stresses the need, as implied by the UNGPs, to provide the Dutch Public Prosecutor's Office with the means, the expertise and the support required to investigate and to prosecute the involvement of persons and business enterprises in human rights abuses.

Both tort law and criminal law strongly focus on enforcement after the fact against business enterprises that have acted negligently or blameworthy as regards the prevention of a negative impact of the business enterprises' activities on people and the planet. They thus play an important role in holding business enterprises to account that (on certain points) score poorly as regards the observance of their *responsibility to respect*. In addition, attention should also in particular be paid to the business enterprises' responsibility to prevent harm to people and planet. The UNGPs provide a relatively concrete basis for this, among other things in the human rights *due diligence* procedure, which is a core component of the *responsibility to respect*. In each of the countries examined, however, only a very limited group of forerunners seem to have actually implemented such a procedure into their corporate policy and operational practices, or are at least working on it.

It is thus fair to assume that the possibilities of a more compelling legal framework should be explored further if the present approach of the Dutch government, in the form of ICSR covenants with a focus on consensualism, does not yield sufficiently concrete results. One might think of changes in company law, which offers certain points of reference to elaborate on the *responsibility to respect*, for example in the progressive transparency obligations in the ICSR field. However, an obligation for business enterprises to report (on a *comply or explain* basis) on the impact of their activities on people and

planet is not the same as a duty of care to prevent a negative impact, although the two may be connected, as the French legislative proposal on a *devoir de vigilance* shows.

A restriction inherent to the role of company law in this context is that this branch of law primarily focuses on the interest of the business enterprise and not on the interests of non-company third parties who suffer harm as a result of the business enterprise's activities. In addition, it offers few possibilities with regard to that part of the *responsibility to respect* relating to a responsibility for the activities of for example subsidiaries and supply chain partners. As the aggrieved parties do not have access to the business law enforcement mechanisms in the ICSR context, it has little added value as part of the *access to (judicial) remedies*. This underlines the importance of ensuring adequate access for victims to tort law and/or criminal law mechanisms in this context.

The UNGPs clearly show that the choice to observe due diligence with regard to people and planet in host States cannot be left to the discretion of business enterprises themselves, as they have a different objective than the protection of people and the planet. They simultaneously show that business enterprises can neither hide behind human rights, environmental, health & safety and labour standards that are not strict or not strictly enforced in the host States where they operate, nor behind the fact that these operations were not carried out by themselves, but by their subsidiaries or supply chain partners. Furthermore, holding business enterprises to account for damage inflicted upon people and the planet in host States cannot exclusively be left to Western society-based shareholders, investors and consumers. In the cases where actual harm exists for people and planet, the injured parties should have adequate access to remedy through tort law and criminal law mechanisms, also in the home States of the business enterprises involved, such as the Netherlands.