UTS UNIVERSITY OF TECHNOLOGY SYDNEY

A FEMINIST REGULATORY APPROACH TO HUMAN RIGHTS DUE DILIGENCE TO ADDRESS SEXUAL VIOLENCE IN LARGE-SCALE MINING

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A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I, Anaïs Tobalagba, declare that this thesis, is submitted in fulfilment of the requirements for the award of a Doctor of Philosophy, in the Faculty of Law at the University of Technology Sydney.

This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

This document has not been submitted for qualifications at any other academic institution.

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PUBLISHED WORK

This thesis is a conventional thesis following the requirements established by the University of Technology Sydney. Chapter 5 of this thesis incorporates original work arising from research undertaken during candidature that has been published in a peer-reviewed journal: Anaïs Tobalagba, 'Corporate Human Rights Due Diligence and Assessing Risks of Sexual Violence in Large-Scale Mining Operations' (2021) *Australian Journal of Human Rights*.

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LIST OF ACRONYMS

ASM: Artisanal and Small-scale Mining

BHR: Business and Human Rights

BSR: Business for Social Responsibility

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women

CEDAW Committee: Committee on the Elimination of Discrimination against Women

CSR: Corporate Social Responsibility

DEVAW: Declaration on the Elimination of Violence against Women

EITI: Extractive Industries Transparency Initiative

EU: European Union

GRI: Global Reporting Initiative

HR: Human Rights

HRDD: Human Rights Due Diligence

IACHR: Inter-American Commission on Human Rights

ICJ: International Court of Justice

ICMM: International Council on Mining and Metals

IFC: International Finance Corporation

ILO: International Labour Organization

IRMA: Initiative for Responsible Mining Assurance

MONUC: United Nations Organization Mission in the Democratic Republic of the Congo

NGO: Non-Governmental Organisation

OEIWG: Open-ended Intergovernmental Working Group

OECD: Organisation for Economic Co-operation and Development

OECD Guidelines for MNE: OECD Guidelines for Multinational Enterprises

OHCHR: Office of the High Commissioner on Human Rights

PJV: Porgera Joint Venture

RAID: Rights and Accountability in Development

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNGC: UN Global Compact

UNGPs: UN Guiding Principles on Business and Human Rights

VPs: Voluntary Principles on Security and Human Rights

WEPs: Women's Empowerment Principles

ABSTRACT

Large mining projects are often accompanied by systemic risks of sexual violence against women in communities where the mine operates. In this context, sexual violence is increasingly associated with the practices of multinational mining companies that find themselves involved in sexual violence through their employees or the security forces they employ or through their association with State armed forces. Prominent examples involve Anvil Mining in the Democratic Republic of Congo, Barrick Gold in Tanzania and Papua New Guinea, Monterrico Metals in Peru and Hudbay Minerals in Guatemala. Analysis of these cases reveals that there are numerous challenges to the effective implementation of regulatory initiatives that have emerged within the 'business and human rights debate' to regulate corporate behaviour and limit the adverse consequences of business activities on human rights. The most authoritative, the United Nations Guiding Principles on Business and Human Rights, provide that this objective should be achieved through the establishment by corporate stakeholders of human rights due diligence processes to identify, prevent, mitigate and account for how they address their impacts on human rights. Using a theoretical approach that draws on both feminist and regulatory scholarship, this thesis examines the notion of human rights due diligence to test its potential to prevent mining-related risks of sexual violence against women. This analysis demonstrates that it is possible for mining companies to inadequately address or to exclude sexual violence from their due diligence processes while still complying with their international responsibilities under business and human rights standards. Ultimately, this thesis argues that despite the limitations of human rights due diligence, reinforcing separate but complementary systems of regulation (corporate self-regulation, State law and civil society monitoring) to align them with feminist objectives may constitute an avenue for more gender-responsive due diligence and more effective prevention of mining-related sexual violence.

CHAPTER 1: INTRODUCTION

I CONTEXT AND RESEARCH QUESTION

A *Context*

Not all stories have happy endings. Some stories are tales of suffering and loss; they leave your heart heavy with grief, your mind raging at the injustice and your mouth at a loss for words. Dorcas Monga's is one of these stories. In October 2004, during a military operation conducted in the Congolese town of Kilwa and strategically supported by the multinational mining company Anvil Mining, Dorcas was raped by three soldiers while seven months pregnant. She was left paralysed by the early birthing that followed her assault and died in the hospital three months later.[1] Dorcas's story is not an isolated event. It is now accepted that sexual violence against women is a systematic outcome of the presence in communities of large mining projects. Back from her mission in South Africa in 2016, the United Nations (UN) Special Rapporteur on Violence against Women reported that 'sexual violence and other forms of gender-based violence, such as sexual harassment, in mining are rife and not once off phenomena'.[2] The relationship between large-scale mining and sexual violence in communities of operations takes several forms and, while often attributed to the individual actions of male mineworkers,[3] sexual violence is also increasingly linked to the adverse practices of multinational mining companies themselves. Multinational mining companies find themselves involved in sexual violence through their employees, through the security forces they employ or through their association with State armed forces. The involvement of mining companies in sexual violence has been documented in several contexts, both in conflict and in its absence, and irrespective of their geographical location. Yet, given the locational preference of the large-scale mining industry for the global South,[4] this thesis focuses on North–South mineral extraction. Drawing on regulatory theories and feminist legal scholarship, this thesis critically examines whether and, if so, how international standards regulating corporate conduct address

[1] Rights and Accountability in Development and Global Witness, *Le Massacre de Kilwa: Récits de Familles des Victimes et de Survivants [The Kilwa Massacre: Testimonies from Victims and Survivors' Families]* (RAID and Global Witness, 2010) 2–3.
[2] Dubravka Šimonović, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on Her Mission to South Africa*, UN Doc A/HRC/32/42/Add.2 (14 June 2016) [20].
[3] Katy Jenkins, 'Women, Mining and Development: An Emerging Research Agenda' (2014) 1(2) *The Extractive Industries and Society* 329, 334.
[4] Kuntala Lahiri-Dutt, 'The Feminisation of Mining' (2015) 9(9) *Geography Compass* 523, 523.

women's experiences of sexual violence in the context of large-scale mining. Due to the limitations of international human rights law in addressing this problem, I argue that better regulation of large mining companies for the purpose of preventing sexual violence in contexts of mineral extraction is needed.

Globally, '35 per cent of women have […] experienced physical and/or sexual intimate partner violence, or sexual violence by a non-partner'.[5] This statistic demonstrates that violence against women, including sexual violence, is a universal issue. Women in mining – and business – contexts are not spared. Since the mid-1990s, sexual violence has attracted increased attention, with feminist campaigns putting violence against women on the international human rights agenda.[6] However, concerns about sexual violence are late to the debate over human rights in business. In academic literature, research on sexual violence against women in communities adjacent to mine sites has so far attracted limited attention.[7] In international law, the application of developing standards to the specific circumstances of women betrays important deficiencies in responding to risks of sexual violence. A common thread of the international instruments regulating business conduct is that women's experiences 'are seen as the exception to the main or general understanding of [their] provisions'.[8] In other words, business-related sexual violence is perceived as a deviation from those standards and an exception to the rules they establish. This theoretical observation has practical implications for women. Specifically, the 'exceptionalising' of sexual violence perpetuates gender biases against survivors – and women, generally – and consequently prevents any meaningful transformation of corporate practices in relation to women. For these reasons, this thesis focuses on making sexual violence in mining contexts more visible and proposes regulatory strategies to prevent this violation of women's human rights.

The human rights impacts of business activities are addressed by an emerging branch of international human rights law, commonly referred to as 'business and human rights'. As a field of study, business and human rights is interested in how business activities may adversely impact human rights, and how corporate-related human rights abuses can be prevented and

[5] UN Women, *Facts and Figures: Ending Violence against Women* <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.
[6] Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011) xiii.
[7] See, eg, Adriana Eftimie, Katherine Heller and John Strongman, *Gender Dimensions of the Extractive Industries: Mining for Equity* (The World Bank, 2009); Penelope Simons, 'Unsustainable International Law: Transnational Resource Extraction and Violence against Women' (2017) 26 *Transnational Law & Contemporary Problems* 415.
[8] Edwards (n 6) xiii.

addressed. This includes questions about how businesses can be held accountable.[9] The business and human rights debate is established upon an array of international and regional soft law instruments[10] including, among the best-known, the United Nations Guiding Principles on Business and Human Rights (UNGPs)[11] and the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises.[12] These standards aim to regulate corporate behaviour and limit the adverse consequences of corporate activities on human rights. This thesis seeks to contribute to business and human rights by taking as its particular focus the notion of corporate human rights due diligence and applying it to mining-related sexual violence.

Corporate human rights due diligence is a concept that is central to the international standards regulating the activities of business enterprises. It constitutes a set of measures that corporations are expected to implement in order to limit the harmful human rights impacts of their operations. In that sense, it is different from the notion of human rights due diligence that is common to international human rights lawyers and that refers to States' obligations to act in such a way as to prevent a violation committed by a non-State actor.[13] Corporate human rights due diligence is thus conceived as a *preventative* process. Although relatively novel for companies, this process has gained recognition as a valuable tool for the corporate sector to prevent human rights risks in its activities and supply chains. Numerous companies have committed to due diligence, at least in principle.[14] Similarly, the international system has acknowledged the importance of the UNGPs and other voluntary initiatives that frame human rights due diligence despite their soft law nature. [15] The focus on human rights due diligence in this thesis is partly justified by its recognition, in both the corporate and international legal spheres, as the most comprehensive method to prevent human rights abuses in business

[9] Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge, 2017) 3.
[10] I employ 'soft law' and 'hard law' according to international law terminology. 'Soft law' refers to non-binding measures, 'hard law' to binding measures.
[11] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) ('*UNGPs*').
[12] Organisation for Economic Co-operation and Development ('OECD'), *OECD Guidelines for Multinational Enterprises*, 2011.
[13] *Velásquez Rodríguez v Honduras (Judgment)* (Inter-American Court of Human Rights, Series C No 4, 29 July 1988) ('*Velásquez Rodríguez v Honduras*').
[14] See, eg, Rio Tinto, *Human Rights* <https://www.riotinto.com/en/sustainability/human-rights>; Barrick Gold, *Putting Human Rights at the Core of How We Conduct Our Business* <https://www.barrick.com/English/sustainability/human-rights/default.aspx>.
[15] Maureen A Kilgour, 'The UN Global Compact and Substantive Equality for Women: Revealing a "Well Hidden" Mandate' (2007) 28(4) *Third World Quarterly* 751, 752 ('The UN Global Compact').

activities.[16] Indeed, this endorsement raises important questions. What are the legal implications of due diligence as 'a hybrid straddling international human rights law and corporate governance'?[17] Does this mechanism address all human rights violations? The attention in this thesis to due diligence is also explained by the traditionally androcentric nature of international law.[18] If due diligence, developed as an international human rights standard, is to be the backbone of corporate efforts to prevent human rights risks, can it be relied on to respond to women's specific experiences of business activities, including sexual violence? Because human rights due diligence aims to prevent human rights violations, this thesis focuses on measures that may be taken by corporations, States and civil society to anticipate and avoid risks of sexual violence in large-scale mining. Considerations of civil and criminal liability for non-compliant companies and of remedies for survivors are recognised in international standards on business and human rights as related to but distinct from due diligence.[19] They are thus outside of the scope of this research.

B *Research Question*

My thesis seeks to answer the following questions: is human rights due diligence an effective tool to prevent and respond to risks of mining-related sexual violence? If not, how can overlapping systems of regulation achieve due diligence's preventative potential? The motivation for this focus is the sense that the literature has not yet engaged sufficiently with the impacts of corporate activities – including mining – on women and regulatory responses to violations of women's rights in business contexts. Given the differentiated, systemic and adverse consequences women have long faced in large mining operations,[20] this work is urgent and necessary.

This thesis proposes a reading of human rights due diligence that is different from the dominant view proposed by international lawyers and business and human rights scholars generally. In

[16] Björn Fasterling, 'Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk' (2017) 2 *Business and Human Rights Journal* 225.
[17] Olga Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2013) 31(4) *Netherlands Quarterly of Human Rights* 44, 46.
[18] This question will be elaborated further in Chapter 3.
[19] See, eg, *UNGPs* (n 11), Principles 22, 25–31.
[20] See, eg, Kuntala Lahiri-Dutt, 'The Megaproject of Mining: A Feminist Critique' in Brunn S. (ed), *Engineering Earth* (Springer, 2011) 329–351 ('The Megaproject of Mining'); Simons (n 7); Katherine Heller and Rachel Perks, 'Extractive Industries in Fragile Settings Present Opportunities and Risks for Women' on *World Bank Blog* (10 July 2013) <http://blogs.worldbank.org/energy/extractive-industries-fragile-settings-present-opportunities-and-risks-women>.

response to my research question, my thesis builds on two central and innovative arguments. First, it offers a highly original theoretical engagement with human rights due diligence. I argue that due diligence processes used to assess and prevent sexual violence in large-scale mining may be better understood by adopting a method of analysis that draws on both regulatory and feminist theories. Thus, one of the aims of this thesis is to bring critical insight from feminist literature to bear on how existing international regulation responds to business-related human rights risks for women.

In a second but related argument, this thesis analyses all the steps of what constitutes a 'by the book' human rights due diligence process to determine whether it constitutes an effective tool for preventing systemic risks of mining-related sexual violence and for limiting the involvement of multinational mining companies in this abuse against women. To my knowledge, such a testing of the effectiveness of human rights due diligence in relation to sexual violence has not yet been conducted. In fact, international regulators have conceived due diligence as a response to *all* human rights violations in business environments. By analysing due diligence through a gender lens, however, I demonstrate that this process, in its present form, allows mining companies to ignore sexual violence while still complying with their international responsibilities. This contribution shows that the common understanding of due diligence as a tool to prevent business-related harms against women is underdeveloped and, sometimes, erroneous.

The conclusion that flows from these claims is that a regulatory system combining international regulation, corporate self-regulation, State law and civil society monitoring, if implemented in a way that encourages gender-responsive human rights due diligence,[21] may constitute an avenue for more effective prevention of mining-related sexual violence. In this system, and despite weaknesses analysed in subsequent chapters, companies, States and civil society can embrace overlapping and complementary regulatory roles in line with feminist objectives. These objectives include, for instance, the insertion in mining company's policies and practices of comprehensive, prolonged and systematic strategies to prevent current and future acts of sexual violence in their operations. This approach may be unusual for an international lawyer because it does not focus on reinforcing the regulatory role of the State but, instead, relies on the countervailing powers of three types of institutions: the State, mining corporations and civil

[21] In this thesis 'gender responsive human rights due diligence' refers to a process that identifies the multiple and intersecting forms of discrimination that generate sexual violence in mining operations as well as the normalising justifications for sexual violence, and actively responds to them in order to prevent sexual violence in large mining operations.

society. Several reasons justify this approach and validate the reliance on multiple forms of regulation to prevent mining-related sexual violence effectively. First, from an international law perspective, the private sector constitutes an arena that remains separate from the State and that has mainly operated in an international legal vacuum,[22] with multinational corporations lacking the status of subjects of international law. At the same time, the current neoliberal environment perceives multinational corporations as primary stakeholders in the international arena, and it is well documented that mining companies have strong political, economic or personal influence over their home and host States.[23] Relying purely on corporate self-regulation to address risks of sexual violence against women is inadequate; corporations, as profit-driven entities, have consistently demonstrated their incapacity, and sometimes unwillingness, to take human rights seriously.[24] Yet, in a context where the activities of such prominent actors have had severe impacts on individuals' human rights, and where these actors have been largely left to self-regulate their practices, it seems unrealistic to ignore their role and influence in establishing regulatory mechanisms to prevent sexual violence.

Second, while the State remains essential to the prevention of sexual violence, domestic and international solutions targeted *only* at improving State regulation are not sufficient. In relation to sexual violence, most feminist scholars agree that State intervention is needed.[25] In practice, however, over-reliance on the State to protect women from violence has encouraged undue emphasis on civil and criminal justice, leading to adverse consequences such as arrests of survivors, frequent dismissal of cases related to sexual violence, and inappropriate sanctions against perpetrators.[26] Likewise, domestic law has persistently disempowered women, with

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[22] Justine Nolan, 'The Corporate Responsibility to Respect: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 138–161, 146. This 'legal vacuum' is not absolute. Multinational companies have rights under certain international human rights regimes (see, eg, art 1 of the *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, ETS No 9 (entered into force 18 May 1954), which recognises a right to property to '[e]very natural or legal person'). They also have rights under international investment agreements, among others. Similarly, some long-standing multilateral treaties impose obligations on companies (see, eg, *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 137(1); *International Convention on Civil Liability for Oil Pollution Damage*, opened for signature 29 November 1969, 973 UNTS 3 (entered into force 19 June 1975) art III).

[23] In this thesis, 'home State' refers to the State where a multinational mining company is registered, incorporated or domiciled. 'Host States' are States where the company operates as a foreign corporation.

[24] See, eg, Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge, 2014) 3.

[25] See, eg, Catharine MacKinnon, 'Reflections on Law in the Everyday Life of Women' in Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (University of Michigan Press, 1993) 109–122; Vanessa E Munro, 'Legal Feminism and Foucault: A Critique of the Expulsion of Law' (2001) 28(4) *Journal of Law and Society* 546.

[26] Julie Goldscheid and Debra J Liebowitz, 'Due Diligence and Gender Violence: Parsing its Power and its Perils' (2015) 48(2) *Cornell International Law Journal* 301, 301; Yakın Ertürk, 'The Due Diligence Standard:

civil and criminal systems often ineffective in protecting women from sexual violence. Important discrepancies exist between different national jurisdictions as well as between international human rights law and local legal protection of women.[27] In transnational extractive contexts, significant jurisdictional issues surround the liability of parent companies for human rights violations by their subsidiaries or subcontractors. The entity principle, which considers each company within a corporate group as a separate legal entity,[28] is widely reflected in the practice of States,[29] which tend not to regulate the offshore operations and relationships of locally incorporated, listed or headquartered corporations.[30] Home States' courts have frequently used the doctrine of 'forum non conveniens'[31] to dismiss cases against multinational oil and mining companies allegedly involved in human rights violations abroad, including sexual violence.[32] Recently, however, some home courts have increasingly rejected 'forum non-conveniens' when the defendant company is domiciled on their territory[33] and have cautiously expanded their approach to parent company liability.[34] Yet these evolutions are slow and do not yet represent common State practice. Home States' courts do not, as opposed to the concept of human rights due diligence, focus on preventing but, rather, on responding to human rights abuses. Similarly, both home and host States have treated mining companies involved in human rights violations on their territory leniently, not only because they often lack resources to develop and implement legal and judicial mechanisms effectively (this is particularly the case for host States), but also because their economies may rely heavily on the mining industry. Given the present incapacity of both corporations and States to prevent business-related sexual violence on their own, a single legal approach to preventing mining-related sexual violence is

What Does it Entail for Women's Rights?' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers, 2008) 27–46, 38.

[27] See, eg, Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press, 2006); Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010).

[28] Paul Redmond, 'Corporations and Human Rights in a Globalised Economy: Some Implications for the Discipline of Corporate Law' (2016) 31(1) *Australian Journal of Corporate Law* 3, 24. The 'entity principle' treats each corporation as a separate person, while the 'enterprise principle' considers all companies of a corporate group as one legal person.

[29] International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity and Legal Accountability* (ICJ Report No 3, 2008) 47.

[30] Redmond (n 28).

[31] John Bies, 'Conditioning Forum Non Conveniens' (2000) 67(2) *The University of Chicago Law Review* 489. According to the author, '[f]orum non conveniens is a doctrine under which a court with proper subject matter jurisdiction, personal jurisdiction, and venue in a suit nevertheless declines to exercise its jurisdiction' when it considers another court (or forum) is better suited to hear the case: 492.

[32] See, eg, *Anvil Mining Ltd v Association canadienne contre l'impunité* [2012] 2012 QCCA 117.

[33] See, eg, *Garcia v Tahoe Resources Inc* [2017] 2017 BCCA 39.

[34] See, eg, *Lungowe v Vedanta Resources Plc & Another* [2019] UKSC 20; *AAA & Others v Unilever plc and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532.

ineffective. Instead, I argue here that the answer to these problems lies in the regulatory potential of the multiplicity of stakeholders involved, directly or indirectly, in the mining sector and in understanding the complementary roles of international, State, corporate and social actors.

Finally, in a context where, so far, multinational mining companies have largely adopted a gender-neutral perspective on due diligence, focusing on one particular violation of women's rights allows me to raise awareness on business-related sexual violence at large and offers avenues for broader discussion on a gendered approach to human rights due diligence across contexts and industries. In other words, while some of the findings of this thesis apply specifically to the mining sector, others are relevant to other industries and other violations of human rights.

II TERMS AND SCOPE OF THE THESIS

A *Business and Human Rights*

1 *Definition*

In order to better conceptualise the notion of human rights due diligence, which is the focus of this thesis, it is important to delineate the context in which it emerged: the debate on business and human rights. The debate on business and human rights as we currently know it is the result of a failed effort by the now-disbanded Sub-Commission on the Promotion and Protection of Human Rights to recognise direct international human rights obligations for transnational corporations.[35] This led to the appointment in 2005 of Harvard Business Professor John Ruggie as the UN Secretary-General's Special Representative on Business and Human Rights (Special Representative).[36] Ruggie's mandate culminated in the elaboration of the 2011 UNGPs.[37] The UNGPs rest upon a tripartite policy framework consisting of a State duty to protect human

[35] Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, UN ESCOR, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003) ('*Norms on the Responsibilities of Transnational Corporations*').
[36] Commission on Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, 2005/69, 61st sess, 59th mtg, UN Doc E/CN.4/RES/2005/69 (20 April 2005) [1] ('*Human Rights and Transnational Corporations*'). The formal title is 'Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises'.
[37] *UNGPs* (n 11).

rights, a corporate responsibility to respect human rights, and the need for effective access to remedies in cases of human rights violations.[38]

The State duty to protect human rights derives from 'existing human rights duties that States have taken on by ratifying one or more international human rights treaties'.[39] In that sense, the UNGPs do not create new legal obligations for States. Rather, they 'clarify and elaborate on the implications of relevant provisions of existing international human rights standards, some of which are legally binding on States, and provide guidance on how to put them into operation'[40] in the context of business activities. In contrast, the corporate responsibility to respect is a non-binding *standard of responsibility* for businesses with regards to human rights. This responsibility is grounded in social expectations rather than in international human rights law.[41] It urges companies to avoid human rights infringements and address any potential or actual impact. The responsibility to respect human rights exists even where State human rights legislation is lacking or not effectively enforced.[42]

As such, the UNGPs are a soft law instrument that does not create new legal obligations for States or corporations. However, despite their non-binding nature, the UNGPs have become the most authoritative document in relation to business and human rights. Indeed, their unanimous endorsement in June 2011 by the UN Human Rights Council[43] made the framework the first corporate human rights responsibility initiative to be endorsed by the States at the UN.[44] The UNGPs have since become the first globally accepted standard covering the responsibilities of States and businesses in preventing and addressing business-related human rights abuse and have enjoyed widespread uptake by States, civil society organisations and the private sector.[45] Other international and regional regulators, including the OECD, the European Union (EU) and the International Finance Corporation, have aligned their own standards with

[38] John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UN Doc A/HRC/8/5 (7 April 2008) [9] ('*Protect, Respect and Remedy*').
[39] Office of the High Commissioner on Human Rights ('OHCHR'), *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, UN Doc HR/PUB/14/3 (November 2014) 7.
[40] Ibid 8.
[41] *Protect, Respect and Remedy* (n 38) [54].
[42] OHCHR (n 39) 26.
[43] Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises,* UN Doc A/HRC/RES/17/4 (6 July 2011) [1].
[44] Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9 *European Company Law* 101, 108.
[45] Beata Faracik, *Implementation of the UN Guiding Principles on Business and Human Rights* (European Parliament, 2017) 8.

the UNGPs.[46] In this sense, the UNGPs have generated important lessons for international law, in particular regarding the role of non-State actors in international human rights law and the evolving significance of soft law sources.[47] Equally significant is that while current State practice is not sufficiently consistent to elevate the non-binding UNGPs to the rank of customary international law, the UNGPs are grounded in States' existing human rights obligations. These are guaranteed in treaties, custom, general principles and other sources of international law, and the UNGPs transpose these obligations to business contexts.[48] The current business and human rights debate mainly revolves around the 'protect, respect and remedy' framework.

2 *Business and Human Rights as a Developing Field*

Business and human rights is still evolving as a branch of international human rights law. Debate over the effectiveness of the UNGPs – as a non-enforceable standard – in creating accountability for business-related human rights abuse and providing adequate legal remedies for victims has led to negotiations for the elaboration of an international binding instrument. This initiative was launched in September 2013 when Ecuador, backed by eighty-four States, recommended that a treaty be adopted to

> clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States, and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute effectively those companies.[49]

In 2014, the UN Human Rights Council adopted a resolution creating an Open-ended Intergovernmental Working Group (OEIWG) 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[50] The OEIWG produced a 'Zero draft treaty' in

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[46] See, eg, *OECD Guidelines for Multinational Enterprises* (n 12); *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas*, [2017] L(30) OJ 1 ('*Regulation (EU) 2017/821*').
[47] Michael K Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14(1) *Human Rights Law Review* 133.
[48] *UNGPs* (n 11), General Principles.
[49] *Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council* (September 2013), <https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf>.
[50] Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/RES/26/9 (14 July 2014) [1].

2018, a revised draft in 2019 and a second revised draft in 2020.[51] The outcomes of a legally binding instrument on business and human rights are still unclear. For some, a treaty could be more effective than the non-binding UNGPs in specific areas of business and human rights – specifically, those that have been overlooked by the Special Representative, such as the rights of indigenous people or certain labour rights.[52] As explained in Chapter 7, a treaty could also reinforce State regulation in relation to preventing adverse business-related impacts on women. For others, including Ruggie, a general, abstract treaty would be unfit to respond to the wide range of issues and conflicting interests that emerge in business and human rights and would, consequently, be less comprehensive and appealing to States than the UNGPs.[53] In this context, given that inadequate enforcement is identified as one of the main shortcomings of the UNGPs, questions remain as to the willingness of States to be bound by a treaty and to implement it adequately. Whether a binding instrument is an opportunity to develop a comprehensive international law system to regulate corporate conduct, or whether it holds the threat of undermining the progress accomplished by the UNGPs will be determined in the future. Irrespective of the evolution of business and human rights, the draft treaty confirms that human rights due diligence remains the primary preventative element of both corporate responsibilities and State obligations in relation to business-related human rights risks.[54] This conclusion illustrates the relevance and timeliness of this and further research on due diligence, as well as the necessity of better understanding the roles of States, corporations and civil society in regulating and implementing due diligence.

[51] Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights ('OEIGWG'), *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (Zero Draft, 16 July 2018); OEIGWG, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (Revised Draft, 16 July 2019); OEIGWG, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (Second Revised Draft, 6 August 2020) ('*Treaty on Business and Human Rights Second Revised Draft*').

[52] University of Notre Dame London Gateway, *Expert Round Table on Elements of a Possible Binding International Instrument on Business and Human Rights* (11 July 2017) (London).

[53] John Gerard Ruggie, Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726>.

[54] *Treaty on Business and Human Rights Second Revised Draft* (n 51) art 6.

3 *Business and Human Rights v. Corporate Social Responsibility*

John Ruggie's initial mandate was to 'identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'.[55] Nevertheless, his framework gives little weight to broader discussions on corporate social responsibility (CSR).[56] In fact, the field of business and human rights has evolved to be the 'close cousi[n]'[57] of CSR: a concept that is related but different. CSR is a very diverse field of study and practice that encompasses the 'responsibilities of business and its role in society, including categories such as business and society, business ethics, or stakeholder theory'.[58] It often consists of encouraging businesses to adopt and share best practices,[59] while engaging in 'wide-ranging activities from corporate philanthropy to stepping in to provide aid when governments fail to act, because it is good for business'.[60] In that sense, CSR is broader in scope than business and human rights, the objective of which is less ambitious and is limited to preventing and mitigating businesses-related human rights violations.[61]

Business and human rights and CSR also differ in their approach to corporate responsibilities. While CSR emphasises responsible behaviour based on moral and ethical considerations, the business and human rights debate focuses on the implementation and potential enforceability of business responsibilities grounded in the existing international human rights regime.[62] In practice, this means that corporate activities and impacts are measured in light of universal human rights standards and not only voluntary codes and principles, as is the case for CSR.[63] Deriving from these different approaches is the fact that business and human rights addresses not only business conduct – as does CSR – but also the role of States in facilitating and overseeing companies' respect for human rights.[64] In the UNGPs, this role is portrayed as the extension of States' international obligations to respect, protect and fulfil human rights and

[55] *Human Rights and Transnational Corporations* (n 36) [1].
[56] Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22(4) *Business Ethics Quarterly* 739, 739.
[57] Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14(2) *Journal of Human Rights* 237, 237.
[58] Andreas Georg Scherer and Guido Palazzo, 'Toward a Political Conception of Corporate Responsibility – Business and Society Seen from a Habermasian Perspective' (2007) 32 *Academy of Management Review* 1096, 1096.
[59] Bernaz (n 9) 3.
[60] Ramasastry (n 57) 237.
[61] Bernaz (n 9) 3.
[62] Wettstein (n 56) 744.
[63] Ramasastry (n 57) 238.
[64] Ibid.

fundamental freedoms.[65] Under business and human rights, the State thus has an explicit role in regulating business conduct and enforcing measures to prevent and address business-related human rights violations, while CSR focuses purely on companies' decision-making.

Finally, and importantly for this thesis, business and human rights relies upon practical tools aimed at implementing corporate responsibility to respect human rights. The most important of these tools is human rights due diligence, defined in the UNGPs as an ongoing process encouraging companies to assess actual and potential human rights impacts, integrate and act upon the findings, track responses and communicate how impacts are addressed.[66] Since the adoption of the UNGPs, significant attempts have been made to redefine CSR to include the concept of human rights due diligence.[67] However, this concept, and human rights generally, were not part of the initial terminology of CSR.[68]

B *Women*

Although most of the literature on gender and mining emphasises the hyper-masculinity associated with mining operations, Kuntala Lahiri-Dutt contends that the industry is starting to experience a process of 'feminisation', with more women involved in mineral extraction.[69] She argues that this process enhances the opportunities for and visibility of women in mining[70] while simultaneously reinforcing normative gender roles and multiplying the adverse impacts of mining on women.[71] This phenomenon concerns women working in large- and small-scale mining, as well as women living in surrounding communities. In this thesis, I focus on women and girls living and working around large camp sites and I exclude women who are employed by multinational mining companies, as the latter issue entails considerations of labour law that are outside the scope of this research.

In relation to sexual violence, I acknowledge that risks of violence against men and non-binary people exist in the mining industry, although data on that subject is very limited.[72] However, I

[65] *UNGPs* (n 11) General Principles.
[66] Ibid, Principle 17.
[67] See, eg, European Commission, *A Renewed EU Strategy 2011–14 for Corporate Social Responsibility* (Communication, 25 October 2011). The Commission stated that '[t]o identify, prevent and mitigate their possible adverse impacts, large enterprises, and enterprises at particular risk of having such impacts, are encouraged to carry out risk-based due diligence, including through their supply chains' [3.1].
[68] Wettstein (n 56) 739.
[69] Lahiri-Dutt, 'The Feminisation of Mining' (n 4) 523.
[70] Ibid.
[71] Ibid 524.
[72] Isabel Cane, Amgalan Terbish and Onon Bymbasuren, *Mapping Gender Based Violence and Mining Infrastructure in Mongolian Mining Communities* (International Mining for Development Centre, 2014).

choose here to address sexual violence against women as research demonstrates that women around the world, and across sectors, remain more exposed to such violence.[73] As expressed by Christine Chinkin, 'women have always been and remain the primary target of rape'.[74] It is, however, important to note that, despite its emphasis on sexual violence against women, I do not suggest that women working and living in mining communities or survivors of sexual violence should only be portrayed as victims. In fact, it is now established that women are beneficiaries as well as critical productive agents of the mining industry.[75] Nor do I intend to homogenise women and their experiences.

This thesis uses the notions of 'sex' and 'gender' in its analysis of business and human rights, but it is primarily interested in women's experiences of mining activities and responses to corporate abuse of women. There are many conceptual difficulties surrounding sex and gender and, at least in the international discourse, 'the terms sex, gender, and women are often applied interchangeably or are misunderstood'.[76] Gender is not about women specifically, despite usage in UN documents treating gender as synonymous with women.[77] Rather, 'it is about socially and culturally constructed roles, identities, statuses, and responsibilities that are attributed to men and women respectively on the basis of unequal power'.[78] Sex is generally understood as the biological differences between men and women.[79] I use 'gender' in this thesis as a way to frame women's experiences and identities within 'the unequal structure of power that underlies the relationship between sexes'.[80] In that context, I look at the roles of men and women in the mining industry, as well as the role of predominantly male regulators in responding more effectively to mining-related risks of sexual violence against women. The argument is that if sexual violence is primarily perpetrated by men against women, men should take responsibility for preventing it.[81] This approach aligns with feminist literature, which has

[73] See, eg, Elizabeth Dartnall and Rachel Jewkes, 'Sexual Violence Against Women: The Scope of the Problem' (2013) 27 *Best Practice & Research Clinical Obstetrics and Gynaecology* 3.
[74] Christine Chinkin, 'Addressing Violence Against Women in the Commonwealth Within States' Obligations Under International Law' (2014) 40(3) *Commonwealth Law Bulletin* 471, 475.
[75] See, eg, Lahiri-Dutt, 'The Feminisation of Mining' (n 4).
[76] Edwards (n 6) 13.
[77] Ibid.
[78] Ibid.
[79] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 3.
[80] UN Department of Economic and Social Affairs, *1999 World Survey on the Role of Women in Development: Globalization, Gender and Work* (United Nations, 1999) ix.
[81] Alan D Berkowitz, 'Fostering Men's Responsibility for Preventing Sexual Assault' in Paul A Schewe (ed), *Preventing Violence in Relationships* (American Psychological Association, 2002) 163–196.

warned against expecting women to solve organisational problems and to mainstream women's rights just because of their gender.[82]

C *Sexual Violence*

International initiatives in business and human rights rely heavily on existing international human rights law to guide States and corporations in implementing, respectively, their human rights obligations and responsibilities.[83] As one objective of this thesis is to understand the ability of business and human rights instruments to prevent risks of sexual violence in the context of large-scale mining, it is necessary to understand how international human rights law addresses sexual violence. This is not an easy task. Indeed, none of the binding and non-binding human rights instruments have specifically defined or prohibited sexual violence. Instead, they prohibit it as a category of violence against women.[84] In this thesis, I use the definition developed in the Declaration on the Elimination of Violence against Women (DEVAW), which, although non-binding, is widely relied upon in the international human rights discourse.[85] According to the DEVAW:

> Violence against women shall be understood to encompass, but not be limited to, the following:
>
> (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
>
> (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
>
> (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.[86]

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[82] See, eg, Laura J Shepherd, 'Sex, Security and Superhero(in)es: From 1325 to 1820 and Beyond' (2011) 13(4) *International Feminist Journal of Politics* 504; Robert W Connell, *Masculinities* (Polity Press, 2005).
[83] See, eg, *UNGPs* (n 11) Principle 1 (Commentary) and Principle 12 (Commentary).
[84] Edwards (n 6). The author states that the definition of 'violence against women' itself is contested and is often used interchangeably with the notion of 'gender-based violence': 20-25.
[85] Ibid 21. On this question, see *General Recommendation No 35, (2017): On Gender-Based Violence Against Women, Updating General Recommendation No. 19*, UN Doc CEDAW/C/GC/35 (14 July 2017) [2] ('*CEDAW General Recommendation 35*'); Rashida Manjoo, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Rashida Manjoo*, UN Doc A/HRC/26/38 (28 May 2014).
[86] *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN Doc A/RES/48/104 (20 December 1993) art 2.

I am aware of the limitations of such a broad and non-exhaustive definition in portraying the different layers of sexual violence in a comprehensive manner. For example, it does not address elements that may generate sexual violence, such as *threats* of sexual violence. Nor does it encompass situations that are conducive to sexual violence, such as abuse of power or a coercive environment. These elements are particularly relevant to understand mining-related sexual violence. Indeed, research demonstrates the systemic imbalance of power that exists between large mining companies – including their employees and contractors – and local communities, particularly women, who largely depend on them for livelihood and are disproportionately affected by mining operations.[87] This context offers fertile ground for widespread and recurring sexual violence.[88] In addition, the DEVAW does not refer to conditions that are not violence per se, but which could lead to sexual violence.[89] Such conditions may include social, cultural or traditional practices and beliefs that view women as inferior[90] or even condone sexual violence, some being prevalent in a significant number of mining communities.[91] Finally, and importantly, the language used in article 2 of the DEVAW seems to portray women mainly as victims subordinated to their family, their community or the State. This is far from accurate in the context of mining, where women have consistently been productive actors in all areas of their lives and of the economy.[92]

It is apparent that international human rights law provides only a limited definition of sexual violence, which might constitute an obstacle to the effective implementation of international instruments on business and human rights that rely significantly on other subfields of human rights law. At the same time, the DEVAW, although not binding, was the first international instrument explicitly addressing violence against women. As such, it constitutes an authoritative international instrument that may, in practice, provide a framework that could positively influence the regulatory practices of States, corporations and civil society.

[87] See, eg, Chris Albin-Lackey, *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine* (Human Rights Watch, 2011).
[88] See Chapter 2.
[89] Edwards (n 6) 23.
[90] Ibid.
[91] See, eg, Siri Aas Rustad, Gudrun Østby and Ragnhild Nordås, 'Artisanal Mining, Conflict, and Sexual Violence in Eastern DRC' (2016) 3(2) *Extractive Industries and Society* 475, 477.
[92] Lahiri-Dutt, 'The Megaproject of Mining' (n 20); Kuntala Lahiri-Dutt, 'Roles and Status of Women in Extractive Industries in India: Making a Place for a Gender-Sensitive Mining Development' (2007) 37(4) *Social Change* 37.

D *Multinational Mining Companies and Large-Scale Mining*

1 *Definition*

Multinational mining companies and large-scale mining are the objects of the regulatory strategies examined in this thesis to prevent risks of sexual violence in mining communities. It is therefore important for this thesis to convey a uniform understanding of the relevant mining activities and companies involved in these activities. International instruments that regulate the conduct of corporations use different terms to define large companies that have operations in several parts of the world. The OECD refers to 'multinational enterprises',[93] defined as

> enterprises [that] usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.[94]

The UNGPs use the term 'transnational'[95] corporations or business enterprises – used interchangeably – without making explicit what their transnational character entails. Clarification can be found in the 1983 Draft United Nations Code of Conduct on Transnational Corporations that defined 'transnational corporation' to mean

> [a]n enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activities of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.[96]

These two definitions are similar in that they include a wide range of entities and focus on the nature of the affiliation between these entities,[97] which relies on fluctuating relations of ownership and control by one entity – often a parent company – over foreign entities – often subsidiaries. In fact, the terms 'multinational' and 'transnational' are often used interchangeably by international lawyers, although most of the literature in international

[93] See, eg, *OECD Guidelines for Multinational Enterprises* (n 12).
[94] Ibid [4].
[95] *UNGPs* (n 11) General Principles.
[96] Commission on Transnational Corporations, *Draft United Nations Code of Conduct on Transnational Corporations*, UN ESCOR, UN Doc E/1983/17/Rev. 1 (7–18 March and 9–21 May 1983) art 1(a).
[97] United Nations Conference on Trade and Development, *Scope and Definition*, UN Doc UNCTAD/ITE/IIT/11 (vol. II) (1999) 46.

management acknowledges different types of multinational corporations, including transnational companies as a subset.[98] As multinational corporations may overarch several forms of companies, and as large mining companies may adopt different structures, I use the broader notion of 'multinational mining companies' in this thesis. This definition also allows me to address the role of subsidiaries in perpetuating and responding to risks of sexual violence in mining communities.

The operations of multinational mining companies constitute what is called in this thesis 'large-scale mining'. In international documents, large-scale mining is often defined as opposed to 'artisanal and small-scale mining' (ASM).[99] According to the OECD, ASM can be defined as

> [f]ormal or informal mining operations with predominantly simplified forms of exploration, extraction, processing, and transportation. ASM is normally low capital intensive and uses high labour intensive technology. "ASM" can include men and women working on an individual basis as well as those working in family groups, in partnership, or as members of cooperatives or other types of legal associations and enterprises involving hundreds or even thousands of miners.[100]

In contrast, large-scale mining is typically associated with large or multinational companies embedded in global capital and finance markets, and part of the international supply of mineral and metals commodities.[101] These corporations generally hire many employees and use an extensive labour force to prospect, explore and extract minerals until they are completely excavated.

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[98] See, eg, Anne-Wil Harzing, 'An Empirical Analysis and Extension of the Bartlett and Ghoshal Typology of Multinational Companies' (2000) 31(1) *Journal of International Business Studies* 101. The author identifies three types of multinational companies: global, multidomestic and transnational. She defines transnational companies: '[A] transnational company [...] tries to respond simultaneously to the sometimes-conflicting strategic needs of global efficiency and national responsiveness [...] Subsidiaries in this type of company are more dependent on other subsidiaries for their in- and outputs than on headquarters, which confirms the network type of organizational structure, that is typical for transnational companies. Subsidiaries are usually also responsive to the local market [...] The total level of control exercised towards subsidiaries in transnational companies is slightly lower than for global companies. This is mainly due to a low level of personal centralized control': 21.

[99] See eg OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2016) 69 ('*OECD Guidance on Minerals*').

[100] Ibid 65.

[101] John Owen and Deanna Kemp, *A Large-Scale Perspective on Small-Scale Mining* (Centre for Social Responsibility in Mining, Sustainable Minerals Institute, The University of Queensland, 2019) 2. *OECD Guidance on Minerals* (n 99). The OECD defines mining companies as 'upstream' companies: '"Upstream" refers to the mineral supply chain from the mine to smelters/refiners. "Upstream companies" include miners (artisanal and small-scale or large-scale producers), local traders or exporters from the country of mineral origin, international concentrate traders, mineral re-processors and smelters/refiners': 32.

2 *Why Focus on Large-Scale Mining?*

This thesis focuses on large-scale mining, for three reasons. First, although the notion of human rights due diligence applies to enterprises that operate in ASM settings, to a certain extent,[102] the processes and policies that ASM and large companies need to implement to integrate human rights throughout their operations are different. Specifically, multinational mining companies need more formal and comprehensive due diligence systems because they have more business relationships, longer supply chains and more complex procedures and systems in place for decision-making.[103] Despite this focus on large-scale mining, the findings of this thesis have the potential to be extended to smaller mining companies, as well as to large and small companies in other industries, as examined in the conclusion of this thesis. Second, the data available regarding the involvement of mining companies in sexual violence are limited, and the overwhelming majority of cases on this issue relate to multinational mining companies, which influenced the choices made in this thesis. Finally, the experiences of and risks faced by women are different depending on whether they work and live around large or artisanal mining sites. I do not wish to homogenise the impacts of mining, at large, on women. Large-scale mining in itself is not a uniform industry and it encompasses a variety of techniques, geographical locations and effects on communities. Further, large-scale mining and ASM interact in several ways.[104] Yet, it is useful and relevant to analyse human rights due diligence in relation to a single aspect of the common dichotomy between ASM and large-scale mining.

The focus on multinational mining operations suggests that domestic large-scale mining – for example in cases where a large company exploits minerals in its State of incorporation – is excluded from the scope of this thesis, despite the relevance of a feminist regulatory approach to human rights due diligence in both transnational and domestic contexts. This decision is justified by different considerations (linked, for example, to the application of domestic legislation) in the regulation of mining companies when home and host States are the same country. Similarly, sexual violence is a risk across multinational mining projects, irrespective of their geographical location in the global North or in the global South. Yet, because of the locational preference of the large-scale mining industry for the global South, this thesis focuses

[102] See, eg, *UNGPs* (n 11). The UNGPs state that '[t]hese Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure', General Principles.
[103] OHCHR (n 39) 32.
[104] See, eg, Sara Geenen, 'A Dangerous Bet: The Challenges of Formalizing Artisanal Mining in the Democratic Republic of Congo' (2012) 37(3) *Resources Policy* 322.

on mineral extraction in the global South by multinational companies incorporated in the global North.

3 *Local Communities*

In this thesis, the terms 'local communities' or 'mining communities' are used interchangeably to mean groups of people living in close proximity to a large-scale mine site. They encompass rural and urban communities of various sizes[105] that occupied the area prior to the exploitation of the mine. They also include 'boomtowns' resulting from the migration of thousands of non-local people to the area occupied by the mine, including those employed by the mining company, artisanal miners seeking to exploit portions of the large-scale mineral deposits[106] and individuals providing auxiliary services and looking for work opportunities.

Broader definitions also include 'nomadic communities, communities living […] downstream from a river near the site, or along a transport route or near associated infrastructure such as energy grids or processing plants'.[107] Large-scale mining operations have positive socioeconomic impacts on local communities, including the development of key infrastructure (roads, schools, housing, etc.) and the creation of employment opportunities for local people.[108] They also have significant adverse effects – for example, land acquisition and ensuing forced displacement, environmental risks, social disruption, spread of diseases and exposure to violence from private security personnel.[109] The wide range of problems associated with large-scale mining and their potential impact on vast portions of the population of a country, regardless of their proximity to the mine, justify a broad understanding of local communities. In relation to sexual violence, however, the cases reported refer to increased risks of sexual violence against women in communities that are geographically close to the mine – hence the conservative use of the notion of mining communities in this thesis.

[105] See, eg, Gavin Hilson, 'An Overview of Land Use Conflicts in Mining Communities' (2002) 19 *Land Use Policy* 65, 66.
[106] Ibid.
[107] OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (2017) 19 ('*OECD Guidance on Stakeholder Engagement*').
[108] Hilson (n 105) 66.
[109] International Finance Corporation, *Unlocking Opportunities for Women and Business: A Toolkit of Actions and Strategies for Oil, Gas, and Mining Companies, Tool Suite 3: Women and Community Engagement* (IFC, 2018) 6.

III METHODOLOGY

A *Research Methods*

The research method used in this thesis relies entirely upon document analysis. In the light of five examples (Barrick Gold in Papua New Guinea and Tanzania, Anvil Mining in the Democratic Republic of Congo, Monterrico Metals in Peru and Hudbay Minerals in Guatemala), I have reviewed and evaluated printed and electronic material in order to develop scholarly understanding of the involvement of multinational mining companies in sexual violence and the potential of human rights due diligence to prevent mining-related sexual violence. Documents examined include legal and policy instruments regulating the impacts of business activities on human rights, domestic and international case law, organisational and institutional reports and websites, newspaper articles, audiovisual documentation and academic literature. The five examples chosen are among the best-known cases of sexual violence committed against women in the context of industrial mining. There is also a substantial amount of public information available in relation to these examples, which is important for a thesis that does not combine document analysis with other qualitative research methods – such as interviews or focus groups for instance – as a means of triangulation.[110]

In fact, there are several limitations to using document analysis alone as a research method. Apart from academic literature, most of the documents evaluated in this thesis were produced for purposes other than research and do not provide, by themselves, sufficient detail to answer the research question.[111] In addition, documents elaborated by international organisations, governments, corporations, NGOs or the media are likely to reflect the institution's agenda, thus creating a risk of bias.[112] However, the data contained in the multiple documents converge enough to reveal insights that are relevant to the research question, to identify legal and policy gaps, and to draw conclusions on how mining could be regulated better to reduce risks of sexual violence.

[110] Norman K Denzin, *The Research Act in Sociology: A Theoretical Introduction to Sociological Methods* (Butterworths, 1970). The author defines triangulation as 'the combination of methodologies in the study of the same phenomenon': 291.
[111] Glenn A Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27, 32.
[112] Ibid.

B *Theoretical Frameworks: Feminism and Regulation*

1 *Feminism*

The arguments made in this thesis rely on two theoretical approaches: feminist theories and regulatory theories. First, I use the notion of 'feminism', which has broadly been understood as the theories and movements concerned with improving the status of women and opposing the political, legal, social and economic prejudices that subordinate them. It is, in fact, difficult to define what feminism encompasses as, inside and outside the academy, the words 'feminism' and 'feminist' have long inspired controversy.[113] I believe, however, that Barbara Smith's definition of feminism is comprehensive enough to encompass many of the concerns of feminist scholars and, as a result, is suitable to formulate some of the elements of what constitutes a feminist regulatory framework. She contends that

> [f]eminism is the political theory and practice that struggles to free *all* women: women of color, working-class women, poor women, disabled women, lesbians, old women, as well as white, economically privileged heterosexual women. Anything less than this vision of total freedom is not feminism, but merely female self-aggrandizement.[114]

Feminist theory is closely linked to the aims and interests of feminism,[115] although it contains many schools of thoughts. In the context of this research, which focuses on law and regulation, I rely principally on feminist legal scholarship. Feminist legal scholarship refers to 'a body of scholarship in search of a theoretical understanding of the relation of law to women's subordination or, more simply, of law and patriarchy'.[116] It aims at 'critically describing the relationship between gender and law, prescribing how that relationship might be improved, or both'.[117] I here understand feminist legal scholarship as including feminist scholarship in international law, which is interested in 'looking behind the abstract entities of states to the actual impact of rules on women within states' and argues that 'both the structures of international lawmaking and the content of the rules of international law privilege men'.[118] In

[113] Karen Offen, 'Defining Feminism: A Comparative Historical Approach' (1988) 14(1) *Signs: Journal of Women in Culture and Society* 119, 119.
[114] Barbara Smith, 'Racism and Women's Studies' (1980) 5(1) *Frontiers: A Journal of Women Studies* 48, 48.
[115] Amy Allen, *The Power of Feminist Theory: Domination, Resistance, Solidarity* (Routledge, 1999) 1.
[116] Robin West, 'Women in the Legal Academy: A Brief History of Feminist Legal Theory (Legal Education in Twentieth-Century America)' (2018) 87(3) *Fordham Law Review* 977, 980.
[117] Katherine T Bartlett, 'Feminist Legal Scholarship: A History Through the Lens of the "California Law Review"' (2012) 100(2) *California Law Review* 381, 381.
[118] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613, 614.

this thesis, I use, as prescribed by Hilary Charlesworth, multiple feminist approaches.[119] Using a range of theories has the advantage of addressing different layers of mining-related sexual violence, which is fundamental to test the validity of human rights due diligence in relation to this specific violation of women's human rights. Specifically, it allows me to consider the diversity of women's experiences as '[m]ost feminists would agree that a diversity of voices is not only valuable, but essential, and that the search for, or belief in, one view, one voice is unlikely to capture the reality of women's experience or gender inequality'.[120] I have then chosen three strands of feminist theory to address three concerns that broadly overarch feminist legal scholarship and that I apply to the regulation of transnational corporate activities.[121] The first of these is the invisibility of women in the discourse of, and mechanisms established by, international regulatory initiatives on business and human rights.[122] These instruments either ignore or address inappropriately women's experiences of business activities, including mining. The second is the public/private dichotomy that marginalises women's concerns by locating them in the private, domestic sphere.[123] Despite its emphasis on corporate conduct, the business and human rights sphere has pushed sexual violence further into the private realm. The third strand is the generalisation of women's experiences across business activities,[124] which has led multinational mining companies to disregard the intersectional nature of mining-related sexual violence. Focusing only on three feminist theories that originated in the global North has limitations. First, this approach fails to embrace other feminist theories that are equally relevant in the context of North-South mineral extraction, such as postcolonial and Indigenous feminisms, among others. Second, the theories chosen take as their referent feminist interests as codified in the Western world.[125] However, my choice relies on these three theories encompassing themes that are *generally* articulated, in various forms, by feminist scholarship,

[119] Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *American Journal of International Law* 379, 379.
[120] Charlesworth, Chinkin and Wright (n 118) 613.
[121] Charlesworth (n 119) 381.
[122] See, eg, Andrew Byrnes, 'Using International Human Rights Law and Procedures to Advance Women's Human Rights' in Kelly Dawn Askin and Dorean Koenig (eds), *Women and International Human Rights Law* (Brill, Transnational Publishers, 2000), 79; Rebecca J Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994).
[123] See, eg, Celina Romany, 'State Responsibility goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 85–115; Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 2.
[124] See, eg, Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1984) 12(3) *Boundary 2* 333.
[125] Kuntala Lahiri-Dutt, 'Do Women Have a Right to Mine?' (2019) 31 *Canadian Journal of Women and the Law* 5.

irrespective of feminist scholars' school of thought. In the context of a feminist regulatory framework, described below, that does not claim to be exhaustive or inflexible, these themes are useful because they allow for a reconsideration of a purely regulatory approach to business and human rights based on specific feminist concepts.

2 *Regulation*

Similarly to feminist theories, regulatory theories are diverse. They include different but related approaches to regulation, gather scholars and practitioners from multiple disciplines, and discuss varied concepts.[126] Specifically, my research is informed by several regulatory theories that include responsive regulation, conceived by Ian Ayres and John Braithwaite. It also builds upon the concept of enforced self-regulation put forward by John Braithwaite in 1982 as a response to the incapacity of the State to implement regulatory strategies to address corporate crime.[127] This concept has been expanded by meta-regulation theorists such as Peter Grabosky and Christine Parker, whose works are also analysed throughout this thesis. The focus on responsive regulation in this thesis is explained by the critical influence of this theory in the development of business and human rights instruments, in particular of the UNGPs, as will be developed in Chapter 3. Similarly, I have chosen to use concepts of enforced self-regulation – and particularly meta-regulation –, which combine elements of voluntary corporate self-regulation, state enforcement and third-party monitoring.[128] Such combination is particularly relevant to understand and evaluate the constantly evolving interactions between private, public and social actors that characterise business and human rights. In order to ensure clarity throughout this thesis, I thus use the terms 'regulatory theories' to refer to the commonalities, touched upon below and developed further in subsequent chapters, between responsive regulation, enforced self-regulation and meta-regulation. I also identify and name these regulatory theories when they make a specific, unique, argument.

What all these theories have in common, despite their diversity, is that they move 'beyond the narrow or juridical view of regulation'.[129] In other words, they move away from – or 'decentre' – the law and other forms of deterrence-based regulation (which rely heavily on the application of rules and sanctions) as central regulatory processes. This type of deterrence-based regulation

[126] See, eg, Peter Drahos, *Regulatory Theory: Foundations and Applications* (ANU Press, 2017).
[127] John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80(7) *Michigan Law Review* 1466, 1467.
[128] Peter Drahos and Martin Krygier, 'Regulation, Institutions and Networks' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 1–24, 4.
[129] Ibid 13.

is often referred to as 'command and control' due to its unilateral and linear approach that suggests the omnipotence of the State in establishing, monitoring and enforcing the rules.[130] Instead, the law is positioned as one regulatory option among others, and regulatory capacities are distributed among other actors, including corporations and civil society. In that context, regulation is largely understood as 'the means that guide any activity, individual or institution to behave according to formal or informal rules'[131] or 'the intentional activity of attempting to control, order or influence the behaviours of others'.[132]

Given the diversity of stakeholders, activities and institutions making up different types of regulation, however, some regulation theorists have adopted different, more specific, definitions of regulation. In this thesis, I use Julia Black's interpretation of regulation:

> Regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.[133]

Black's definition is broad and recognises additional and complementary forms of power to that of the State. It encompasses the exercise of regulation by economic forces ('the market'), as well as non-State social and corporate actors that interact with the State or between themselves; hence the 'decentred' nature of regulation.[134] In this definition of regulation, the State remains the ultimate overseeing entity, although its role in regulatory mechanisms varies 'from full participant to mere guiding hand or threatening shadow'.[135]

Based on this broad definition of regulation, it can be argued that there has been a plethora of regulatory attempts and initiatives to regulate the conduct of multinational corporations. Some of them take the form of multi-stakeholder and intergovernmental initiatives such as the UNGPs, the OECD Guidelines for Multinational Enterprises, the Global Compact, the Voluntary Principles on Security and Human Rights or the Extractive Industries Transparency Initiative. Others are standards of conduct developed by international and private stakeholders

[130] Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 2.
[131] Natasha Tusikov, 'Transnational Non-State Regulatory Regimes' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 339, 339.
[132] Black (n 130) 1.
[133] Ibid 20.
[134] Ibid. Julia Black also includes technologies understood as 'the understanding of and ability to employ, manipulate, or alter the physical or human environment and the products of that understanding': 14.
[135] Ibid 7.

including, among others, financial institutions,[136] non-governmental organisations (NGOs)[137] and industry associations.[138] These international, regional and industry initiatives are mostly voluntary in nature,[139] as attempts to create legal obligations for multinational enterprises have been met with fierce opposition from corporate lobbies.[140] Some States have also engaged more or less successfully in legislative initiatives to address human rights violations in business activities abroad, as will be discussed further in Chapter 7.[141]

Understanding regulation as a set of standards encompassing legal and non-legal norms might be a startling approach for a legal thesis. For most lawyers, regulation is different to the law and, typically, inferior.[142] In legal circles, regulation is often perceived as the 'part of law that is instrumentalist in orientation, and contained in the mass of technical statutes, statutory instruments and other secondary and tertiary rules that set out, often in intimidating details, standards of conduct to be followed'.[143] In fact, the interaction between law and regulation is a complex question that has generated much debate. In this thesis, I contend that both domestic and international law are forms of regulation that frame corporate conduct in order to implement broadly defined corporate human rights responsibilities. Indeed, as explained earlier, business and human rights relies on soft standards – elaborated via multi-stakeholder or non-State initiatives and corporate self-regulation – and national laws. As put by John Ruggie, 'whereas governments define the scope of legal compliance, the broader scope of [companies'] responsibility to respect is defined by social expectations'.[144] Any breach of this responsibility, is *primarily* subject to 'the courts of opinion'[145] – or in other words, monitored by non-State regulators – and *occasionally* to legal action in actual courts.[146] In the context of business and human rights, this illustrates an understanding of the law as being one type of

[136] See, eg, International Finance Corporation, *Performance Standards on Environmental and Social Sustainability* (1 January 2012) ('*IFC Performance Standards*'); The Equator Principles Association, *Equator Principles* <https://equator-principles.com/#>.
[137] See, eg, Fairtrade International, *Fairtrade Standard for Gold and Associated Precious Metals for Artisanal and Small-Scale Mining* (November 2013).
[138] See, eg, International Council on Mining and Metals, *Member Requirements* <https://www.icmm.com/en-gb/members/member-commitments/icmm-10-principles>; World Gold Council, *Responsible Gold Mining Principles* <https://www.gold.org/about-gold/gold-supply/responsible-gold/responsible-gold-mining-principles>.
[139] Some of them have a binding nature; see, eg, *Regulation (EU) 2017/821* (n 46).
[140] See, eg, *Norms on the Responsibilities of Transnational Corporations*, (n 35).
[141] See, eg, *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre French Parliament* [Law No 2017-399 of 27 March 2017 on Corporate Duty of Vigilance] (France) JO, 28 March 2017; Corporate Code of Conduct Bill 2000 (Cth).
[142] Black (n 130) 23.
[143] Ibid.
[144] Ruggie, *Protect, Respect and Remedy* (n 38) [54].
[145] Ibid.
[146] Ibid.

standard among others of potentially equal value. This understanding of the law and regulation is also valuable in discussing mining-related sexual violence. Indeed, in many contexts where mining operations take place, laws addressing sexual violence are either non-existent or insufficient to protect women. Adopting a broad definition of regulation allows me to consider various options that might be more effective in preventing sexual violence.

C *A Feminist Regulatory Framework for Business and Human Rights*

As mentioned above, the framework used in this thesis is one of the main contributions my research brings to literature on gender in mining and on business and human rights. My approach uses critical insight from feminist theories and regulatory theories to examine how international regulation responds to mining-related human rights risks for women. In other words, this approach is concerned with connecting two theoretical debates and analysing how the considerations raised by feminism and regulation may interact to address risks of sexual violence better.

The concept of 'feminist regulatory framework' used in this thesis is not new; it has been developed to study other international contexts – although literature on the subject is scarce.[147] To my knowledge, however, it has never been used in relation to business and human rights. Thinking about business and human rights in a way that juxtaposes regulatory and feminist scholarship – two theoretical approaches that have very much evolved separately, at least in relation to international law – is useful in two ways. First, it contributes to the theoretical development of business and human rights as an interdisciplinary academic field. Second, it offers a new perspective on regulation that may encourage State and non-State regulators involved in large-scale mining to think differently about the normative, organisational and operational measures needed to give international standards their full potential, to address the gender dimensions of human rights due diligence and, in the context of this thesis, to prevent mining-related sexual violence in an effective way. In other words, this approach aims at filling the gap between the human rights and social goals laid out by business and human rights international instruments, and ineffective regulatory outcomes for women and survivors of sexual violence.

[147] See in particular Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 246; Gabrielle Simm, *Sex in Peace Operations* (Cambridge University Press, 2013).

The feminist regulatory framework used in my thesis constitutes a two-way process that concurrently considers ways to reinforce regulatory theories through a feminist lens, and feminist objectives regarding mining-related sexual violence via better regulation. In fact, the use of both regulatory and feminist literatures finds justification in their relevance to addressing mining-related sexual violence from a business and human rights perspective. On the one hand, regulatory theories have strongly informed business and human rights and constitute the theoretical roots of this international debate. The UNGPs, notably, are based on a polycentric transnational governance model including traditional public governance, corporate governance and civil governance.[148] Using a framework of analysis that involves regulatory theories is thus essential to understand how the human rights impacts of business activities are regulated internationally. It also answers some of the regulatory challenges that feminist theories have only addressed to a limited extent.

On the other hand, regulatory studies have devoted no attention to sex and gender, including the gender of regulators and of those who are regulated.[149] Similarly, current regulation aimed at preventing or responding to sexual violence in large mining operations is often either non-existent or inadequate. Feminist theories thus bring an essential perspective, focused on women's human rights, to the regulation of corporate conduct. It allows an examination of the extent to which human rights due diligence responds to the experiences and needs of women in mining operations.

I do not perceive the feminist regulatory framework used in my thesis to be exhaustive or rigid in its approach to business and human rights and sexual violence in mining. In fact, although focusing on sexual violence and the mining industry, as discussed in Chapter 2, several of the findings of my thesis may be extended to other industries and other violations of women's human rights.

[148] 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(3) *European Journal of International Law* 921, 925.
[149] Simm (n 147) 49–50.

IV RESEARCH OUTLINE

Following the introductory chapter, Chapter 2 reviews existing literature to argue that there is growing evidence that sexual violence against women is an intrinsic outcome of the presence in communities of large mining projects. In this context, academic literature, reports from non-governmental and international organisations, and journalistic investigations show that multinational mining companies have been involved or allegedly involved in sexual violence. I focus on five examples – Barrick Gold in Papua New Guinea and Tanzania, Anvil Mining in the Democratic Republic of Congo, Monterrico Metals in Peru and Hudbay Minerals in Guatemala – to demonstrate different patterns of involvement in sexual violence. First, sexual violence has been used against local women by employees or by public or private forces engaged by mining companies. Mining companies have also been accused of complicity in sexual violence through their association with State armed forces. Knowledge gaps remain about the patterns and extent of mining-related sexual violence but cases and literature suggest that large-scale mining operations bring with them a systemic risk of sexual violence against women.

In Chapter 3, I build upon regulatory theories and feminist scholarship to establish the foundations of the feminist regulatory framework used throughout the thesis. It is against this framework that the potential of human rights due diligence to prevent sexual violence, as well as regulatory options to increase the effectiveness of due diligence, are examined in subsequent chapters. Chapter 3 first elaborates upon the regulatory nature of the business and human rights debate. It then analyses it using three feminist theories: the invisibility of women in the discourse of, and mechanisms established by, international regulatory initiatives on business and human rights; the public/private dichotomy that marginalises women's concerns by locating them into the private, domestic sphere; and the generalisation of women's experiences across business activities. This chapter identifies the feminist regulatory framework as a two-way process that concurrently considers ways to reinforce regulatory theories through a feminist lens, and feminist objectives regarding mining-related sexual violence via better regulation.

Chapter 4 initiates the second part of this thesis, in which I review international standards on business and human rights – and consequently human rights due diligence – as a first layer of regulation. While the thesis focuses primarily on the UNGPs, I also examine other international instruments that have reproduced or contextualised the UNGPs to the mining industry in order

to establish whether my findings can be generalised throughout the business and human rights debate. In Chapter 4, I use feminist arguments to criticise the international regulation of business conduct, highlighting how international standards on business and human rights support patterns of discrimination against women and contribute to the invisibility of women in international law. This chapter engages in a broad analysis of international instruments as generally marginalising women's experiences of business activities, which, I argue, has adversely informed the practices of States and mining companies in relation to both due diligence and sexual violence. This is because, among other things, the language used in international instruments has made sexual violence an exceptional risk of mining operations when research demonstrates it is a systematic outcome of large mining projects.

Building on the observations made in Chapter 4, Chapter 5 breaks down the notion of human rights due diligence and reviews each step of what constitutes a 'by the book' due diligence process to assess the effectiveness of its implementation in relation to sexual violence. This exercise demonstrates that it is possible for mining companies to inappropriately address or exclude sexual violence from their due diligence processes while still complying with their international responsibilities under business and human rights standards. Indeed, exceptionalising sexual violence, as identified in Chapter 4 impedes the practical identification by mining companies of sexual violence as a systemic risk of their operations. Responding to risks of sexual violence, once identified, also requires that mining companies go further than the measures prescribed by international standards and develop comprehensive, ongoing and systematic strategies to prevent current and future acts of sexual violence in their activities. I then contend that in order to monitor cases of sexual violence, mining companies need to develop varied, measurable and gender-responsive indicators to track the effectiveness of their response to sexual violence. Regarding the last step of due diligence, I establish that international and domestic regulation offers limited guidance to mining companies in relation to their reporting responsibilities, which has had negative consequences on companies' reporting practices.

Having identified that human rights due diligence as an international standard of conduct fails to prevent mining-related sexual violence effectively, Part III of this thesis moves on to answering the second part of my research question: how can overlapping systems of regulation achieve due diligence's preventative potential? My overall argument, explored in Chapters 6, 7 and 8, is that reinforcing separate but complementary systems of regulation (corporate self-regulation, State law and civil society monitoring) to align them with feminist objectives may

constitute an avenue for more gender-responsive due diligence and more effective prevention of mining-related sexual violence. In Chapter 6, I recognise that in regulatory theories, relying on companies themselves to create internal standards to manage the adverse impacts of their activities is an essential layer of regulation. The UNGPs, while recognising that self-regulation is only one of the three governance systems that influence corporate conduct, along with State- and civil society-led types of governance,[150] also conceive self-regulation as a cornerstone of human rights due diligence. Chapter 6 analyses how, despite the value of self-regulatory practices, feminist theories highlight the drawbacks of relying solely on self-regulation to implement human rights due diligence and prevent sexual violence. This is revealed through two of its most significant flaws: the predominance of corporate self-interest and the risk of cosmetic compliance. At the same time, I argue, discarding self-regulation from regulatory processes on human rights due diligence is unrealistic and unnecessary. In fact, corporate self-regulation is flexible enough to be reinforced in line with feminist objectives. I propose systematic strategies to achieve this goal, including aligning corporate due diligence practices with international human rights law standards and increasing the role of women as corporate regulators.

In Chapter 7, I turn to the State and discuss its key role in reinforcing and monitoring corporate self-regulation of human rights due diligence. However, I contend that a feminist regulatory approach to State regulation – in particular the law – requires that domestic regulatory strategies be developed and implemented in a way that does not alienate survivors of mining-related sexual violence. Chapter 7 develops how this may be achieved by designing the law in a way that supports the recognition of women's experiences in business activities. Another strategy, I explain, is encouraging State regulation to focus on a preventative approach to mining-related sexual violence, in keeping with the preventative nature of corporate human rights due diligence.

Chapter 8 addresses the last sphere in the regulatory system I propose to make human rights due diligence more effective in preventing mining-related sexual violence: civil society. I argue that in order to modify the political and economic incentive structures faced by States and mining companies, external and independent regulators are essential to ensure monitoring of and accountability for State and corporate due diligence regulatory mechanisms. Regulatory

[150] These governance systems include other stakeholders such as insurers, investors, industry associations, non-governmental organisations, international organisations and consumers, for instance. Regulatory theories recognise the significant (and sometimes more effective than State law) role of these stakeholders in influencing the conduct of corporations.

theories recognise these stakeholders as being, among others, public interest groups, employees, communities and consumers. In multiple ways, indeed, NGOs and academics have been instrumental in shedding light on cases of sexual violence in large-scale mining and in monitoring corporate response. I argue in Chapter 8 that the role of civil society is critical in opening the regulatory sphere to women, both as regulators and as influencers of regulation. In other words, for State and corporate regulatory strategies to integrate better women's concerns and to prevent effectively sexual violence in mining operations, women and women's organisations need to be involved in developing, implementing and monitoring regulatory standards.

Chapter 9 provides the concluding discussion of the thesis, and summarises the arguments and findings presented throughout the thesis. In the process, it emphasises the value of multistakeholder initiatives that include States, mining companies and civil society as opportunities for the intertwined and complementary layers of regulation discussed in my research to reinforce each other to achieve effective prevention of sexual violence in large mining projects. It also advocates for further research on the interactions between business, due diligence and women's rights. Indeed, in a context where increasing light is being shed on women's experiences of corporate activities, some of the findings of this thesis have the potential to be explored further in relation to other human rights issues and other industries.

PART I: ESTABLISHING MINING-RELATED SEXUAL VIOLENCE AND A FEMINIST REGULATORY FRAMEWORK

CHAPTER 2: SEXUAL VIOLENCE IN LARGE-SCALE MINING

I INTRODUCTION

In a context where sexual violence has been identified as a systemic risk of mining operations, this chapter explores how multinational mining companies may be involved in sexual violence through their employees, through the security forces they employ and through their association with State armed forces. This chapter reviews existing literature and maps the involvement of mining companies in sexual violence based on available information. However, further research is needed as to the extent of mining-related sexual violence and the scope of corporate involvement in this abuse of women's rights. This chapter also relies on standards established by the UNGPs to determine that mining companies have a responsibility to use human rights due diligence to prevent their involvement in human rights violations, regardless of whether their connection to the abuse is through their own employees and activities or as a result of their relationship with other entities.

A growing body of literature associates mining operations with specific impacts on and risks for women, including endangered livelihoods, displacement and health risks, among others.[1] This thesis concentrates on sexual violence against women in communities adjacent to mine sites, which has so far attracted limited attention.[2] This is despite evidence suggesting systemic risks of sexual violence in large mining projects, and mining companies themselves being accused of involvement in rape and sexual assault. To analyse the several ways in which multinational mining companies may contribute to risks of sexual violence in their extraterritorial operations, this chapter relies on five prominent examples. They involve Anvil

[1] See, eg, Katy Jenkins, 'Women, Mining and Development: An Emerging Research Agenda' (2014) 1(2) *The Extractive Industries and Society* 329; Katherine Heller and Rachel Perks, 'Extractive Industries in Fragile Settings Present Opportunities and Risks for Women' on *World Bank Blog* (10 July 2013); Kuntala Lahiri-Dutt, 'The Megaproject of Mining: A Feminist Critique' in Brunn S. (ed), *Engineering Earth* (Springer, 2011) 329–351.

[2] See, eg, Adriana Eftimie, Katherine Heller and John Strongman, *Gender Dimensions of the Extractive Industries: Mining for Equity* (The World Bank, 2009); Penelope Simons, 'Unsustainable International Law: Transnational Resource Extraction and Violence against Women' (2017) 26 *Transnational Law & Contemporary Problems* 415.

Mining in the Democratic Republic of Congo, Monterrico Metals in Peru, Hudbay Minerals in Guatemala and Barrick Gold Corporation in Tanzania and Papua New Guinea. These cases are informative enough to allow generalisations to be made about the connections between multinational mining companies and sexual violence. Local and international NGOs around the world have reported situations in which employees of multinational mining companies, their subsidiaries, their business partners, and private and public security forces patrolling mine sites, have committed or facilitated acts of sexual violence.

Yet, drawing general conclusions on the involvement of multinational mining companies in sexual violence based on five examples occurring in different contexts risks homogenising women and their experiences. In reality, the literature analysed demonstrates that women are affected differently depending on their socioeconomic position, the community structures in which they live, their ethnicity, their age and their sexuality, among many other factors. For instance, research has established that as many large mining projects take place in remote and rural areas, including on traditional indigenous territory, indigenous women often bear disproportionately the negative impacts of mining.[3] According to the former UN Special Rapporteur on the rights of indigenous peoples, James Anaya,

> extractive industries many times have different and often disproportionately adverse effects on indigenous peoples, and particularly on the health conditions of women. For example, […] indigenous women have reported […] increased incidents of sexual harassment and violence, including rape and assault.[4]

It is thus critical to recognise the intersectional nature of women's experiences of the mining industry, of their relationships with multinational mining companies and of mining-related sexual violence. However, as expressed by Penelope Simons and Melisa Handl,

> while women's experiences of violence in the global South and the global North between countries and regions and cultures are unique, there appear to be some notable similarities in the causes and the multi-faceted nature of gendered violence associated with mining and oil and gas projects across the globe.[5]

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[3] Victoria Sweet, 'Extracting More Than Resources: Human Security and Arctic Indigenous Women (Special Issue on Arctic Issues)' (2014) 37(4) *Seattle University Law Review* 1157; Sarah Morales, 'Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women From Extractive Industries' (2019) 31(1) *Canadian Journal of Women and the Law* 58.

[4] James Anaya, 'Statement to the International Expert Group Meeting on the Theme: Sexual Health and Reproductive Rights' at <https://unsr.jamesanaya.org/?p=1083>.

[5] Penelope Simons and Melisa Handl, 'Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction' (2019) 31(1) *Canadian Journal of Women and the Law* 113, 122.

This chapter undertakes a review of the literature identifying sexual violence against women as a by-product of large mining operations. In Section II, I provide an overview of the manner in which large-scale mining, whether it encompasses domestic or extraterritorial projects, brings with it systemic risks of sexual violence. This pattern is partly explained by the temporary migrations and the disruptions of local socioeconomic dynamics that often accompany the development of large mining operations. In Section III, I highlight that mining companies themselves have been involved in acts of sexual violence. Elaborating on this issue is important as it informs the way in which multinational mining companies may use human rights due diligence to limit their contribution to sexual abuse against women. After clarifying the meaning of mining companies being 'involved' in sexual violence, I distinguish patterns of involvement. These include involvement through the use of public and private security forces and via the provision of financial and logistical support to perpetrators. I conclude that while mining-related sexual violence is multifaceted, it is systematically present in large mining operations, calling for a response by mining companies to this systemic issue.

II SEXUAL VIOLENCE AS A SYSTEMIC RISK IN MINING OPERATIONS

For some time, research has established that transnational business operations have gender-specific impacts on women. Since the 1970s, international discussions on equality between men and women started shifting towards recognition that large-scale institutions, as well as international relations, international trade and global markets, are 'inherently an arena of gender formation and gender politics'.[6] Academics, civil society organisations, and public and private stakeholders have since investigated how diverse industries affect women in both positive and negative ways. The mining industry is no exception and research on the impacts of transnational mining on women is developing rapidly.[7] Kuntala Lahiri-Dutt, for example, argues that 'mining is and has been discursively, culturally and ideologically constructed as a male domain eliminating women and hiding their productive roles in mining'.[8] In this context, and while scholars and practitioners have cautioned against framing women as 'victims' of mining,[9] it is clear throughout literature that women disproportionately bear the adverse effects

[6] Robert W Connell, 'Masculinities and Globalization' (1998) 1(1) *Men and Masculinities* 3, 7.
[7] See, eg, Jenkins (n 1); Eftimie, Heller and Strongman (n 2).
[8] Lahiri-Dutt, 'The Megaproject of Mining: A Feminist Critique' (n 1).
[9] Despite its emphasis on sexual violence, this article does not suggest that women working and living in mining communities or survivors of sexual violence should only be portrayed as victims. In fact, research demonstrates that women are beneficiaries as well as critical productive agents of the mining industry. See, eg, Kuntala

of transnational mining operations.[10] These include environmental degradation, which adversely modifies women's traditional caretaking and subsistence roles as available land and unpolluted resources diminish; health risks associated with constant exposure to heavy metals and toxic substances; and community displacement that leads to declining food security.[11] Katy Jenkins also contends that increased violence against women, including sexual violence, systematically accompanies the arrival of large-scale mining activities in communities around the world.[12] Most studies on that matter have been conducted in relation to mining projects located in the global South.[13] This might be explained by the existence of weak governance structures in some countries of the global South, as well as power imbalances between multinational mining companies, governments and communities, which may exacerbate the adverse impacts of mining on affected populations. However, in large mining projects, increased sexual violence against women has been documented in several contexts irrespective of their geographical location or their (non)categorisation as a conflict-affected area. In research conducted in the Fort St James area of the Canadian province of British Columbia, for example, data from the local police demonstrated a 38 per cent increase in reported sexual assaults during the first year of the construction phase of the industrial Mount Milligan Mine.[14]

This phenomenon has been explained by the temporary influx of large numbers of predominantly single male workers that characterises large-scale mining. While modifying the traditional gender dynamics established in host communities, these sudden migrations increase rates of sex work, sexual and gender-based violence, unwanted pregnancies and the spread of sexually transmitted diseases.[15] This situation is often co-incident with mineworkers' greater access to substantial amounts of cash, translating into higher levels of alcohol consumption.[16]

Lahiri-Dutt, 'Digging Women: Towards a New Agenda for Feminist Critiques of Mining' (2012) 19(2) *Gender, Place & Culture* 193. See also *Conflict Minerals, Gender and (In)Security in the Great Lakes Region: the Limitations of the Sexual Violence Paradigm* (Directed by Institute of African Studies Carleton University, 2015); Kuntala Lahiri-Dutt, 'Do Women Have a Right to Mine?' (2019) 31 *Canadian Journal of Women and the Law* 1.

[10] See, eg, Lahiri-Dutt, 'The Megaproject of Mining: A Feminist Critique' (n 1); Jenkins (n 1); Heller and Perks (n 1).

[11] Jenkins (n 1) 333.

[12] Ibid 334.

[13] Sweet (n 3) 1167.

[14] Janis Shandro et al, *Ten Steps Ahead: Community Health and Safety in the Nak'al Bun/Stuart Lake Region During the Construction Phase of the Mount Milligan Mine* (University of Victoria, 2014) 30.

[15] Simons and Handl (n 5); Eftimie, Heller and Strongman (n 2) 14–15; Isabel Cane, Amgalan Terbish and Onon Bymbasuren, *Mapping Gender Based Violence and Mining Infrastructure in Mongolian Mining Communities* (International Mining for Development Centre, 2014); Rachel Perks, 'Towards a Post-Conflict Transition: Women and Artisanal Mining in the Democratic Republic of Congo' in Kuntala Lahiri-Dutt (ed), *Gendering the Field: Towards Sustainable Livelihoods for Mining Communities* (ANU E Press, 2011) 177, 190.

[16] Jenkins (n 1); Sweet (n 3); Ginger Gibson MacDonald et al, *Indigenous Communities and Industrial Camps: Promoting Healthy Communities in Settings of Industrial Change* (The Firelight Group, 2017).

The Inter-American Commission on Human Rights (IACHR), for instance, reported that 'large-scale mining activities leave deep impacts on the lives and on occasions, in the bodies of women'.[17] These impacts include 'increased alcoholism in the communities by [extractive workers]' and the subsequent 'rape of girls and women in communities affected by mining and oil activities by [these] workers'.[18] Other scholars link increased levels of sexual violence to 'heavily male cultures in many mines'[19] and the 'overtly masculine character'[20] that defines the mining industry, condones a 'sexually-based division of labour'[21] and exacerbates risks of violence against women. The multifaceted dynamics between large-scale mining and sexual violence are further complicated in contexts of conflict fuelled, in certain circumstances, by the presence of mining activities,[22] or in post-conflict situations. Such contexts are known to perpetuate a culture of violence against women[23] and increase risks of sexual violence.

III CORPORATE INVOLVEMENT IN SEXUAL VIOLENCE

Although most of the literature that addresses the relationship between sexual violence and large-scale mining tends to focus on the construction of masculinity and on male mineworkers committing individual acts of sexual violence,[24] mining companies themselves have recently been accused of involvement in acts of sexual violence through their employees or the security forces they employ, who may have caused or contributed to acts of sexual violence, and through their associations with State armed forces.[25] The Inter-American Commission on Human Rights states that 'in the context of the implementation of extractive or development projects or plans', it 'has been informed of acts of physical violence, including sexual violence against indigenous women'. It adds that 'the actions reported are performed by or at the request of persons linked to extractive companies, who usually have strong economic power and are able to exert strong local pressure'.[26] Five well-documented examples involve the multinational

[17] Inter-American Commission on Human Rights ('IACHR'), *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, Inter-American Commission on Human Rights (IACHR, 2015) [319].
[18] Ibid [320].
[19] Eftimie, Heller and Strongman (n 2) 13.
[20] Samantha Hargreaves and Patricia Hamilton, *Extractivism's Impacts on Women's Bodies, Sexuality and Autonomy* (The WoMin Collection of Papers on Women, Gender and Extractivism, nd) 2.
[21] Lahiri-Dutt, 'The Megaproject of Mining: A Feminist Critique' (n 1) 332.
[22] See, eg, Philippe Le Billon, *Wars of Plunder: Conflicts, Profits and the Politics of Resources* (Hurst & Company, 2012). See also Michael L Ross, 'How do Natural Resources Influence Civil War? Evidence from Thirteen Cases' (2004) 58(1) *International Organization* 35.
[23] Jenkins (n 1) 334.
[24] Ibid.
[25] Details on the notion of 'involvement' are provided below.
[26] IACHR (n 17) [19]-[20].

mining companies Anvil Mining, Monterrico Metals, Hudbay Minerals, Barrick Gold Corporation (in two cases), and their subsidiaries, in their global South operations.[27] In these cases, the companies were accused of causing and facilitating sexual violence in communities of operation, or of being associated with perpetrators. These and other similar examples have led scholars to identify 'a pattern of human rights problems that is intrinsic to most oil and mining corporations' (the author also refers to sexual violence).[28]

While these reports and examples reveal diverse patterns of corporate involvement in sexual violence, detailed below, they do not offer exhaustive data on the contribution of multinational mining companies to increased risks of sexual violence communities adjacent to mine sites. Indeed, researchers have documented that many women do not report sexual assault committed by employees of mining companies because of shame and for fear of retribution, stigma, rejection or physical assault.[29] As a result, few of the accusations made by women have been officially investigated by public authorities.[30] Those that have been investigated have often been settled in the secrecy of out-of-court agreements, revealing little information on the role played by the companies themselves. Survivors also often lack financial and material resources[31] or trust in the justice system to bring allegations of sexual violence to light, thus limiting the amount of data available for research.

Yet, in a research field that still lacks critical information about the extent of corporate involvement in sexual violence, the five examples detailed in this chapter shed some light on the risks faced by women in the context of large-scale mining operations. These cases have been investigated, documented and sometimes litigated before domestic courts. They constitute

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[27] There are other examples available but they have been much less documented or rely on isolated allegations that have not been investigated. See, eg, Chris Ballard, *Human Rights and the Mining Sector in Indonesia: A Baseline Study* (Mining, Minerals and Sustainable Development, 2001); Down to Earth, *Illegal Military Payments by Freeport/Rio Tinto* <https://www.downtoearth-indonesia.org/story/illegal-military-payments-freeportrio-tinto>; Down to Earth, *Rio Tinto: Practise What You Preach!* <https://www.downtoearth-indonesia.org/story/rio-tinto-practise-what-you-preach>.

[28] Caroline Kaeb, 'Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks' (2008) 6(2) *Northwestern Journal of Human Rights* 328, 329.

[29] Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned* (Columbia and Harvard Universities, 2015) 22–23.

[30] UN Department of Economic and Social Affairs, *The World's Women 2015: Trends and Statistics* (United Nations, 2015). In all contexts, rape is one of the less reported crimes. According to the Department, '[i]n the majority of countries, less than 40 per cent of the women who experienced violence sought help of any sort. [...] In almost all countries with available data, the percentage of women who sought help from the police, out of all women seeking help for experience of violence, was less than 10 per cent': 159.

[31] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011), Principle 26 (Commentary) ('*UNGPs*').

critical starting points to clarify the several ways in which multinational mining companies might contribute to increased rates of sexual violence against women in communities of operation.

A *The 'Involvement' of Mining Companies in Sexual Violence*

The literature has made connections between large mining projects and systemic acts of sexual violence in communities of operations. Academics, international organisations and civil society are increasingly looking at the role multinational mining companies play in perpetuating sexual violence, including how they might be involved in the acts themselves. Nonetheless, most of this literature is unclear about what it legally means for a multinational company – a legal person – to be 'involved' in sexual violence. Researchers usually use notions of 'links'[32] between mining companies and acts of sexual violence, or 'direct' or 'indirect' impacts[33] of large-scale mining on women. While this language is appropriate to discuss sexual violence in relations to workers' migrations, for example, and identifiable individuals committing acts of sexual violence, it is less convincing in addressing the responsibility of multinational mining companies for limiting their contribution to and preventing sexual violence in their operations. Indeed, in order for multinational mining companies to account for the responsibilities set upon them by business and human rights instruments, it is essential to evaluate the extent of these responsibilities. Depending on their level of 'involvement' in sexual violence, the expectations put on mining companies may vary, which raises questions of what conduct of a mining company would or would not qualify as involvement. Being involved in sexual violence may require, for example, that the company somewhat contributes to the harm, or it may envisage a simple association with the perpetrator of the violence.[34]

Business and human rights instruments and the human rights due diligence expectations they establish for companies will be discussed at length later in this thesis. At this stage, however, it is necessary to mention guiding principle 11 of the UNGPs, which lays down, in the most authoritative manner, the corporate responsibility to respect human rights. This responsibility urges companies to 'avoid infringing on the human rights of others and […] address adverse

[32] See, eg, IAHRC (n 17) [119]–[120].
[33] See, eg, Jenkins (n 1).
[34] Radu Mares, '"Respect" Human Rights: Concept and Convergence' in Robert C Bird, Daniel R Cahoy and Jamie Darin Prenkert (eds), *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar Publishing, 2014) 3–47, 11.

human rights impacts with which they are involved'.[35] Guiding principle 11 elaborates little on the scope of corporate responsibilities and uses the broad – and inherently ambiguous[36] – notion of 'involvement'. Guiding principle 13 elucidates the responsibility of multinational corporations,[37] which usually comprise various legal entities established in several countries (parent, subsidiaries, affiliated companies and other related business actors).[38] It does so by differentiating three levels of involvement in human rights violations – causation, contribution and linkage.

> The responsibility to respect human rights requires that business enterprises:
>
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
>
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[39]

Under guiding principle 13, a company may *cause* an adverse human rights impact 'when its activities (including omissions) materially increase the risk of the specific impact which occurred *and* would be sufficient, in and of themselves, to result in that impact'.[40] It may *contribute* to adverse human rights impacts 'when its activities (including omissions) materially increase the risk of the specific impact which occurred *even if* they would not be sufficient, in and of themselves, to result in that impact'.[41] Finally, it may be directly linked to an adverse human rights impact 'when it has established a relationship for mutual commercial benefit with a state or non-state entity, and, in performing activities within the scope of that relationship, the state or non-state entity materially increases the risk of the impact which occurred'.[42] Thus, multinational mining companies may be involved in sexual violence either through their own activities (including through a corporate group) – understood as both actions and omission – or as a result of their relationship with other entities.[43] In other words, mining companies are responsible for sexual violence committed by their employees (causation). They

[35] *UNGPs* (n 31) Principle 11.
[36] Mares (n 34) 11.
[37] Guiding principle 13 applies to all enterprises but I focus here on multinational ones.
[38] Simons and Handl (n 5) 141.
[39] *UNGPs* (n 31) Principle 13.
[40] Debevoise Business Integrity Group and Enodo Rights, *Practical Definitions of Cause, Contribute, and Directly Linked to Inform Business Respect for Human Rights* (Debevoise and Enodo Rights, 2017) 8, emphasis in original.
[41] Ibid, emphasis in original.
[42] Ibid 14.
[43] *UNGPs*, (n 31, Principle 13 (Commentary)

are also responsible for violations occurring in third-party operations 'even if [they] did *not contribute in any way* to the human rights violation (linkages scenario), or if [their] conduct reflects only a *partial and/or remote causality* to the harm (contribution scenario)'.[44] In an extraterritorial context, a parent company cannot hide behind the fact that sexual violence happened remotely in an affiliate's operations or that the company did not cause the violation through its own culpable decisions or practices.[45] Instead, the UNGPs establish that companies should conduct human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights. Such due diligence should cover both the impacts that businesses may cause or contribute to through its own activities and those that may be directly linked to a company's operations, products or services through its business relationships.[46]

The UNGPs approach the involvement of companies in human rights harms very broadly. This understanding of corporate involvement has been criticised for failing to address important aspects of corporate law, including limitations to the fiduciary duty of directors (which is owed, in certain States, only to the corporation and the shareholders) and the doctrines of separate legal personality and limited liability. These are not only enforced in various domestic jurisdictions but also 'facilitate the development of complex corporate structures that enable […] business enterprises to operate in a variety of jurisdictions and, through these structures, to avoid regulation and to minimize the corporate group's potential liability for any harms that may be caused to women'.[47] Mary Dowell-Jones and David Kinley have also highlighted the inevitable complexity in operationalising the corporate responsibility to respect because the relationships between human rights risks and markets[48] is still neither well documented nor well understood.[49]

These critiques illustrate the many debates that remain open in relation to the practical implementation of companies' responsibility to respect human rights. These debates include questions on the legal liability, under domestic and international law, of corporations, and

[44] Radu Mares, 'Decentering Human Rights from the International Order of States: The Alignment and Interaction of Transnational Policy Channels' (2016) 23(1) *Indiana Journal of Global Legal Studies* 171, 176–77; emphasis in original.
[45] Ibid.
[46] *UNGPs* (n 31) Principle 17.
[47] Simons and Handl (n 5) 143.
[48] Their research focuses on financial markets.
[49] Mary Dowell-Jones and David Kinley, 'The Monster Under the Bed: Financial Services and the Ruggie Framework' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, 2012) 196, 210.

concerns about the true compatibility of the UNGPs' expectations with considerations of business organisation and public policy.[50] Because this thesis focuses on due diligence as a way to prevent sexual violence – rather than on judicial and non-judicial responses and remedies for corporate failure to address human rights risks – these questions are not discussed here. Yet, for the purpose of corporate human rights due diligence, which is at the heart of operationalising corporate responsibility[51] and focuses on the *prevention* of human rights violations, the framework laid out in the UNGPs encourages mining companies to act upon their responsibility to prevent sexual violence across their corporate group and supply chain at large. It also assigns 'collective corporate responsibility for systemic dynamics and the role that their activities may play in systemic dynamics'[52] to every corporate participant in a mining project. The failure of mining companies to prevent sexual violence in their operations, and their role in perpetuating systemic manifestations of violence against women, directly or indirectly, is thus highly likely to constitute an 'involvement' of the company under the UNGPs. Research demonstrates that multinational mining companies have been involved in sexual violence in several ways encompassing causation or contribution to the violation, or linkage with the perpetrator of the harm (or, simultaneously, several types of involvement).

B *Employees and Security Forces as Perpetrators*

In most cases, multinational mining companies have been involved in acts of sexual violence through the actions of their employees and, most significantly, their security personnel. Mining companies in particular, those operating in conflict and high-risk areas – commonly hire or contract security forces, which can range from unarmed watchmen for theft prevention, to large contingents of private guards to protect assets, employees and facilities, to consulting firms for advisory services, to deployment of public security forces.[53] Mining companies can resort to public instead of private security, or to both public and private security for various reasons,

[50] See, eg, Mares, '"Respect" Human Rights: Concept and Convergence' (n 34).
[51] More so than the concept of legal liability of corporations, that involves concepts of legal personality and corporate entities' relationships, for instance. John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company, 2013). Addressing the ambiguities of the UNGPs, John Ruggie stated that his intention was not to establish a scheme for the attribution of corporate legal liability: 'I did not set out to establish a global enterprise legal liability model. That would have been a purely theoretical exercise' (189).
[52] Dowell-Jones and Kinley (n 49) 210.
[53] International Finance Corporation ('IFC'), *Use of Security Forces: Assessing and Managing Risks and Impacts. Guidance for the Private Sector in Emerging Markets* (Good Practice Handbook, February 2017) xi; Joanna Bourke-Martignoni and Elizabeth Umlas, *Gender-Responsive Due Diligence for Business Actors: Human Rights-Based Approaches* (Geneva Academy, 2018) 54.

discussion of which is outside the scope of this thesis.[54] It is important to note, however, that mining companies do not have the same amount of leverage over public security forces that they do over private ones, the latter potentially being their own employees or contractors.[55] Yet, while in relation to private security '[a] company's leverage and oversight over the behaviour and quality of its employees or service provider is expected to be high',[56] 'the company may [also] be associated with [the] actions [of public security forces] in the eyes of local communities and other stakeholders'.[57] Association with public security forces may very well be recognised under the UNGPs as corporate involvement in human rights violations through contribution or linkage, depending on circumstances and the type of contractual relationship established.

Interactions with security forces can seriously affect the security and the human rights of individuals and communities living and working around mine sites, although these interactions have differentiated impacts on women and on men. According to Nick Killick, '[w]omen's perceptions and experience of security will differ from those of men. Women are at much greater risk of sexual violence, men at higher risk of arrest, extrajudicial killing or physical intimidation by security forces.'[58] Similarly, the International Finance Corporation asserts that '[i]n some cases, women may be subjected to gender-related harassment or intimidation or may be the victims of sexual violence'.[59] In relation to the mining sector, multinational companies have been accused of involvement in sexual violence perpetrated by their security providers against women in communities of operation. In fact, in this context sexual violence has been used extensively by public and private forces as an 'intimidation technique'[60] to evict communities from prospective mining land, to prevent entry onto mine sites, or to discourage artisanal mining.

Prominent examples include that of the Canadian multinational mining companies Barrick Gold and Hudbay Minerals. The practices of Barrick Gold's private security forces[61] and of

[54] It should be noted that mining corporations do not always have a choice in whether to use public or hybrid rather than private security forces. In some contexts, in particular where host State-owned enterprises are joint venture partners, the joint venture agreement may include the use of public or hybrid security forces. This comment was made by the anonymous examiner of this thesis.
[55] Bourke-Martignoni and Umlas (n 53).
[56] IFC (n 53) 44.
[57] Ibid 60; Bourke-Martignoni and Umlas (n 53) 54.
[58] Nick Killick, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries* (Institute for Human Rights and Business, 2011) 60.
[59] IFC (n 53) 27.
[60] Simons and Handl (n 5) 127.
[61] Chris Albin-Lackey, *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine* (Human Rights Watch, 2011); Earth Rights International, *Barrick* <https://earthrights.org/case/barrick/>.

the Papua New Guinean police, with which Barrick Gold has an agreement,[62] at the Porgera mine in Papua New Guinea[63] has long been criticised. NGOs, scholars and survivors have accused them of detaining, beating and carrying out extrajudicial killings of mainly peaceful illegal miners and other trespassers who enter the mine property to obtain ore in the mine's dumps.[64] Survivors of assaults also reported that, while on duty, police mobile squads and mine security personnel have committed rapes, gang rapes and other acts of sexual violence against women in and around the mine site.[65] Human Rights Watch interviewed women between 2008 and 2010, who described how mine security guards, while patrolling on or near the waste dumps surrounding the mine, threatened them with sexual assault, punched, kicked, beat and gang-raped them.[66] In total, it is believed that more than 200 women and girls have been raped since the start of the PJV's operation.[67] Similar allegations have been made in relation to Barrick Gold's North Mara gold mine, in Tanzania.[68] African Barrick Gold's security forces

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Barrick Gold employed a private security force run by the company's Asset Protection Department. This security force comprised personnel it inherited from the company Placer Dome, from which it acquired the PJV – local police officers who had taken extended leave from their position to accept better-paid work with the PJV and other staff with police or military background.

[62] Barrick Gold, *2017 Human Rights Report* (Annual Report, 2018). Barrick Gold had a Memorandum of Understanding with the government of Papua New Guinea to provide police reservists from its own security personnel in order to increase the local police force. The organisation Earthrights International has reported that 'in practice, these reservists patrol the mine at Barrick's direction, and reportedly exercise the same power, and use the same weaponry as local police officers'. The organisation has also collected evidence that 'Barrick […] provides financial and other support, such as housing on mine property and transportation, to the Mobile Police squads, a branch of the national police force, to protect its facilities': Earth Rights International (n 61).

[63] Porgera: Joint Venture, *Our Story* <http://www.porgerajv.com/Company/Our-Story>. The mining project has been owned by the Porgera Joint Venture (PJV) since 1989. In 2006, Barrick Gold acquired 75 per cent of the PJV, and purchased an additional 20 per cent in 2007. Until 2015, Barrick Gold was the sole operator of the PJV and had 95 per cent interest in the venture through its wholly owned subsidiary Barrick (Niugini) Ltd (BNL), while the company Mineral Resources Enga Ltd had 5% interest. Zijin Mining Group Company Ltd acquired 47.5 per cent of the PJV and 50 per cent of BNL in 2015.

[64] Albin-Lackey (n 61) 39–40; Columbia Law School Human Rights Clinic and Harvard Law School (n 29) 20–21; International Human Rights Clinic and Center for Human Rights and Global Justice, 'Legal Brief before the Standing Committee on Foreign Affairs and International Development (FAAE), House of Commons, regarding Bill C-300' (Legal Brief, 16 November 2009) 11–12.

[65] Albin-Lackey (n 61) 46–47.

[66] Ibid.

[67] Rick Feneley, '200 Girls and Women Raped: Now 11 of Them Win Better Compensation from the World's Biggest Gold Miner', *The Sydney Morning Herald* (Sydney) <https://www.smh.com.au/world/200-girls-and-women-raped-now-11-of-them-win-better-compensation-from-the-worlds-biggest-gold-miner-20150325-1m7ibq.html>.

[68] Acacia Mining, *Annual Report and Accounts 2017* (Acacia Mining, 2018) 7, 69; Barrick Gold Corporation, 'Recommended Share Offer for Acacia Mining PLC' (17 September 2009) <https://barrick.q4cdn.com/788666289/files/doc_news/2019/09/17/BG-Announcement-of-Scheme-effective-date-19-September-2019.pdf>. In February 2010, Barrick Gold created a separate company as one of its units to hold its assets in Tanzania, African Barrick Gold plc (ABG), incorporated in the United Kingdom. In 2014, ABG changed its name to Acacia Mining Plc. Until 2018, Barrick Gold was the group majority shareholder, holding 63.9 per cent of Acacia's issued shares, and the controlling shareholder of Acacia. In 2019, Barrick Gold acquired all outstanding shares of Acacia, delisted the it from the London and Dar es Salaam Stock Exchanges and took it back under its control (it is now named Barrick Tz Limited). Barrick Gold acquired the North Mara Gold Mine in 2006. Between 2010 and 2019, it was operated by ABG (and then by Acacia).

and Tanzanian police forces contracted by the company have been accused of beating and shooting at local villagers, sometimes killing them,[69] in an effort to prevent them from entering the mine site to collect low-grade rocks.[70] The NGOs Rights and Accountability in Development (RAID) and Mining Watch Canada interviewed twenty-one women, some of whom claimed to have been raped or beaten by police or mine employees.[71] The fact that acts of sexual violence occurred in relation to the Porgera and the North Mara mines is no longer in dispute. In both cases, Barrick Gold launched independent investigations that led to the development and implementation of company-created mechanisms to compensate the women who had been sexually assaulted.[72] The remedy frameworks have been strongly criticised by civil society organisations for being inadequate and for forcing women to waive their legal right to sue the company.[73] Another mining company, Hudbay Minerals, is presently defending a lawsuit filed in 2011 in Canadian courts[74] by eleven Mayan Q'eqchi women over the negligence of its corporate predecessor, Skye Resources, in directing, monitoring and supervising its security personnel.[75] The plaintiffs argue that during forced evictions organised

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[69] *Silent No More: Women Speak out about Mining Violence. Canadian Mining in Tanzania* (Directed by MiningWatch Canada, 2018) 1:41–1:55; Geoffrey York, 'Police Killed 65, Injured 270 at Barrick Mine in Tanzania, Inquiry Hears', *The Globe and Mail* (Toronto) <https://www.theglobeandmail.com/report-on-business/international-business/african-and-mideast-business/police-killed-65-injured-270-at-tanzanian-mine-inquiry-hears/article32013998/>. In July 2016, a commission established by the Tanzanian Minister of Mines reported having received complaints of 65 people who had been killed and 270 injured by Tanzanian police at the North Mara gold mine.

[70] MiningWatch Canada (n 69) 0:37–1:13.

[71] Rights and Accountability in Development, *Acacia Mining (African Barrick Gold) and North Mara* <http://www.raid-uk.org/content/acacia-mining-african-barrick-gold-and-north-mara>.

[72] MiningWatch Canada, 'African Barrick's Confidential Compensation Agreements Questioned at Troubled Tanzania Mine' (2013) <https://miningwatch.ca/news/2013/12/17/african-barrick-s-confidential-compensation-agreements-questioned-troubled-tanzania>; York (n 69).

[73] Rights and Accountability in Development (n 71); Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic (n 29) 1.

[74] *Caal v Hudbay Minerals Inc (Statement of Claim)* [2011] ONSC; Klippensteins Barristers & Solicitors, *Choc v. HudBay Minerals Inc. & Caal v. HudBay Minerals Inc.* <http://www.chocversushudbay.com/>. This lawsuit was filed along with two other lawsuits against Hudbay Minerals and its two subsidiaries, HMI Nickel Inc. and CGN. These lawsuits, *Choc v. Hudbay Minerals Inc* and *Chub v. Hudbay Minerals Inc*, filed respectively in September 2010 and December 2011, involve claims of Fenix security guards beating, shooting and killing a Q'eqchi community leader, Adolfo Ich Chamán, during a protest against the mine in 2009, and of the chief of security for the Fenix project shooting German Chub.

[75] *Caal v Hudbay Minerals Inc (Amended Statement of Claim)* [2012] ONSC [18]-[21]; Hudbay Minerals, 'Hudbay Minerals and Skye Resources Announce Proposed Business Combination' (2008) <https://hudbayminerals.com/investors/press-releases/press-release-details/2008/Hudbay-Minerals-and-Skye-Resources-Announce-Proposed-Business-Combination/default.aspx>; Hudbay Minerals, 'HudBay Minerals Completes Business Combination With Skye Resources; Announces New Director and Chief Financial Officer' (2008) <https://hudbayminerals.com/investors/press-releases/press-release-details/2008/Hudbay-Minerals-Completes-Business-Combination-With-Skye-Resources-Announces-New-Director-and-Chief-Financial-Officer/default.aspx>. The rights in the Fenix project were acquired by the Canadian company Skye Resources Inc., which operated and controlled the mining project through its wholly controlled Guatemalan subsidiary, Compañía Guatemalteca de Níquel (CGN) until 2008. Skye Resources owned 98.2 per cent of the shares of CGN, with the remaining 1.8 per cent owned by the government of Guatemala. In August 2008, Hudbay Minerals Inc. acquired all of Sky Resources' shares, converting Skye Resources into its wholly owned and

to implement the Fenix mining project in El Estor, Guatemala, the Fenix security personnel, along with the police and the military, trapped them in their homes, physically assaulted and gang-raped them.[76]

In addition to providing examples of the way multinational mining companies may cause or contribute to sexual violence through the public or private security forces they employ or contract, these cases illustrate the important risks women face in relation to large mining projects. From a human rights due diligence perspective, these risks, at the intersection of business, conflict – sometimes – gender and security raise several questions for multinational mining companies seeking to prevent sexual violence in their operations and their role in these acts of sexual violence. [77] These questions revolve around the choice and implementation of their security arrangement, the use of their leverage to compel or encourage private or public security personnel to behave consistently with their human rights responsibilities, or ways to address misconduct, for example. They also require companies to adopt gender-specific considerations in their due diligence processes to address the contextual and intersectional forms of sexual violence in their operations.[78]

C *The Provision of Financial and Logistical Support*

Mining companies have also been accused of complicity in sexual violence through their association with State armed forces. There is less evidence of this type of involvement than there is in relation to sexual violence committed by public and private security forces. Yet, survivors, academics, civil society and the United Nations have alleged that in some instances, multinational mining companies have provided logistical, financial and material support to State police or military forces that have carried out acts of sexual violence during military or law enforcement operations.

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controlled subsidiary. As part of the acquisition, Hudbay amalgamated Skye with another company (0828275 B.C. Ltd) to form the corporation HMI Nickel Inc.

[76] *Caal v Hudbay Minerals Inc (Amended Statement of Claim)* [2012] ONSC [64]–[75]. See also Business and Human Rights Resource Centre, *Hudbay Minerals lawsuits (re Guatemala)* <https://www.business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0>; Hudbay Minerals Inc, *Guatemala Lawsuits: Factors to consider* <https://www.hudbayminerals.com/English/Responsibility/The-Facts-CGN-and-Hudbay-in-Guatemala/Guatemala-Lawsuits-Factors-to-Consider/>.

[77] Bourke-Martignoni and Umlas (n 53) 57.

[78] For example, it has been documented that indigenous women tend to be more targeted by perpetrators of sexual violence than non-indigenous women. Nora Götzmann, Linnea Kristiansson and Julia Hillenbrand, *Towards Gender Responsive Implementation of Extractive Industries Projects* (Danish Institute for Human Rights, 2019) 33; MacDonald et al (n 16) 22.

The most emblematic, and most researched, example is that of the Australian-Canadian mining company Anvil Mining in the small town of Kilwa, in the Democratic Republic of Congo. In October 2004, the Congolese army launched an attack in Kilwa, then the primary export point for the Dikulushi copper and silver mine operated by Anvil Mining's Congolese subsidiary, Anvil Mining Congo SARL.[79] During the operation, the army bombarded the town, destroying several houses, and engaged in summary executions, arbitrary detentions, looting of homes and shops, and torture.[80] Civil society organisations and survivors also alleged that several women were sexually assaulted and raped. The NGO ASADHO/Katanga[81] documented the rape of three women by Congolese soldiers and reported that other women refused to give statements for fear of being rejected by their husbands.[82] Anvil Mining was subsequently exposed for providing crucial[83] financial and logistical assistance for the operation, including vehicles, drivers and airplanes to transport the Congolese troops to and from Kilwa, as well as food rations and payment to the soldiers after the operation.[84] This contribution resulted in the company facing an Australian Federal Police investigation as well as legal action in Canada[85] and the Democratic Republic of Congo.[86] Both cases failed at the procedural phase. In 2017, however, the African Commission on Human and People's Rights urged the Congolese government to launch a new criminal investigation and to 'take all diligent measures to prosecute and punish State's agents and Anvil Mining Company staff who were involved in the violations'.[87] To this date, the Congolese government has not responded to the decision.[88]

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[79] Anvil Mining, *Annual Information Form for the Financial Year Ended December 31, 2007* (Anvil Mining, 28 March 2008) 4–5.

[80] MONUC, *Report on the Conclusions of the Special Investigation into Allegations of Summary Executions and Other Violations of Human Rights Committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004* (MONUC, 2005) [17]. In 2004, the then United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) was asked to investigate the human rights violations in Kilwa and the role of Anvil Mining in the events. As of 1 July 2010, MONUC was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). See also Keren Adams, *Nowhere to Turn: Addressing Australian Corporate Abuses Overseas* (Human Rights Law Centre, 2018) 17.

[81] Association africaine de défense des droits de l'homme / Katanga.

[82] Adam McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11 *Yale Human Rights and Development Law Journal* 127, 133.

[83] Adams (n 80) 18; MONUC (n 80) [37]. According to the Congolese commander of the 6th military region in Lubumbashi, the logistical assistance provided by Anvil Mining to the armed forces was critical to the success of the operation.

[84] MONUC (n 80) [36]. This was confirmed by Anvil Mining's then Managing Director, Bill Turner, during an interview with the Australian television channel ABC.

[85] *Association canadienne contre l'impunité (ACCI) v Anvil Mining Ltd* [2011] 2011 QCCS 1966; *Anvil Mining Ltd v Association canadienne contre l'impunité* [2012] 2012 QCCA 117.

[86] *Anvil Mining et al.* [2007] Military Court of Katanga.

[87] *Institute for Human Rights and Development v Democratic Republic of Congo,* African Commission on Human and People's Rights, Communication 393/10, 2003, [154.i].

[88] Adams (n 80) 18.

Similar allegations have been made against the English company Monterrico Metals in relation to protests at its Peruvian Rio Blanco mine site,[89]during which the Peruvian police tried to disperse the crowd with tear gas[90] and detained at least twenty-eight people, including two women, for over seventy-two hours in the premises of the mine site.[91] Detainees claimed that during their captivity they were beaten, abused, shot, threatened – including with rape and death – and forced to eat rotten food. The two women also reported having been sexually assaulted.[92] Monterrico Metals and its subsidiary were sued in England for, among other things, providing 'logistical support to officers of the Peruvian police during their operation'.[93] The matter was settled out of court in July 2011 by compensation payments, without Monterrico Metals or Rio Blanco Copper admitting liability.[94]

While demonstrating that a mere association with police and military forces may, under the UNGPs, engage mining companies' responsibility for their indirect involvement in sexual violence, these examples also highlight that in many contexts where minerals extraction takes place, conflict and civil unrest arising around mine sites is commonly associated with public security operations, which may themselves be associated with sexual violence against women.[95] Given the lack of leverage mining companies may have on State police and military, and their possible involvement in sexual violence through the relationships they establish with State forces, these examples also suggest that a preventative approach, through human rights due diligence, is relevant. A preventative approach may involve, for example, pre-emptive assessments of the risks posed by public security forces, and proactive and continuous

[89] Katy Jenkins and Glevys Rondón, '"Eventually the Mine will Come": Women Anti-Mining Activists' Everyday Resilience in Opposing Resource Extraction in the Andes' (2015) 23(3) *Gender & Development* 415, 417; *Guerrero v Monterrico Metals Plc* [2009] EWHC 2475 (QB), [4]. In 2003, Monterrico Metals Plc acquired the Rio Blanco copper mine, located in the Huancabamba and Ayabaca provinces of Peru, which it operated through its wholly-owned Peruvian subsidiary, Minera Majaz. Zijing Mining Group Co. Ltd. acquired a majority shareholding in Monterrico Metals PLC on 27 April 2007.

[90] International State Crime Initiative, *Torture at the Río Blanco Mine – A State-Corporate Crime?* <http://www.statecrime.org/testimonyproject/peru>.

[91] Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (ICAR-CORE-ECCJ, 2013) 89.

[92] Leigh Day, 'Peruvian Torture Claimants Compensated by UK Mining Company' <https://www.leighday.co.uk/News/2011/July-2011/Peruvian-torture-claimants-compensated-by-UK-minin>.

[93] *Guerrero v Monterrico Metals Plc* [2009] EWHC 2475 (QB), [10].

[94] Leigh Day (n 92); Business and Human Rights Resource Centre, *Monterrico Metals Lawsuit (re Peru)* <https://www.business-humanrights.org/en/monterrico-metals-lawsuit-re-peru-0>. In June 2008, Peru's National Coordinator for Human Rights (CNDDHH) and the Fundación Ecuménica para el Desarrollo y la Paz (FEDEPAZ) filed a criminal complaint in Peru against police officers, and against Rio Blanco Copper's security personnel for their alleged involvement in the abuses. The court acquitted Rio Blanco Copper's personnel but an appeal decision is pending.

[95] See, eg, Documentation Working Group on Violence and Human Rights Violations against Papuan Women, *Enough is Enough! Testimonies of Papuan Women Victims of Violence and Human Rights Violations 1963–2009* (Report, 2010) 31–32.

communication and engagement with public forces. The details of a preventative approach to risks of sexual violence through human rights due diligence will be discussed further.

IV CONCLUSION

The examples discussed above provide an overview of several ways in which multinational mining companies have allegedly been – and may continue to be – involved in sexual violence in communities of operations. These include involvement through direct causation or contribution, in cases where a company's security employees or contractors engage in acts of sexual violence, or via association with public forces perpetrating sexual violence during military or public unrest situations. These examples also illustrate that the involvement of multinational mining companies in sexual violence is a complex phenomenon, variable in its nature and in the stakeholders connected to it.

In fact, despite increasing numbers of academic articles, as well as civil society and United Nations reports, more research is needed on mining-related sexual violence. Quantitative data about the extent of sexual violence in mining operations, for instance, are lacking. Doris Buss illustrates this point by referring to a study conducted in relation to artisanal and small-scale mining by the International Peace Information Service.[96] The Service's report on the social dynamics of mining in the Ituri province of the Democratic Republic of Congo found cases of 'sexual abuse of women' at seven mine sites, one instance of which was 'by undisciplined military elements'. It noted, however, that the actual prevalence of 'sexual abuse' is likely higher, calling for more 'in-depth research […] to unravel [its] full scope'.[97] This example is very context-specific and limited in scope. Yet, in addition to well-documented research on the low levels of reports of sexual violence in many communities, it provides a glimpse of the difficulty of collecting exact data on the numbers of mining-related cases of sexual violence. Knowledge gaps also remain in relation to the patterns of mining-related sexual violence and the various ways in which mining companies and their employees may contribute, directly or indirectly, to increased rates of sexual violence in local communities.

While existing literature does not yet reflect all the nuances of associating sexual violence with large-scale mining, it does suggest that sexual violence in mining operations is not a rare occurrence. On the contrary, research consistently demonstrates that large-scale mining

[96] Doris Buss, 'Conflict Minerals and Sexual Violence in Central Africa: Troubling Research' (2018) 25(4) *Social Politics: International Studies in Gender, State & Society* 545.
[97] Ibid 560.

operations bring with them a systemic risk of sexual violence, whether or not mining companies themselves are involved. The UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (hereinafter the UN Working Group on Business and Human Rights), in a report examining the gender dimensions of the UNGPs, recognised that 'sexual violence by security guards in the extractive industry is an endemic problem'.[98] In that context, sexual violence appears multifaceted but systematically present, justifying, as will be elaborated further in this thesis, strong corporate human rights due diligence processes to address this systemic issue. This situation is influenced by the fact that sexual violence is the direct result of structural gender inequalities that manifest themselves through marginalisation of and discrimination and violence against women in mining communities. It is also exacerbated by the globalisation of minerals extraction[99] and 'the locational shift of [the] large-scale mining industry to the global South',[100] which contributes to the impoverishment of communities[101] and thus increases the potential for violence against women.[102]

[98] Human Rights Council, *Gender Dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the Issue of Human rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/41/43 (23 May 2019) [14].
[99] Simons (n 2) 422–423.
[100] Kuntala Lahiri-Dutt, 'The Feminisation of Mining' (2015) 9(9) *Geography Compass* 523, 523.
[101] Ibid 528.
[102] Simons (n 2) 422. See also Jacqui True, *The Political Economy of Violence against Women* (Oxford University Press, 2012). According to True, violence against women is not only embedded in women's 'relative poverty and economic status', it is also a reflection of 'the broader structure of global power relations' (18–19).

CHAPTER 3: A FEMINIST REGULATORY FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS

I INTRODUCTION

Since the 1970s, international law has seen the emergence of regulatory initiatives aimed at governing corporate behaviour and limiting the adverse impacts of business activities on human rights.[1] The 2011 UN Guiding Principles on Business and Human Rights (UNGPs), informed by regulatory theories, constitute today the most authoritative normative standards in the 'business and human rights' debate.[2] This chapter lays the foundations for arguments to follow by establishing the analytical framework through which the notion of human rights due diligence, and its effectiveness in preventing mining-related risks of sexual violence, will be evaluated. To conduct this evaluation, I rely first on regulatory theories, specifically responsive regulation, enforced self-regulation and meta-regulation. Indeed responsive regulation has had a critical influence in the development of business and human rights instruments, in particular of the UNGPs. Enforced self-regulation and meta-regulation establish a combination of voluntary corporate self-regulation, State enforcement and third-party monitoring, which is particularly relevant to understand and evaluate the interlocking corporate, public and social layers of regulation that characterise business and human rights. These regulatory theories are developed further in this and subsequent chapters.

These theories have not only been influential in the development of business and human rights, they have also been widely used in the literature to engage with the role of corporations in human rights violations. Yet, regulatory theories have not been applied to analyse the specific impacts of business activities on women, in particular regarding sexual violence. One of the reasons this has not been done might be that there are many limitations in using regulatory theories to address gender and sex in an adequate manner. These gaps can be filled, to a certain

[1] For example, the OECD has embraced policies of regulatory reform and better regulation since the 1980s: Colin Scott, 'The Regulatory State and Beyond' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 265, 276.

[2] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) ('*UNGPs*').

extent, by feminist legal scholarship and feminist international legal scholarship, which I also use to frame my arguments.

There are several schools of feminist international legal scholarship, each using different techniques and bringing new perspectives to a shared objective: to 'expose and question the limited bases of international law's claims to objectivity and impartiality and insist on the importance of gender relations as a category of analysis'.[3] In this chapter, I do not rely on one specific feminist approach to international human rights law; as argued by Hilary Charlesworth, 'when confronted with a concrete issue, no single theoretical approach seems adequate. A range of feminist theories are necessary to excavate the issues.'[4] Here, I apply three feminist theories to the regulation of corporate activities. The first is the invisibility of women in the discourse of, and mechanisms established by, international and domestic regulatory initiatives on business and human rights. This critique can be extended to regulatory theories themselves that have largely failed to convey women's experiences of business activities. The second is the public/private dichotomy that marginalises women's experiences and concerns, and characterises international human rights law. It has been reproduced in the business and human rights debate and has allowed mining companies to push sexual violence further into the private realm by failing to recognise their responsibility in perpetuating this abuse. The third is the generalisation of women's experiences across business activities. All three themes will be developed further in this chapter. Although this research focuses on three critiques generally made by feminist scholars, I acknowledge that there are many more than those elaborated upon here. For instance, given that much mineral extraction takes place in the Global South and on Indigenous land, it would have been relevant in this thesis to analyse the works of postcolonial and Indigenous feminists, among others. The choice made in this research to use only three feminist theories that originated in the global North, indeed, has limitations. As put by Kuntala Lahiri-Dutt, '[a] divided analytical focus among "Western-based ["] feminists […] is based on a discursive colonization, focusing on a certain mode of appropriation and the codification of knowledges about women by particular analytic categories, which take as their referent feminist interests as articulated in the Anglo-American world.'[5] However, this choice is justified by the ability of these three theoretical strands to address themes that are *generally*

[3] Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *American Journal of International Law* 379, 379.
[4] Ibid 381.
[5] Kuntala Lahiri-Dutt, 'Do Women Have a Right to Mine?' (2019) 31 *Canadian Journal of Women and the Law* 5.

articulated, in various forms, by feminist legal scholarship, irrespective of feminist scholars' school of thought. These three critiques are also helpful in analysing how the regulation of human rights due diligence fails to prevent risks of sexual violence in mining operations, and in identifying ways of making this concept more effective. Furthermore, the framework proposed in this thesis does not claim to provide an exhaustive model of how feminist theories can inform business and human rights. Instead, it aims to prompt a reconsideration of a purely regulatory approach to mining, and seeks to adjust according to specific considerations that come with specific mining operations, specific women, and specific feminist concepts.

The approach developed in this chapter and applied throughout this thesis to address human rights due diligence through both regulatory and feminist lenses constitutes a form of 'feminist regulatory framework'.[6] To draw the contours of this analytical framework and delimit its application to the regulation of mining-related sexual violence, this chapter proceeds as follows. As a preliminary step, it is essential to define the contours of the framework used in this thesis, to then discuss how regulatory and feminist theories, as fundamental elements of this framework, enter into a conversation that can inform mining and business and human rights. This chapter does so by first elaborating on the concept of 'feminist regulatory framework' as an approach to business and human rights, while highlighting the relevance of regulatory and feminist theories in engaging with the regulation of mining operations. It then provides an account of how regulatory theories have influenced the international regulation of transnational business operations. Section IV puts the feminist regulatory framework into practice by engaging three feminist theories in a dialogue with the regulatory foundations of business and human rights, laying the ground for further analysis of how a feminist regulatory framework might be implemented to analyse human rights due diligence. Closing this conversation between regulatory and feminist theories, the chapter concludes that reinforcing separate but complementary systems of regulation (corporate self-regulation, State law and civil society monitoring) to align them with feminist objectives may constitute an avenue for more gender-responsive due diligence[7] and more effective prevention of mining-related sexual violence.

[6] While rarely used in literature, this concept has been developed by feminist scholars who have engaged with regulation in international contexts. See, eg, Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 246; Gabrielle Simm, *Sex in Peace Operations* (Cambridge University Press, 2013).

[7] In this thesis 'gender responsive human rights due diligence' refers to a process that identifies the multiple and intersecting forms of discrimination that generate sexual violence in mining operations as well as the

II A FEMINIST REGULATORY APPROACH

A *Conceptualising a Feminist Regulatory Framework*

Methodological approaches to business and human rights, while varied, are found mainly in the human rights, business ethics and management research fields. However, business and human rights methodologies are generally embedded in their established academic disciplines, which has led scholars to call for 'a cross-disciplinary conversation that enables exchange and production of knowledge among scholars of law, business ethics, management, anthropology and sociology as well as other fields'.[8] This conversation would allow for better understanding of the theoretical evolution of business and human rights. It would also offer the opportunity for researchers to provide a deeper analysis of the practical implementation of recent corporate human rights policies – of operational due diligence, and of public disclosure, for instance –all of which inherently contain several multidisciplinary aspects.[9]

Thinking about business and human rights in a way that juxtaposes regulatory and feminist scholarship – two theoretical approaches that have very much evolved in separate silos, at least in relation to international law – is a means to contribute to the development of business and human rights as an interdisciplinary academic field. This process constitutes a 'feminist regulatory framework' that brings feminist theories into a conversation with regulatory theories. In the context of this thesis, the conversational nature of this feminist regulatory framework makes it a two-way approach that evaluates concurrently the manner in which regulation can support feminist perspectives on mining-related sexual violence, and the fashion in which feminism can reinforce the regulatory theories that inform the business and human rights debate. Combining regulatory and feminist theories as research framework is not new, although literature on the subject is particularly scarce. This analytical framework was developed by feminist scholars engaging with regulation in international contexts.[10] Gabrielle Simm, for example, in relation to sex in peace operations, specifically refers to a 'feminist regulatory framework' and defines it as an attempt 'to clarify the desirability of particular policy goals and to suggest regulatory mechanisms that achieve feminist objectives'.[11] Using a

normalising justifications for sexual violence, and actively responds to them in order to prevent sexual violence in large mining operations.

[8] Karin Buhmann, Björn Fasterling and Aurora Voiculescu, 'Business & Human Rights Research Methods' (2018) 36(4) *Nordic Journal of Human Rights* 323, 323.

[9] Ibid 325.

[10] See, eg, Simm (n 6); Charlesworth and Chinkin (n 6).

[11] Simm (n 6) 17.

feminist regulatory framework to engage with international law on business and human rights, however, is novel. It offers an original perspective that may allow international and domestic regulators to think differently about normative, organisational and operational measures needed to make the implementation of international standards on business and human rights more gender-responsive and to address the gender dimensions of human rights due diligence.

In this research, a feminist regulatory framework offers a way to fill the gap between the human rights objectives laid out in international instruments and ineffective regulatory outcomes for women and survivors of sexual violence in large mining operations. It aims at analysing corporate human rights due diligence to identify whether it is an effective regulatory response to mining-related sexual violence, and whether it can be implemented in line with feminist objectives. This goal may be achieved through three processes, identified by Simm and applied, in this thesis, to the context of business and human rights. First, a feminist regulatory framework may constitute a tool to review the mainstream narratives in business and human rights that either ignore sexual violence or address it inappropriately. Second, it is a way to critique regulatory theories as ignoring women's experiences of business and potentially conflicting with feminist objectives in relation to mining-related sexual violence. Finally, a feminist regulatory framework allows one to determine the types of regulation that provide effective responses to sexual violence in large-scale mining.[12]

B *A Feminist Framework and Regulatory Theories*

Building a framework based on regulatory theories, which discard the central role of the law, may seem incongruous in legal research. In fact, very few international lawyers have engaged with regulatory theories despite their relevance to a branch of the law that lacks a central, hierarchical authority.[13] However, one of the advantages of using regulatory theories in this thesis relates to their significance to the business and human rights debate, responsive regulation in particular constituting the theoretical root of the most foundational instruments on business and human rights. For example, as will be developed further in Section III of this chapter, the UNGPs are based on a polycentric transnational governance model that includes traditional public law and governance, corporate governance and the civil governance of

[12] Ibid 25.
[13] Gabrielle Simm, 'Regulating Sex in Peace Operations' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 415, 455.

stakeholders affected by business activities.[14] In that context, the corporations' responsibility to respect human rights is not rooted in international legal norms but instead in transnational social norms.[15] Using a framework that involves regulatory theories, in particular responsive regulation, is thus essential to assess the rationale of current international regulation of business activities, and their coherence to prevent mining-related sexual violence.

The second advantage of relying on regulatory theories to address regulation preventing sexual violence in large-scale mining is the exact fact that it locates the law within the broader sphere of regulation. I acknowledge this point may be controversial, and an argument may be made that business and human rights regulation is not an appropriate framework, even if it embraces a feminist perspective. On the one hand, as explained by Simm in relation to sex in peace operations, sex is already subject to several layers of regulation: 'in addition to regulation by criminal law […], sex is regulated by social norms, religious doctrines, organisational ethics and personal morality'.[16] This may support an argument that further regulation of sexual violence is not necessary. On the other hand, it could be contended that mining-related sexual violence should not be part of the international business and human rights debate, as a soft law-based, decentred regulatory sphere involving corporate and other non-State regulators. Instead, it should be addressed by international and domestic hard law, including human rights law and criminal law, for example. In fact, some feminist scholars and international institutions have advocated for sexual violence to remain within the boundaries of the law.[17] However, these considerations rely on the postulate that the law is able to respond effectively to risks of sexual violence against women, including in mining operations. In practice, while international and domestic laws on sexual violence contain standards that constitute important guidance for States and non-State actors, these laws are inconsistent across countries and often unsatisfactory in responding to the needs of survivors. According to the Committee on the Elimination of Discrimination against Women (CEDAW Committee):

> In many states, legislation addressing gender-based violence against women remains non-existent, inadequate and/or poorly implemented. An erosion of legal and policy frameworks to eliminate

[14] 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(3) *European Journal of International Law* 921, 925–26.
[15] Ibid 923.
[16] Simm (n 6) 15.
[17] See, eg, Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) *European Journal of International Law* 326; Susan Edwards, 'Violence against Women: Feminism and the Law' in Loraine Gelsthorpe and Allison Morris (eds), *Feminist Perspectives in Criminology* (Open University Press, 1990) 145.

> gender-based discrimination or violence, often justified in the name of tradition, culture, religion or fundamentalist ideologies, and significant reductions in public spending, often as part of 'austerity measures' following economic and financial crises, further weaken the state responses.[18]

In addition, the law is often accompanied by legal loopholes.[19] For example, in relation to the human rights impacts of overseas business operations, significant jurisdictional issues surround the liability of parent companies for human rights violations by their subsidiaries or subcontractors. Indeed, the entity principle considers each company within a corporate group as a separate legal entity, liable only for its own actions and omissions. The entity principle is widely reflected in the practice of States, which tend not to regulate the offshore operations and relationships of locally incorporated, listed or headquartered corporations.[20] While domestic law is developing importantly on that matter,[21] survivors of mining-related sexual violence are often unable to obtain remedy either in the country of operation, if it has a weak or ineffective judicial system, or in the parent company's State of incorporation.[22] The relevance of regulatory theories also lies in the multiplicity of stakeholders involved in mining-related sexual violence, which are not necessarily well regulated (if at all) by the law. Research has demonstrated that in the mining industry, relationships between multinational mining companies, host governments and public and private security forces can be tainted by corruption, thus limiting the regulatory power of the law to prevent sexual violence in communities of operation.[23] In other situations, imbalances of power enfeeble the capacity of host States to enforce their laws in relation to multinational mining companies.

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[18] Committee on the Elimination of Discrimination Against Women ('CEDAW Committee'), *General Recommendation No. 35, (2017): On Gender-Based Violence Against Women, Updating General Recommendation No. 19*, UN Doc CEDAW/C/GC/35 (14 July 2017) [7].

[19] Simm (n 6) 16.

[20] Paul Redmond, 'Corporations and Human Rights in a Globalised Economy: Some Implications for the Discipline of Corporate Law' (2016) 31(1) *Australian Journal of Corporate Law* 3, 24.

[21] See, eg, *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Law No 2017-399 of 27 March 2017 on Corporate Duty of Vigilance] (France) JO, 28 March 2017.

[22] Adam McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11 *Yale Human Rights and Development Law Journal* 127. The author states that in the case of Anvil Mining, for example, the trial against the company before the Military Court of Katanga (Democratic Republic of Congo) was highly criticised for alleged political interference, partiality of the presiding judge and procedural irregularities (144–145). *Anvil Mining Ltd v Association canadienne contre l'impunité* [2012] 2012 QCCA 117. The petition for certification as a class action filed in Canada was dismissed in appeal on the grounds that Anvil Mining did not have a Canadian establishment at the time of the events and that the victims had not proven that they were unable to gain access to a foreign court.

[23] See, eg, Michael L Dougherty, *By the Gun or by the Bribe: Firm Size, Environmental Governance and Corruption Among Mining Companies in Guatemala* (U4 Anti-Corruption Resource Centre, 2015); Andrea Petermann, Juan Ignacio Guzmán and John E Tilton, 'Mining and Corruption' (2007) 32(3) *Resources Policy* 91; Lisa Caripis, Andrea Shaw and Alexia Skok, 'Using Risk Assessments to Address Corruption in Mining' (2019) 32(2) *Mineral Economics* 251.

The limitations of the law in relation to sexual violence and transnational business do not mean that legal responses to mining-related sexual violence should not be strengthened. As will be demonstrated in Chapter 7, the State plays a fundamental role in framing and overseeing corporate regulatory practices. The law, if aligned with feminist principles, is also an effective tool for compelling corporations to address women's rights concerns more systematically and effectively. The importance of State due diligence legislation is confirmed by international regulators, who are currently negotiating a binding instrument on business and human rights. This potential treaty is aimed at reinforcing, according to international human rights law, the role of the State in regulating the activities of business enterprises.[24] Instead, the limitations of the law, added to the propensity of multinational mining companies to operate in areas of weak governance, suggest that sexual violence in large-scale mining cannot be addressed effectively by *one single* legal, approach.[25] Rather, it is necessary to rely on the regulatory potential of the multiplicity of stakeholders involved, directly or indirectly, in the mining sector. This approach is one of the strengths of regulatory theories that put faith in the contribution of non-State actors to better regulation. In practice, even in contexts where the law regulates the activities of mining companies, corporate conduct is influenced not only by the normative requirements created by States but also, significantly, by incentives established by non-State regulators such as investors, industry associations and NGOs, among others.[26] In relation to the prevention of, and response to, sexual violence in large-scale mining, specifically, the engagement of these regulators has proven somewhat effective. Concerning the rapes committed against Papua New Guinean women in and around the Porgera mine operated by Barrick Gold, for example, intense pressure from NGOs and academics was critical in the decision made by the company to investigate and address the allegations against their security forces.[27]

[24] Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/RES/26/9 (14 July 2014).
[25] On this, see also Simm (n 6).
[26] See, eg, Justine Nolan, Jolyon Ford and M Azizul Islam, *Regulating Transparency and Disclosures on Modern Slavery in Global Supply Chains: A 'Conversation Starter' or a 'Tick-Box Exercise'?* (CPA Australia, 2019). In relation to transparency and disclosures on modern slavery in global supply chains, the authors found that the decision of Australian respondents to report externally on supply chain risks was most likely influenced by 'legal requirement (penalty for not reporting)'. Factors such as customer expectations, reputational impact and adverse publicity, and civil society expectations were less significant drivers than 'legal expectation', but not dramatically so (14). The way incentives established by States influence corporate conduct is examined in Chapter 7.
[27] See, eg, International Human Rights Clinic and Center for Human Rights and Global Justice, 'Legal Brief before the Standing Committee on Foreign Affairs and International Development (FAAE), House of Commons, regarding Bill C-300' (Legal Brief, 16 November 2009).

In that context, by relying on regulatory theories, business and human rights issue shifts the focus of international human rights law by emphasising that the State is not the only recognised threat to women, but that powerful non-State actors may also be involved in violating women's rights and bodies. The CEDAW Committee, notably, recognises this shift by encouraging States to engage the private sector in efforts to 'enhance its responsibility for [all forms of gender-based violence] in the scope of its action'.[28] Regulatory theories thus go further than international human rights law by suggesting that, combined with State law that remains an overseeing power, focus should be put on the regulatory roles of non-State actors which also have the potential to be effective in modifying the conduct of mining companies. Questions remain, however, as to the effectiveness relevance of relying on regulatory theories alone in addressing the gendered dimensions and gendered impacts of systems of regulation. Hilary Charlesworth and Christine Chinkin, specifically, have raised some of these questions: 'who are the regulators; who regulates the regulators? Does regulation affect women and men differently? What gendered patterns of life, work and politics does regulation support?'[29] Relying on feminist scholarship and combining it with regulatory theories helps to answer some of these concerns.

C *A Regulatory Framework and Feminist Scholarship*

While regulatory studies constitute an important theoretical foundation for addressing issues related to business and human rights, they have, by themselves, important limitations in responding effectively to sexual violence against women in large-scale mining. A significant drawback of regulatory theories is their inability, in their implementation, to achieve expected regulatory outcomes and social goals regarding sexual violence against women. These outcomes include, among others, the establishment of norms and standards that are effective in addressing women's specific and intersectional experiences of mining activities. In practice, however, it seems that international business and human rights regulation has different impacts on men and on women. As will be developed further in Chapter 4 of this thesis, for example, the prevention of sexual violence in business contexts, although somewhat regulated, is regulated very much in a discursive rather than in a substantive way. Indeed, a growing literature demonstrates the role corporations play in increased risks of sexual violence across industries. In parallel, business and human rights instruments, despite apparently adopting a

[28] CEDAW Committee (n 18) [39].
[29] Charlesworth and Chinkin (n 6) 268.

'gender perspective' and, in some cases, referring to sexual violence,[30] fail to encourage State and non-State regulators to engage actively in the prevention of this risk.

In this context, feminist theories may reinforce regulatory processes to achieve feminist objectives, i.e. to prevent mining-related sexual violence more effectively and to consider the specific impacts of mining activities on women more seriously. At the same time, bringing feminism into the regulatory sphere, although essential, may not be an easy process. In the business and human rights debate, as in international legal scholarship in general, feminist theories still constitute what Hilary Charlesworth and Christine Chinkin have called a 'scholarly ghetto'. [31] Until recently, business and human rights lacked awareness of feminist insight. It was only in 2019, eight years after the launch of the UNGPs, that the UN Working Group on Business and Human Rights reported on the gender dimensions of the UNGPs.[32] Similarly, in 2017 and 2018, the OECD provided general recommendations for mining companies to 'engag[e] with women' and to 'apply a gender perspective throughout [their] stakeholder engagement',[33] and for all businesses to 'integrate gender issues into [their] due diligence'.[34] Feminist theories thus bring an essential perspective, focused on women's human rights, to the regulation of corporate conduct. They allow a thorough examination of the extent to which human rights due diligence responds to the experiences and needs of women in mining operations, and provide insight into how diverse regulatory mechanisms may be made more effective in preventing mining-related sexual violence. The role of feminist theories is particularly relevant as current regulation of preventing sexual violence is either non-existent or inadequate.

At the same time, as will be discussed throughout this thesis, juxtaposing feminist theories with ideas of decentred regulation and multiplicity of regulators offers practical tools to address pragmatic issues that result from the international character of mining operations and that have

[30] See, eg, Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/RES/8/7 (18 June 2008), [4(d)] ('*HRC Resolution 8/7*').
[31] Hilary Charlesworth, 'The Women Question in International Law' (2011) 1(1) *Asian Journal of International Law* 33, 35.
[32] Human Rights Council, *Gender Dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the Issue of Human rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/41/43 (23 May 2019).
[33] OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (2017) 100 ('*OECD Guidance on Stakeholder Engagement*').
[34] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018) 41.

been largely ignored by feminist theories.[35] The following sections of this chapter frame the contours of the feminist regulatory framework used in this thesis.

III REGULATORY THEORIES IN BUSINESS AND HUMAN RIGHTS

A *Business, Human Rights and Polycentric Governance*

Regulating the risks of industrial mining-related sexual violence is not an easy task. It requires understanding of what it means to regulate transnational mining operations and what adequate regulation should look like. Locating this question within the broader context of international regulation of business activities to prevent extraterritorial violations of human rights, this debate, which started in the 1970s,[36] remains unsettled.[37]

Over the years, most discussions have revolved around the compulsory versus voluntary nature of norms aimed at regulating corporate conduct at the international level.[38] The launch of the UN Global Compact[39] in 2000 illustrated the global attraction to a voluntary initiative, while the 2003 United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (the Norms)[40] adopted by the former Sub-Commission on the Promotion and Protection of Human Rights explicitly imposed direct international human rights obligations on transnational corporations.[41] The Norms generated vigorous opposition from corporations and their business associations,[42] and were eventually rejected by the then UN Human Rights Commission. Following the controversy around the Norms, the Human Rights Commission requested the then UN Secretary-General, Kofi Annan,

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[35] Simm (n 6) 18.
[36] Economic and Social Council, *ESC Res 1993/49* (29 July 1993). Efforts to regulate transnational companies started in 1972 with negotiations on a UN Code of Conduct on Transnational Corporations, which formally ended in 1993, [14].
[37] Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge, 2014) 3.
[38] Humberto Cantú Rivera, 'Regional Approaches in the Business and Human Rights Field ' (2013) 35(2) *L'Observateur des Nations Unies* 54, 54.
[39] United Nations Global Compact, *United Nations Global Compact* <https://www.unglobalcompact.org/>. The United Nations Global Compact is a voluntary initiative in which transnational companies commit to responsible business practices in the areas of human rights, labour, the environment and corruption.
[40] Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, UN ESCOR, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).
[41] Ibid. The Sub-Commission stated that 'within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law' (art 1).
[42] Simons and Macklin (n 37) 3.

to appoint a Special Representative on Business and Human Rights,[43] whose role would be to 'identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'.[44] Harvard Professor John Ruggie was appointed to the position. Between 2005 and 2008, the Special Representative developed the 'Protect, Respect and Remedy' framework (the Framework).[45] This policy framework was based on three pillars: the State duty to protect against human rights abuses by third parties; the corporate responsibility to respect human rights, including undertaking due diligence and impact assessments in order to ensure compliance with international human rights law; and the need for more effective access to remedies.[46] The framework evolved into an implementing document, the UNGPs, unanimously endorsed by the UN Human Rights Council in 2011[47] and now considered the most authoritative international norm on business and human rights. The UNGPs were developed as a UN instrument, which makes them separate from purely private guidance instruments and certification programmes[48] and public-private schemes involving State, corporate and civil society stakeholders.[49] However, other public regulatory organisations, including the OECD and the EU, have been inspired to develop instruments highly influenced by the UNGPs.[50] Replicating the due diligence process developed in the UNGPs, for example, in 2011 the OECD revised its Guidelines for Multinational Enterprises to include non-binding due diligence requirements for businesses.[51]

The UNGPs are based on a model of 'polycentric governance' characterised by three distinct governance systems: domestic and international public law and governance, corporate governance and a civil governance system involving stakeholders affected by business activities.[52] Civil governance systems include a variety of stakeholders such as insurers,

[43] Commission on Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, 2005/69, 61st sess, 59th mtg, UN Doc E/CN.4/RES/2005/69 (20 April 2005), [1].
[44] Ibid.
[45] John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UN Doc A/HRC/8/5 (7 April 2008) [9] ('*Protect, Respect and Remedy*').
[46] Ibid [9].
[47] Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises,* UN Doc A/HRC/RES/17/4 (6 July 2011), [1].
[48] See, eg, ITSCI, *ITSCI Programme for Responsible Mineral Supply Chains* <https://www.itsci.org/>.
[49] See, eg, *Voluntary Principles on Security and Human Rights* <https://www.voluntaryprinciples.org/>; EITI, *The Extractive Industries Transparency Initiative* <https://eiti.org/homepage>.
[50] See, eg, *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas*, [2017] L(30) OJ 1.
[51] OECD, *OECD Guidelines for Multinational Enterprises*, 2011.
[52] John Gerard Ruggie, 'Global Governance and New Governance Theory: Lessons from Business and Human Rights' (2014) 20 *Global Governance* 5, 8.

investors, industry associations, NGOs, international organisations and consumers, among others. According to this model, States have binding obligations, elaborated in existing international law standards,[53] to protect human rights.[54] In international human rights law and in the UNGPs, the obligation to protect requires States to exercise due diligence and to take legislative, administrative and adjudicative measures to prevent third parties under their jurisdiction, including business enterprises, from violating human rights and to respond to such violations.[55] As for business enterprises, they have non-binding *responsibilities* that exist independently of States' duties, and are defined by social expectations.[56] Failure to meet these responsibilities 'can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts'.[57] At the same time, corporations are expected to comply with national laws and regulations,[58] calling – as Ruggie did early in his mandate – for a strengthening of the capacity of States to regulate corporate activities.[59] In other words, with a view to allow businesses to fill governance gaps where State policies and laws are ineffective,[60] the UNGPs combine social expectations, voluntary commitment and self-regulation by businesses, and public regulation that defines the scope of legal compliance through hard and soft law.

The UNGPs combine both business compliance and public regulation,[61] which differentiates them from other initiatives (such as the UN Global Compact) that rely solely on the voluntary commitment of corporations. The analytical framing of this approach emerges from regulatory scholarship. According to John Ruggie,

> [n]ew governance theory rests on the premise that the state by itself cannot do all the heavy lifting required to meet most pressing societal challenges and that it therefore needs to engage other actors to leverage its capacities. Hence, the literature emphasizes "responsive regulation," informal cooperation, public-private partnerships, and multistakeholder processes. The need is especially acute where regulating the conduct of multinational corporations is involved. [C]onstructing an

[53] *UNGPs* (n 2) General Principles.
[54] Ibid Principle 1.
[55] Ibid.
[56] *Protect Respect and Remedy* (n 45) [54]–[55].
[57] Ibid.
[58] Ibid.
[59] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) *American Journal of International Law* 819, 838.
[60] Karin Buhmann, 'Public Regulators and CSR: The 'Social Licence to Operate' in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136(4) *Journal of Business Ethics* 699, 701.
[61] Ibid.

> authoritative framework for business and human rights inevitably was an exercise in polycentric governance.[62]

Ruggie here refers to two theoretical strands: new governance theory and, as a regulatory dynamic under this governance system, responsive regulation. In legal scholarship, the notion of 'new governance' has developed to explain the destabilisation of traditional governance forms and mechanisms 'in the private, semi-private and public spheres, and at (and in-between) the local, regional, national, transnational and global levels'.[63] In other words, new governance is connected to the neoliberal shift in legal regulation that has characterised recent decades and that has translated into a worldwide growth in privatisation.[64] New governance theorists describe and analyse a 'shift in governance'[65] that departs from State-based command-and-control regulatory models and 'blurs the line between public and private, State and market, and hard and soft law'.[66] In that context, the interaction between 'the law' and new governance is unsettled. A significant part of the legal, mainly positivist, scholarship on governance equates law with 'hard law' associated with command-and-control regulation;[67] separate from but nonetheless superior to other forms of regulation that are simply species of the genus 'law'.[68] In contrast, 'new governance is envisaged as existing largely apart from and beyond law, as an amorphous cluster of new processes, instruments and values'.[69] This polycentric understanding of governance, wherein the law of the State is only one of the many techniques used by regulators in a 'centreless society'[70] characterised by a multiplicity of players (mainly States, civil society and business), does not mean, however, that the State assumes a secondary regulatory role. As stated by Neil Gunningham, regulation 'still involves the state as a central player because even mechanisms that are not reliant on legislation for their authority are negotiated directly with the state and operate "in the shadow of the state"'.[71] Although still

[62] Ruggie (n 52) 8–9.
[63] Kees Van Kersbergen and Frans Van Waarden, '"Governance" as a Bridge between Disciplines: Cross-disciplinary Inspiration regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy' (2004) 43(2) *European Journal of Political Research* 143, 143.
[64] See, eg, John Braithwaite, Cary Coglianese and David Levi-Faur, 'Can Regulation and Governance Make a Difference?' (2007) 1 *Regulation and Governance* 1, 3.
[65] Kersbergen and Waarden (n 63) 144.
[66] Chris Tollefson, Anthony R Zito and Fred Gale, 'Symposium Overview: Conceptualizing New Governance Arrangements' (2012) 90(1) *Public Administration* 3, 3.
[67] Ibid 6.
[68] Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 23.
[69] Tollefson, Zito and Gale (n 66) 6.
[70] Carol Harlow, 'Deconstructing Government?' in Tom Ginsburg and Robert A Kagan (eds), *Institutions & Public Law: Comparative Approaches* (P. Lang, 2005), 59.
[71] Neil Gunningham, 'Environment Law, Regulation and Governance: Shifting Architectures' (2009) 21(2) *Journal of Environmental Law* 179, 181.

very much debated,[72] new governance has influenced many initiatives in the business and human rights debate.[73]

According to John Braithwaite, Cary Coglianese and David Levi-Faur, 'governance' is a broader concept than 'regulation': '[g]overnments and governance are about providing, distributing and regulating. Regulation can be conceived as that large subset of governance that is about steering the flow of events and behavior, as opposed to providing and distributing.'[74] As such, responsive regulation falls within the concept of new governance and 'decentred' forms of regulation.[75] Developed by Ian Ayres and John Braithwaite, responsive regulation claims that its 'responsiveness' implies both the preventative (what triggers a regulatory response) and the enforcement (what the regulatory response will be) elements of effective regulation.[76] Responsive regulation conceptualises a mixed and dynamic regulatory space[77] where some State regulatory responsibilities are delegated to non-State actors (public interest groups, unregulated competitors and the regulated firms themselves),[78] and where all stakeholders exercise countervailing power against each other.[79] In that system, however, the State has the responsibility to decide the extent to which government intervention is needed to ensure enforcement of and compliance with the regulation. As put by Braithwaite, 'law enforcers should be responsive to how effectively citizens or corporations are regulating themselves before deciding whether to escalate intervention'.[80]

A State's decision to punish or persuade non-compliant actors is conceptualised in an enforcement pyramid beginning at its base with deliberative options (persuasion, warning) and, when dialogue and soft compliance measures fail, escalating to increasingly severe punitive

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[72] See, eg, Gráinne De Búrca and Joanne Scott, *Law and New Governance in the EU and the US* (Bloomsbury Publishing, 2006); David M Trubek and Louise G Trubek, 'New Governance & (and) Legal Regulation: Complementarity, Rivalry, and Transformation' (2006) 13 *Columbia Journal of European Law* 539.
[73] See, eg, Ruggie (n 52).
[74] Braithwaite, Coglianese and Levi-Faur (n 64) 3.
[75] Simons and Macklin (n 37) 14.
[76] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 4.
[77] John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) *World Development* 884, 886.
[78] Ayres and Braithwaite (n 76) 4.
[79] Muhammad Azizul Islam and Ken McPhail, 'Regulating for Corporate Human Rights Abuses: The Emergence of Corporate Reporting on the ILO's Human Rights Standards within the Global Garment Manufacturing and Retail Industry' (2011) 22(8) *Critical Perspectives on Accounting* 790, 294.
[80] Braithwaite, 'Responsive Regulation and Developing Economies' (n 77) 886. This relates to the idea of 'enforced self-regulation' (Ayres and Braithwaite (n 76) Chapter 4) that subsequently evolved to the one of 'meta-regulation' (developed, among others, by Peter Grabosky and Christine Parker). According to this idea, the State, instead of simply delegating regulatory powers, oversees non-State actors – mainly corporations – in regulating themselves.

sanctions (civil and criminal penalties, and licence suspension and revocation).[81] This pyramidal model reflects a wish for flexibility based on the nature and willingness of actors to comply with the regulation. The first step, restorative justice, is applied to presumed virtuous actors; rational actors are likely to respond to deterrence; the top of the pyramid is aimed at incapacitating incompetent or irrational actors.[82] Categories of sanctions and actors are not predetermined. Instead, Braithwaite recommends starting with dialogue and moving up the pyramid in response to a persistent failure from the actor to reform and repair.[83] The rationale behind this approach is that

> [t]he pyramidal presumption of persuasion gives the cheaper, more respectful option a chance to work first. More costly punitive attempts at control are thus held in reserve for the minority of cases where persuasion fails. When it does fail, the most common reason is that an actor is being a rational calculator about the likely costs of law enforcement compared with the gains from breaking the law. Escalation through progressively more deterrent penalties will often take the rational calculator up to the point where it will become rational to comply.[84]

Applied to the business and human rights debate, responsive regulation assumes that the violation by large corporations of their human rights responsibilities should provoke a response from a plurality of regulators (for example NGOs, international organisations, the media, investors, insurers etc.) to mitigate corporate abuses and attempt to apply regulatory mechanisms to corporate violations of human rights.[85] In that sphere, the model is seductive and many international regulators have engaged directly with the enforcement pyramid.[86] The OECD, notably, has developed policies implicitly or explicitly inspired by responsive regulation to suggest how States should implement systemic regulatory reform and improve their regulatory governance.[87]

While essential to grasp the full extent of regulatory theories, enforcement pyramids and their value in responding to corporate failures to comply with regulation are not examined in this

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[81] Ayres and Braithwaite (n 76) 35.
[82] Braithwaite, 'Responsive Regulation and Developing Economies' (n 77) 887.
[83] Ibid.
[84] John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 475, 484.
[85] Islam and McPhail (n 79) 794.
[86] Colin Scott, 'The Regulatory State and Beyond' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 265, 276.
[87] See, eg, OECD, *Implementing the OECD Due Diligence Guidance* <http://mneguidelines.oecd.org/implementingtheguidance.htm>; OECD, 'Recommendation of the Council on Regulatory Policy and Governance' (Policy, 2012).

thesis.[88] Instead, this thesis focuses on the preventative element of effective regulation that is achieved, in relation to business and human rights, through human rights due diligence, and on regulation as a mechanism allowing corporate engagement with social and feminist objectives.[89] By focusing on the elements that trigger a regulatory response, this thesis focuses on the *prevention* of sexual violence in large mining operations.

B *Regulatory Theories and Multinational Mining Operations*

Unlike some instruments on business and human rights, which focus their attention solely on multinational business operations,[90] the UNGPs claim authority over 'all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure'.[91] Yet, in the mining industry, they seem to have been incorporated primarily by multinational companies that refer to them as a token of their commitment to human rights and to establish the contours of their human rights policies and practices.[92] In other words, although not all business and human rights instruments claim to apply specifically to extraterritorial business operations, many of the regulatory issues they aim to address have moved to the globalised, transnational arena. The regulatory theories they rely on, however, were designed to operate within an 'old governance' framework as a tool for domestic agencies: 'it was designed for a setting in which agencies had clear jurisdiction, full regulatory capacity and extensive information, and could (contingently) deploy stringent sanctions against well-defined private targets'.[93]

From a purely theoretical perspective, applying responsive regulation to transnational business issues comes with an array of problems that has led regulatory scholars to call for a significant adaptation of regulatory models to extraterritorial business activities.[94] Kenneth Abbott and Duncan Snidal, for instance, emphasise that in a context in which multinational companies

[88] I acknowledge, however, that there are numerous issues surrounding the enforcement of standards and practices addressing sexual violence across sectors. I also recognise the significant limitations of existing judicial and non-judicial, State and non-State, existing mechanisms in place to respond to acts of sexual violence.
[89] See Christine Parker et al, 'Introduction' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 1, 13.
[90] See, eg, *OECD Guidelines for Multinational Enterprises* (n 51).
[91] *UNGPs* (n 2) General Principles.
[92] See, eg, Glencore, *Human Rights – Ask Glencore* <https://www.glencore.com/ask-glencore/human-rights>; BHP, *Respecting Human Rights* <https://www.bhp.com/our-approach/operating-with-integrity/respecting-human-rights/>; Rio Tinto, *Human Rights* <https://www.riotinto.com/en/sustainability/human-rights>.
[93] Kenneth W Abbott and Duncan Snidal, 'Taking Responsive Regulation Transnational: Strategies for International Organizations' (2013) 7(1) *Regulation & Governance* 95, 95.
[94] Ibid.

operate through overseas subsidiaries within lengthy and opaque supply chains, national regulatory authorities have lost direct access to multinational corporations. This is because these companies, if facing a move up the regulatory pyramid, may transfer their operations to more welcoming jurisdictions.[95] The authors thus recognise the importance of developing 'transnational regulatory standard-setting', including transnational self-regulation by individual firms and industry associations, and regulatory relationships between international organisations and businesses, to overcome some of these issues.[96] In other words, they identify the legitimacy of business and human rights standards and their polycentric governance emphasis while highlighting some of their limitations, such as the potential lack of coordination between the ever-expanding multiplicity of regulators, and the need for strengthening the regulatory authority of non-corporate domestic and transnational stakeholders.[97] Similarly, Gregory Rawlings demonstrates that the transnational use of responsive regulation strategies in the context of taxes has led to the strengthening of offshore finance centres and the increase of international tax competition – given the limited capacity of multilateral organisations to implement regulatory techniques including penalty and coercion. He concludes that in some business contexts, transnational responsive regulation may have the opposite effect from that intended, in particular where the enforcement peak of the regulatory pyramid is lacking.[98] Ruggie himself recognised similar drawbacks in the UNGPs and emphasised their preliminary nature as 'the end of the beginning' of better regulation of business and human rights challenges.[99] Potential avenues for strengthening of multinational business regulation will be discussed at length in subsequent chapters of this thesis.

[95] Ibid 97.
[96] Ibid 98.
[97] Ibid 103.
[98] Gregory Rawlings, 'Taxes and Transnational Treaties: Responsive Regulation and the Reassertion of Offshore Sovereignty' (2007) 29(1) *Law & Policy* 51.
[99] Special Representative of the Secretary-General for Business and Human Rights, *Presentation of Report to United Nations Human Rights Council*, 30 May 2011.

IV IMPLEMENTING A FEMINIST REGULATORY FRAMEWORK: INTEGRATING FEMINISM INTO MINING REGULATION

In the context of this research, the objectives of a feminist approach to the regulation of business activities are multiple. They include, first, identifying why the regulation of business and human rights has, until recently, addressed women's rights in a very limited manner. This is despite the mandate of the Special Representative on Business and Human Rights to integrate a 'gender perspective' in his endeavour to regulate the human rights impacts of business operations.[100] A second objective is to identify why recent efforts to integrate a gender perspective in business and human rights have somewhat discarded women's intersectional experiences of sexual violence. To answer these questions, it is essential to determine what a feminist regulatory framework involves, and how it can respond to the limitations of the business and human rights regulation targeting mining-related sexual violence. In that sense, a feminist regulatory framework helps one identify what type of regulation meets the feminist objectives of effective prevention of sexual violence in communities of operation.

A feminist regulatory framework can take different forms depending on the feminist theories used. The framework proposed in this thesis is not an exhaustive model of the manners in which business and human rights may be addressed through regulatory and feminist approaches. Instead, I rely on three themes of feminist theory that prompt a reconsideration of a purely regulatory approach to business and human rights, and of the various dimensions of regulation that may support and effective prevention of sexual violence in mining operations. The first is the invisibility of women in the discourse of, and mechanisms established by, international regulatory initiatives on business and human rights.[101] These instruments either ignore or address women's experiences of business activities inappropriately, including mining. The second is the public/private dichotomy that marginalises women's concerns by locating them in the private, domestic sphere.[102] The business and human rights sphere has pushed sexual violence further in the private realm. It has done so by failing to recognise the responsibility of mining companies in perpetuating this violation of women's rights. The third is the

[100] *HRC Resolution 8/7* (n 30) [4(d)].
[101] See, eg, Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613; Andrew Byrnes, 'Using International Human Rights Law and Procedures to Advance Women's Human Rights' in Kelly Dawn Askin and Dorean Koenig (eds), *Women and International Human Rights Law* (Brill, 2000) 79; Rebecca J Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994).
[102] See, eg, Charlesworth, 'Feminist Methods in International Law' (n 3); Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995).

generalisation of women's experiences across business activities,[103] which has led multinational mining companies to discard the intersectional nature of mining-related sexual violence.

As mentioned earlier, focusing on these three feminist theories risks omitting further exploration of other feminist theories that are also relevant in the context of mineral extraction in the global South. Postcolonial feminism (also known as 'Third World feminism'), notably, emerged in opposition to Western second-wave feminism,[104] which it critiqued for subscribing to the idea that all women, irrespective of where they lived, faced the same oppression simply by virtue of their sex and gender.[105] As such, postcolonial feminist theory is primarily concerned with the 'construction of gender difference in colonial and anti-colonial discourses [and the] representation of women in anti-colonial and postcolonial discourses'.[106] Its goal is thus to provide feminist analyses by 'Third World' women of 'Third World' women's specific forms of oppression and modes of resistance.[107] Chandra Talpade Mohanty, notably, denounces Western feminist scholars' mischaracterisation of 'Third World' women's oppression as the worst form of homogenised gender oppression.[108] She identifies several ways in which 'women' as a category of analysis used in Western feminist discourse on women in the 'Third World' leads to the construction of '"Third World Women" as a homogeneous "powerless" group often located as implicit victims of particular socio-economic systems.'[109]

Similarly, Indigenous feminism 'interrogates the material conditions that Native women face as subjects situated within a nexus of patriarchy, colonialism, and white supremacy.'[110] While

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[103] See, eg, Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1984) 12(3) *Boundary 2* 333.
[104] Second wave feminism emerged in the 1960s and 1970s in the United States. It was largely influenced and inspired by the Civil Rights Movement and, although not a unified or homogeneous movement, it addressed common issues such as equality between men and women, sexual and domestic violence, reproductive rights and workplace safety, among other themes. Its starting point, in the United States, is largely considered to be Betty Friedan's argument that women are trapped in systemic subordination (later described as 'patriarchal') that denies them self-identity as women. Betty Friedan, *The Feminine Mystique* (WW Norton & Company, 1963).
[105] Ranjoo Seodu Herr, 'Reclaiming Third World Feminism: or Why Transnational Feminism Needs Third World Feminism' (2014) 12(1) *Meridians: Feminism, Race, Transnationalism* 1, 2.
[106] Ritu Tyagi, 'Understanding Postcolonial Feminism in relation with Postcolonial and Feminist Theories' (2014) 1(2) *International Journal of Language and Linguistics* 45, 45.
[107] Herr (n 105) 2.
[108] Mohanty (n 103).
[109] Ibid 338. See also, eg, Chilla Bulbeck, *Re-orienting Western Feminisms: Women's Diversity in a Postcolonial World* (Cambridge University Press, 1998); Leela Gandhi, 'Postcolonialism and Feminism' in Leela Gandhi (ed), *Postcolonial Theory: A Critical Introduction* (Columbia University Press, 2019) 81; Ratna Kapur, *Erotic Justice: Postcolonialism, Subjects and Rights* (The Glass House Press, 2005); Gayatri Chakravorty Spivak, 'Three Women's Texts and a Critique of Imperialism' (1985) 12 *Critical Inquiry* 243.
[110] Andrea Smith, 'Against the Law: Indigenous Feminism and the Nation-State' (2011) 5(1) *Affinities: A Journal of Radical Theory, Culture, and Action* 56, 56.

still constituting slim academic literature,[111] Indigenous feminism finds its origins in Indigenous women's movement that have been fighting for more gender equality since the 1990s. In many cases, these Indigenous women have been advocating for equality between men and women based on identities that transcend Western understanding of personhood. According to Aida Hernandez Castillo, 'their notion of equality identifies complementarity between genders as well as between human beings and nature. It considers what constitutes a dignified life through a different understanding of people's relationship to property and to nature than the one liberal individualism provides.'[112] In that sense, Indigenous feminist perspectives on women's rights reclaim Indigenous epistemologies as spaces of analysis and resistance.

Postcolonial and Indigenous feminist theories address concerns that are important in relation to abuses against women in global South mining operations, particularly because they aim to highlight the unique experiences of women in countries of operation. While relevant frames of analysis for the questions raised in this thesis, they also raise questions that are generally considered by feminist theorists, irrespective of their school of thought. These concerns encompass, among others, the invisibility of women, the public/private dichotomy and intersectionality, the three themes developed in this thesis. For Deepika Bahri, for example, postcolonial feminist theory's main contribution is to extend the formulation of the 'woman question' – discussed in Section A below in relation to the invisibility of women – to the 'Third World woman question'.[113] Others argue that feminisms that have emerged as a response to white feminist theories are closely associated with African American feminism as they strive not only for recognition by men in their own cultures but also by Western feminists.[114] In relation to postcolonial feminism, Rajeswari Sunder Rajan and You-me Park state that

> In their engagement with the issue of representation, postcolonial feminist critics, in common with other US women of color, have attacked both the idea of universal "woman," as well as the reification of the Third World "difference" that produces the "monolithic" Third World woman. They have insisted instead upon the specificities of race, class, nationality, religion, and sexualities

[111] Joyce Green, 'Introduction: Indigenous Feminism, from Symposium to Book' in Joyce Green (ed), *Making Space for Indigenous Feminism* (Fernwood Publishing, 2017) 14, 14.
[112] Aida Hernandez Castillo, 'Comparative Perspectives Symposium: Indigenous Feminisms, the Emergence of Indigenous Feminism in Latin America' (2010) 35(3) *Signs: Journal of Women in Culture and Society* 539, 540.
[113] Deepika Bahri, 'Feminism and Postcolonialism in a Global and Local Frame' in Christine Verschuur (ed), V*ents D'Est, Vents d'Ouest: Mouvements de Femmes et Féminismes Anticoloniaux* (Graduate Institute Publications, 2016) 193.
[114] Raj Kumar Mishra, 'Postcolonial Feminism: Looking into Within-Beyond-To Difference' (2013) 4(4) *International Journal of English and Literature* 129, 131.

> that intersect with gender, and the hierarchies, epistemic as well as political, social, and economic that exists among women.[115]

These relate to issues analysed in Section B in relation to feminist theories of intersectionality.

The three themes elaborated below are essential and relevant in a context of business and human rights, and do not discard the validity of other equally relevant feminist theories. They help us better understand why this regulatory structure remains largely gender-biased and why, when emphasis is placed on women and sexual violence, it generally approaches women and survivors in a problematic way, i.e. as victims (instead of agents) and family members (instead of *direct* agents).

A *Addressing the Invisibility of Women and Survivors in Business and Human Rights*

1 *Business and Human Rights and Women's Silence*

Analysis of the business and human rights debate demonstrates that it reproduces one of the limitations of regulatory theories: their silence on the impact of business activities on women. For instance, although somewhat represented, women have been largely absent from the formulation of business and human rights regulatory frameworks and are still generally missing. This assessment of the business and human rights debate derives from one of the most prominent feminist critiques of international human rights law: the exclusion of women and their voices from international law-making processes. Although it has lost some of its appeal to many Western legal feminists for its emphasis on formal equality,[116] this critique remains an important one as the invisibility of women in human rights discourses, and their absence in negotiating, drafting, monitoring and implementing human rights norms, typically results in the omission of women's rights and concerns from international regulatory mechanisms.[117] Ursula O'Hare explains the 'gender myopia'[118] of international human rights law, noting that '[m]ale hegemony over public life and institutions meant that rights came to be defined by

[115] Rajeswari Sunder Rajan and You-me Park, 'Postcolonial Feminism/ Postcolonialism and Feminism' in Henry Schwarz and Sangeeta Ray (eds), *A Companion to Postcolonial Studies* (Blackwell Publishing, 2005) 53, 54.
[116] Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011) 44. The author explains that formal equality requires that men and women be treated identically in all circumstances, as opposed to substantive equality, which recognises that men and women are *not* equal.
[117] Ibid 37.
[118] Ursula A O'Hare, 'Realizing Human Rights for Women' (1999) 21(2) *Human Rights Quarterly* 364, 364.

men'.[119] These critiques do not omit the fact that in reality, women are not *entirely* absent from the international human rights arena. The development of women's rights law[120] and efforts in other branches of human rights law to encapsulate some aspects of women's experiences are examples. Yet feminist scholars contend that, where they are recognised, women are often viewed as victims in need of protection.[121] Hilary Charlesworth, Christine Chinkin and Shelley Wright explain the significance of women's invisibility in human rights law by referring to sexual violence:

> Because men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored. The orthodox face of international law and politics would change dramatically if their institutions were truly human in composition: their horizons would widen to include issues previously regarded as domestic-in the two senses of the word.[122]

International regulatory initiatives on business and human rights reproduce the bias of human rights law, as illustrated by the text of the UNGPs. Although the UNGPs recognise that corporate operations may have specific adverse impacts on women,[123] these inclusions seem to be largely rhetorical. Nowhere do the UNGPs provide for concrete measures to guide corporations to effectively prevent and address the effects their activities might have on women. In addition, while not entirely excluding women, the UNGPs highlight their 'vulnerability'.[124] These conclusions are highly problematic on several levels. First, they betray an erroneous understanding of women in mining as victims rather than workers and productive agents. Second, it perpetuates an essentialist discourse of women as solely victims of corporate patriarchal oppression. These arguments will be examined in details in the next chapter of this thesis. Yet at this stage, it is important to mention that by reproducing the deficiencies of international law, the business and human rights debate is unsuccessful in developing standards that are tailored to respond to women's specific experiences of business – and mining. It also

[119] Ibid 366.
[120] Notably the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
[121] Charlesworth, 'Feminist Methods in International Law' (n 3) 381. See also Dianne Otto, 'Holding up Half the Sky, But for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women' (1996) 6(1) *Australian Feminist Law Journal* 7.
[122] Charlesworth, Chinkin and Wright (n 101) 625.
[123] *UNGPs* (n 2) Principles 3, 12 and 18.
[124] Ibid Principles 3 and 18 (Commentaries); Office of the High Commissioner on Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (OHCHR, 2012) 11.

falls short of integrating women into the regulatory sphere as objects of regulation but also as agents, influencers and regulators.[125]

2 *Regulatory Theories and Women's Silence*

The influence of regulatory scholarship on the development of business and human rights standards might partially explain this situation. Strikingly, new governance and responsive regulation have largely failed to convey women's experiences of business activities. This is because regulatory theories have devoted no attention to sex and gender, including the gender of regulators and of those who are regulated.[126] The few studies that address both gender and regulation, including research on sexual violence,[127] tend to be feminist research addressing regulation rather than regulation theorists engaging with gender.[128] The gender bias of regulatory theories leads one to conclude that they do not constitute, on their own, an adequate framework upon which to base regulatory initiatives on business and human rights in a way that is adequate to address the concerns and experiences of women.

On another note, however, regulatory studies give an important regulatory role to non-State actors. In the context of human rights, they convey the idea of a networked governance of human rights wherein civil society and rights-holders have a role in challenging behaviours that violate human rights and contribute to the elaboration of human rights regulation.[129] The UNGPs attribute human rights responsibilities to business enterprises, which entails a possibility for corporations to self-regulate on their due diligence process[130] and to develop remedies for right-holders whose human rights have been violated.[131] Communities, consumers, civil society and investors are in charge of monitoring the actual implementation of these responsibilities.[132] Regulatory theories demonstrate some optimism as they rely on the

[125] These concerns extend to research on business, human rights and mining. Kuntala Lahiri-Dutt, 'Do Women Have a Right to Mine?' (2019) 31 *Canadian Journal of Women and the Law* 1. According to Kuntala Lahiri-Dutt, 'the application of a rights-based approach to industrial mining has, to date, been largely based on a limited interpretation of women's rights. The limited view construes women as being located outside of the mining industry, suffering the impacts of mining as victims, and resisting capitalist and patriarchal oppression. Such an incomplete focus on women's rights is contrary to a feminist perspective that is necessarily holistic as well as eclectic in its treatment of gender and women' (1–2).
[126] Simm, *Sex in Peace Operations* (n 6) 49–50.
[127] See, eg, Kathleen Daly, 'Sexual Assault and Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 62; Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge, 2011).
[128] Simm, 'Regulating Sex in Peace Operations' (n 13) 425.
[129] Hilary Charlesworth, 'A Regulatory Perspective on the International Human Rights System' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 357, 368.
[130] UNGPs (n 2) Principle 17.
[131] Ibid Principle 22.
[132] *Protect Respect and Remedy* (n 45) [54].

hope that corporations will be willing to regulate, and that NGOs and international organisations will have enough influence to foster effective regulation.[133] From a feminist regulatory perspective, this position is helpful. In fact, given the relative silence on women's specific experiences in business and human rights international instruments, NGOs and international organisations have played a significant role in making women's voices heard, in monitoring corporate behaviour and in fostering regulatory response to the violations of women's rights. In relation to mining-related sexual violence, for example, this role has been significant. The United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) issued a report in 2004 highlighting the logistical and financial support provided by Anvil Mining to the Congolese armed forces accused of raping women in the town of Kilwa.[134] This report constituted a reference for all judicial and non-judicial proceedings against the company. Likewise, the NGO Human Rights Watch conducted extensive investigations into allegations of sexual violence against Barrick Gold in Papua New Guinea. Its reports led the company to launch its own investigation and to develop a remedy framework for survivors. In that case, the company referred to the UNGPs on several occasions to illustrate its compliance with public regulation.[135] In that sense, regulatory theories, as well as multistakeholder and intergovernmental regulatory initiatives, may have a role to play in preventing sexual violence if, coupled with a feminist understanding of regulation as a tool to achieve women's rights, they allow expanded space for women and survivors' voices and agency.[136]

B *Sexual Violence in Mining and the Public/Private Divide*

The second theoretical aspect of the feminist regulatory framework used in this thesis relates to the public/private divide that characterises the Eurocentric origins of international law. By identifying this divide, feminist theories help understand why, in the business and human rights debate, sexual violence remains perceived as a private matter, and why standards regulating

[133] Charlesworth, 'A Regulatory Perspective on the International Human Rights System' (n 129) 368–369.
[134] MONUC, *Report on the Conclusions of the Special Investigation Into Allegations of Summary Executions and Other Violations of Human Rights Committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004* (MONUC, 2005).
[135] See, eg, Barrick Gold, *2017 Human Rights Report* (Barrick Gold, 2018).
[136] Laura J Shepherd, 'Sex, Security and Superhero(in)es: From 1325 to 1820 and Beyond' (2011) 13(4) *International Feminist Journal of Politics* 504. In this thesis, I understand women's 'agency' as encompassing 'the capacity to engage in formal and informal political discussion and decision-making, capacity to represent the interests of a [mining] community and capacity to insist upon 'the development of effective financial and institutional arrangements to ensure equality and participation' (510).

corporate conduct create a disconnection between mining companies' human rights responsibilities and sexual violence.

The public/private dichotomy refers to what feminist scholars have described as the distinction between the '"public" world of politics, government and the state and the "private" world of home, hearth and family'.[137] In this system, the public sphere is associated with stereotyped 'masculine' qualities, such as 'rationality, culture and intellectual endeavour', as opposed to 'feminine' characteristics of 'nature, nurture and non-rationality' typical of the private sphere.[138] In this context, sexual violence against women has traditionally been considered a violation of international human rights law only if it is connected to the public realm.[139]

I am aware of the caution needed in transposing the public/private divide to the business and human rights arena as corporations are traditionally neither subjects of international law nor 'public' stakeholders, and because this concept has been developed in relation to the role of the State.[140] Nevertheless, business and human rights regulation has brought corporations out of the 'unregulated periphery of international law'.[141] The UNGPs, for instance, anchor businesses' human rights responsibilities within social expectations, thus recognising, if not their public structure, the public dimension of their role, i.e. the expectation put on them to serve public interests.[142] This approach to the role of the private sector is not limited to the business and human rights debate, and international regulators have, previous to the adoption of the UNGPs, highlighted the changing roles played by multinational companies. In relation to the mining sector, for example, the United Nations Economic Commission for Africa and the African Union established that

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[137] Charlesworth, 'Feminist Methods in International Law' (n 3) 382.
[138] Thornton (n 102) 11–12.
[139] Charlesworth, 'Feminist Methods in International Law' (n 3) 382; Edwards (n 104) 70.
[140] Edwards (n 104). International human rights law is an exception to the horizontal application of international law as regulating the relations between States, as it has established a system of State responsibility for individual rights. However, Alice Edwards states that 'the system has focused almost exclusively on state action directed against individuals, rather than on so-called 'private' attacks against women in their homes or in other private settings' (65).
[141] Daria Davitti, 'On the Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence' (2012) 12(3) *Human Rights Law Review* 421, 343.
[142] John Ruggie, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/11/13 (22 April 2009) [46]–[48]. On debates regarding the public or private nature of corporations, see, eg, Olufemi O Amao, 'Reconstructing the Role of the Corporation: Multinational Corporations as Public Actors in Nigeria' (2007) 29 *Dublin University Law Journal* 312; Charlie Cray and Lee Drutman, 'Corporations and the Public Purpose: Restoring the Balance' (2005) 4(1) *Seattle Journal of Social Justice* 305; William H Simon, 'What Difference Does it Make Whether Corporate Managers Have Public Responsibilities' (1993) 50(4) *Washington and Lee Law Review* 1697.

> the roles and impacts of these entities go beyond providing revenue and employment and maximizing profits, thus increasing shareholders' value, that they have power and influence (actual and potential) beyond their formal location within legal and political structures, particularly those of developing countries, and that they should be recognized as conscious and influential participants in activities with a broad range of consequences.[143]

In addition, the reliance of international law on regulatory theory, notably through the UNGPs and other international instruments on business and human rights, sets corporations up as public regulators involved in developing publicly applicable due diligence norms through self-regulation. It is thus arguable that under international law on business and human rights, corporations hold some similarities with public stakeholders. In that context, the public/private dichotomy demonstrates that sexual violence may become a human rights violation associated with mining companies only if connected with the company in its public role.[144] Applied to a business setting, the recurring silencing of survivors' voices in regulatory initiatives conveys the idea that sexual violence is a private matter between individuals. As a result, mining companies are highly likely to consider that acts of sexual violence committed by their employees, the private security they employ, or their contractors are private acts outside of their duties – and therefore not attributable to the company – as opposed to the direct public effects of the companies' operations in the mining community. These elements will be analysed further in Chapter 6, notably, to establish how regulatory standards on business and human rights push sexual violence further within the private realm.

C *Multinational Mining, Diversity and Intersectionality*

Finally, feminist scholarship on diversity and intersectionality provides a critical lens to explain why the impacts of business activities on indigenous women or women from the global South are still considered to a lesser extent. It allows corporate and non-corporate stakeholders to think about regulation in a way that takes into account the context, region and domain of corporate activities, and that identifies how these factors interact with business operations in a way that can adversely affect women. From a practical point of view, a feminist regulatory framework that focuses on the diversity and intersectionality of women's experiences may encourage, for example, mining companies to implement international standards on women's rights in a way that is well received in their country of operation, and in close cooperation with

[143] Economic Commission for Africa, *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes* (UNECA, 2011) 81.
[144] Charlesworth, 'Feminist Methods in International Law' (n 3) 382.

local women. In fact, multinational mining companies generally have very sophisticated community engagement mechanisms in place, some specifically tailored to working with women on gender issues.[145] However, there is some discrepancy between such engagement and self-regulatory outcomes in relation to the specific risks faced by different women. The Responsible Mining Index[146] reports that in 2020, one mining company showed 'minimal evidence' in its internal policies and systems of tracking, reviewing and disclosing data on its performance on managing any impacts of its activities on women.[147] None of the 37 other large-scale mining companies assessed demonstrated any action on this issue.[148] These findings demonstrate that, largely, mining companies are not responding effectively to the differentiated impacts of their operations on women. This calls for more systematic and intersectional feminist perspectives on regulation.

'Intersectionality' is a term popularised in 1989 by Kimberlé Crenshaw to illustrate the various ways in which race and gender interact to inform the multiple dimensions of Black women's experiences.[149] It has since been expanded in feminist scholarship to question the power relationships and systemic conditions that shape women's experiences and reproduce conditions of inequality. According to the Association for Women's Rights in Development, '[i]ntersectionality is an analytical tool for studying, understanding and responding to the ways in which gender intersects with other identities and how these intersections contribute to unique experiences of oppression and privilege'.[150] The adoption of an intersectional approach to

[145] See, eg, Deanna Kemp et al, *Why Gender Matters A Resource Guide for Integrating Gender Considerations into Communities Work at Rio Tinto* (Rio Tinto, 2009).
[146] Responsible Mining Foundation, *RMI Framework and Methodology 2020* <https://www.responsibleminingfoundation.org/rmi-framework-2020/>. The Responsible Mining Index 'includes information on a set of 43 topics, providing brief overviews of each topic as well as the company-wide indicators and metric questions used in the RMI assessment to measure mining company policies and practices covering the key six thematic areas of Economic Development, Business Conduct, Lifecycle Management, Community Wellbeing, Working Conditions and Environmental Responsibility'.
[147] Responsible Mining Foundation, *Responsible Mining Index 2020: Results* <https://2020.responsibleminingindex.org/en/results/thematic/318>.
[148] Ibid.
[149] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) *University of Chicago Legal Forum* 139; Kimberlé Williams Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) *Stanford Law Review* 1241. However, the concept of intersectionality can be traced back farther: Bim Adewunmi, 'Kimberlé Crenshaw on Intersectionality: "I Wanted to Come up with an Everyday Metaphor that Anyone could Use"', *New Statesman* (London, 2 April 2014). In the words of Crenshaw about her work: 'So many of the antecedents to it are as old as Anna Julia Cooper, and Maria Stewart in the 19th century in the US, all the way through Angela Davis and Deborah King. […] In every generation and in every intellectual sphere and in every political moment, there have been African American women who have articulated the need to think and talk about race through a lens that looks at gender, or think and talk about feminism through a lens that looks at race. So this is in continuity with that.'
[150] Association for Women's rights in Development, *Intersectionality: A Tool for Gender and Economic Justice* (AWID, 2004) 1.

regulation by mining companies and other regulators is essential in order to identify and respond to the various domestic and transnational relations of power that create risks of sexual violence and shape the experiences of women in mining communities. In practice, intersectionality encourages regulators involved in the mining sector to engage with several questions, such as those laid down by Susan Manning in her intersectional study of sexual violence in Barrick Gold's Porgera mine:

> Who benefits from and who bears the cost of resource extraction? How is sexual violence a symptom of broader structural violence? What transnational relationships of power must be examined to begin to find an effective solution to violence and appropriate compensation? How is building a link between sexual violence and Barrick Gold as a company based in Canada an act that has political implications for Barrick, the Canadian government and the women in Porgera?[151]

Effective regulation and self-regulation of mining-related sexual violence would thus require real effort from multinational mining companies to challenge their assumptions about survivors and sexual violence, as well as to recognise their own role, as exploitative powers, in nurturing power imbalances and perpetuating intersectional discrimination and violence against women. More importantly from a feminist perspective, for mining companies operating in transnational environments, self-regulating to address sexual violence necessitates understanding the intersectional experiences and socio-cultural references of survivors. This might be a difficult task for corporations mainly incorporated in Western countries, which may develop internal standards applicable uniformly to the entirety of their operations. Such work echoes the concerns of postcolonial feminists, among others, who have critiqued the perception of non-Western or poor women as victims without agency. As pointed out by Chandra Mohanty, '[w]omen are constituted as women through the complex interaction between class, culture, religion and other ideological institutions and frameworks. They are not "women" – a coherent group – solely on the basis of a particular economic system or policy.'[152] Interestingly, however, the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (OECD Guidance on Stakeholder Engagement) – the only international guideline to advise transnational mining companies on applying a gender perspective throughout their stakeholder engagement – while recognising the intersecting factors faced by women,[153] suggests that these factors be taken into account by enterprises to identify 'the most

[151] Susan M Manning, 'Intersectionality in Resource Extraction: A Case Study of Sexual Violence at the Porgera Mine in Papua New Guinea' (2016) 18(4) *International Feminist Journal of Politics* 574, 576.
[152] Mohanty (n 103) 344.
[153] *OECD Guidance on Stakeholder Engagement* (n 33) 102.

[…] vulnerable'[154] women, perpetuating the vision of indigenous women and women from the global South as victims. This example demonstrates the flawed potential of international regulatory initiatives to address mining-related sexual violence in line with feminist objectives. As will be discussed throughout this thesis, survivors of sexual violence might be better served by overlapping layers of regulation that integrate women's rights standards and embrace the regulatory agency of women and survivors.

The focus on intersectional feminism means that a feminist regulatory framework to regulate mining operation, as conceived in this thesis, cannot be rigid. It needs to fluctuate according to the specific considerations that come with specific mining operations, such as geographical context, the community affected etc. It needs to be flexible enough to allow for responsiveness to local conditions.[155] In fact, Leslie McCall emphasises the fact that research embracing intersectionality should acknowledge the multiple, complex and changing social relations it addresses – and consider more than gender, race and class.[156] In other words, a research framework may remain changeable to embrace the malleability of the social relations it embodies. This comes with a risk of inconsistence in practice, which may act as a deterrent to some mining companies and other regulators but are essential to respond effectively to the needs and singular experiences of survivors.

V CONCLUSION

This chapter establishes the theoretical bases through which the concept of human rights due diligence and its application to mining-related sexual violence will be analysed. While regulatory theories have the benefit of allowing flexibility and certain levels of responsiveness to the violation of women's human rights in corporate settings, their practical implementation demonstrates that the regulation of business and human rights relies more on the discretion and interests of regulators than on those of women affecting by and participating in mining activities. [157] From a feminist perspective, this approach contributes to the silencing of women's voices and to increased imbalances of power between multinational mining companies and survivors of sexual violence. These concerns justify the elaboration of the feminist regulatory framework used in Chapter 4 of this thesis as a tool to assess the extent to which international

[154] Ibid 100.
[155] Charlesworth and Chinkin, 'Regulatory Frameworks in International Law' (n 6) 265.
[156] Leslie McCall, 'The Complexity of Intersectionality' (2005) 30(3) *Signs: Journal of Women in Culture and Society* 1771.
[157] Charlesworth and Chinkin, 'Regulatory Frameworks in International Law' (n 6) 265.

regulatory standards establishing human rights due diligence either ignore sexual violence or assess it inadequately. The feminist regulatory framework also allows me to achieve two objectives from chapters 4 to 8. The first, developed in chapters 4 and 5, is to provide a critique of the mainstream narratives used in international business and human rights instruments. By discarding women's experiences of mining operations and promoting de facto gender-neutral human rights due diligence, international regulation conflicts with feminist objectives in relation to sexual violence. The second goal, established in chapters 6, 7 and 8, is to identify throughout various layers of regulation – including corporate, State and civil society-based regulation – specific types of regulatory strategies that may be used in the mining industry to prevent risks of sexual violence against women in communities of operation.

PART II: ASSESSING INTERNATIONAL INSTRUMENTS AND THE POTENTIAL OF HUMAN RIGHTS DUE DILIGENCE TO PREVENT MINING-RELATED SEXUAL VIOLENCE

CHAPTER 4: WOMEN'S RIGHTS, SEXUAL VIOLENCE AND THE INTERNATIONAL REGULATION OF BUSINESS AND HUMAN RIGHTS

I INTRODUCTION

For the past five decades, various soft law international instruments have tried to fill avoid in international law that allowed companies to operate without any legal obligations, and to regulate corporate behaviour.[1] In that context, a number of inter-governmental organisations have developed voluntary guidelines, declarations and codes of conduct to prevent business-related human rights violations. Two of the most notable efforts are those of the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO).[2] As discussed earlier, the UNGPs emerged in 2011 from decades of reliance on soft measures and, although not legally binding on corporations, they have become the most influential set of international standards in relation to business and human rights. Subsequent international instruments have applied the UNGPs to specific sectors, particularly those with history of poor social and environmental performance, such as the extractive, clothing and footwear industries, among others.[3] It is not possible in this chapter to analyse all existing international standards, although some of those relevant to the mining industry will be mentioned for contextualisation purposes. Rather, I focus here on the UNGPs and guidelines developed by the OECD that, despite their general character and their applicability across industries, have significantly influenced multinational mining companies.

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[1] Justine Nolan, 'The Corporate Responsibility to Respect: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 138–161, 146.

[2] Ibid 147.

[3] See, eg, OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018); OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2016) ('*OECD Guidance on Minerals*'); OECD, *OECD Guidelines for Multinational Enterprises*, 2011; OECD, OECD *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (2017) ('*OECD Guidance on Stakeholder Engagement*').

In the overwhelming majority of these regulatory initiatives, human rights due diligence is a key element. Human rights due diligence, as applied to corporations, was introduced in the UNGPs that linked business enterprises' responsibility to respect human rights to a 'dynamic and ongoing'[4] 'human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'.[5] Some have argued convincingly that regulatory initiatives can be considered effective if they combine the ability to prevent companies from violating human rights with the authority to provide adequate options for redress and remedy to individuals whose human rights have been violated.[6] By focusing on human rights due diligence, this and following chapters primarily assesses the preventative potential of regulatory initiatives.

This chapter concentrates on the international regulation of business conduct as opposed to the corporate, State and civil society regulatory spheres, which will be explored in ensuing chapters. This chapter uses feminist arguments to critique the international regulation of business conduct. It highlights how international standards on business and human rights support patterns of discrimination against women and contribute to the invisibility of women in international law. While sexual violence features to some extent as a specific risk obscured by regulation, this chapter engages in a broader analysis of international instruments as generally marginalising women's experiences of business activities. Two reasons justify this approach. First, as demonstrated in Chapter 3, international business and human rights regulation is inspired by regulatory theories that are largely oblivious to considerations of sex and gender. Consequently, international standards only address sexual violence to a limited extent, which, while a critique in itself, offers insufficient ground to focus solely on an analysis of sexual violence. Second, as will be developed in subsequent chapters, international standards have significantly informed the corporate, State and civil society layers of human rights due diligence regulation. It is thus important to understand how they portray women, women's rights and women's experiences, to assess how such representation has shaped other regulatory practices in relation, specifically, to sexual violence.

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[4] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/14/27 (9 April 2010) [84].

[5] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) Principle 15 ('*UNGPs'*).

[6] Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2017) 47.

In order to demonstrate the limitations of international standards in addressing women's experiences of business and mining activities, I first briefly describe the regulatory context in which these concerns emerged. Specifically, I present the instruments that will be examined in this chapter, and elaborate on their superficial approach to gender. In Section III, I assess these standards though a feminist regulatory lens and conclude that they perpetuate stereotyped and prejudicial representations of women despite a self-professed commitment to women's human rights. Indeed, they fail to give international women's rights their full relevance to business and human rights affairs. While bolstering an image of women as 'victims' of business operations, international standards also make women's experiences of sexual violence in mining exceptional despite evidence of sexual violence being an anticipated outcome of mining operations. This leads international regulatory initiatives to fail to recognise the responsibility of corporations for sexual violence even when they explicitly recognise the risk. I conclude that a feminist understanding of international business and human rights regulation supports better integration of women's rights and experiences of corporate contexts into international law-making, through increased participation of women as regulators and strengthened knowledge of the impacts of mining on women.

II INTERNATIONAL STANDARDS AND INTEGRATING GENDER IN BUSINESS AND HUMAN RIGHTS

A *The UNGPs and a Rhetorical Approach to Women*

While not entirely ignoring women, business and human rights has generally addressed women's rights and experiences of business operations in a superficial way. The rest of this chapter uses feminist arguments to comment on international instruments as failing to provide a comprehensive account of women's roles in business and mining activities, and substantive responses to the specific risks faced by women in these contexts. This section focuses on the language of international instruments on business and human rights, which, according to feminist scholars, is a factor that excludes women from the scope of protection offered by human rights standards. In other words, the recurring use of masculine vocabulary and pronouns in the context of human rights law operates to exclude women at both a direct and subtle level.[7] While Dale Spender, for example, argues that language has been used by the

[7] Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011) 61.

dominant group to structure women's oppression,[8] Hilary Charlesworth, Christine Chinkin and Shelley Wright claim that language 'reinforce[s] hierarchies based on sex and gender, even if it is intended to be generic'.[9] More problematic than the pervasiveness of masculine vocabulary in international instruments is the way masculine referents influence the meaning of substantive norms, including in business and human rights. Based on the work of Canadian sociologist Dorothy Smith on feminist textuality, Penelope Simons and Melissa Handl contend that the text used in business and human rights instruments 'can also be constitutive of a reality that may or may not be consistent with the lived reality of the women affected by business activity, such as resource extraction'.[10] This is particularly problematic, they contend, as texts like the UNGPs 'shape the views and practices of institutions (such as states and intergovernmental organizations like the United Nations (UN), expert bodies like the UN Working Group on Business and Human Rights), and other actors (such as business enterprises)',[11] and 'operate to discipline how the various actors using them think about a particular issue (such as the regulation of the human rights impacts of business activities)'.[12] I aim to demonstrate that the language used by international regulators is illustrative of the cosmetic way in which they integrate women in regulation generally and the consequent invisibility of women.

The Human Rights Council endorsed the 'Protect, Respect and Remedy' Framework developed in 2008.[13] On that occasion, it also extended the Special Representative's mandate for three additional years in order for him to develop practical recommendations to implement the Framework.[14] During this process, it specifically requested that John Ruggie 'integrate a gender perspective'[15] into his endeavours to operationalise the Framework. Despite initial uncertainty from the Special Representative as to how to incorporate gender as a cross-cutting theme in his work,[16] the final version of the UNGPs includes references to gender, to the specific risks

[8] Dale Spender, *Man Made Language* (Pandora, 2nd ed, 2001).
[9] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613, 628.
[10] Penelope Simons and Melisa Handl, 'Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction' (2019) 31(1) *Canadian Journal of Women and the Law* 113, 117.
[11] Ibid.
[12] Ibid.
[13] Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/RES/8/7 (18 June 2008), [1] ('*HRC Resolution 8/7*').
[14] Ibid [4].
[15] Ibid.
[16] Bonita Meyersfeld, 'Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 193, 197.

business activities create for women[17] and to gender-based and sexual violence. Guiding principle 3 requires that States guide businesses on 'how to consider effectively issues of gender [...] recognizing the specific challenges that may be faced by [...] women'.[18] Guiding principle 12 refers business enterprises to international instruments on the rights of women.[19] On corporate due diligence, the commentary to guiding principle 18 recommends that in the process of identifying and assessing the human rights impacts of their activities, companies should 'bear in mind the different risks that may be faced by women and men'.[20]

These textual inclusions, however, seem to be rhetorical. Neither guiding principle 18 nor any other guiding principle provides for concrete measures to guide corporations to prevent and address specific adverse impacts their activities might have on women. They are limited to incorporating generic references to 'specific challenges' or 'risks' faced by women, without significant guidance on systemic changes required by all involved stakeholders (States and corporations, notably) to prevent and address these risks effectively. This 'add women and stir' approach is what feminist scholars have consistently critiqued.[21] On the one hand, it illustrates how the UNGPs, and business and human rights instruments generally, adopt a 'male' standard against which all individuals are judged and make women a deviation from that standard.[22] In that sense, the apparently non-gender specific principles established by the UNGPs are in reality specific in their relevance and application to men's experiences of business activities.[23] On the other hand, it fails to recognise the double bias international regulation on business and human rights imposes on women: as international standards underestimate the full extent and the intersectional nature of business impacts on women, they further deprive women of the benefits of business by making women's experiences, roles and needs secondary.[24]

[17] *UNGPs* (n 5) Principle 18 (Commentary).
[18] Ibid Principle 3 (Commentary).
[19] Ibid Principle 12 (Commentary). On how guiding principle 12 marginalises women's rights, see Penelope Simons, 'Unsustainable International Law: Transnational Resource Extraction and Violence against Women' (2017) 26 *Transnational Law & Contemporary Problems* 415; Simons and Handl (n 10).
[20] *UNGPs* (n 5) Principle 18 (Commentary).
[21] Kuntala Lahiri-Dutt, 'Digging Women: Towards a New Agenda for Feminist Critiques of Mining' (2012) 19(2) *Gender, Place & Culture* 193, 195.
[22] Edwards (n 7) 53.
[23] Ibid.
[24] See, eg, on that matter, Ginger Gibson and Deanna Kemp, 'Corporate Engagement with Indigenous Women in the Minerals Industry: Making Space for Theory' in Ciaran O'Faircheallaigh and Saleem H Ali (eds), *Earth Matters Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility* (Greenleaf Publishing, 2008) 104–122.

B *OECD Standards and the Invisibility of Women*

1 *The OECD, Women and Multinational Companies*

This critique of the UNGPs can be extended to other international instruments that have reproduced or applied the UNGPs to specific sectors and industries, including mining. In fact, many other international standards have been influential in shaping the international regulation of mining. Some of them, including the United Nation's Global Compact[25] and the Voluntary Principles on Security and Human Rights,[26] do not mention women or sexual violence. While this conclusion is problematic – for it illustrates the relative invisibility of women in the business and human rights debate – it also justifies why these instruments will not be studied in this chapter. Others, like the Women's Empowerment Principles, mostly concern women in the workplace, which is outside the scope of this research.[27] The regulatory work of the OECD, however, will be explored in this chapter as, alongside the UNGPs, it constitutes one of the most prominent efforts to regulate the impacts of business operations on human rights. The 1976 OECD Guidelines for Multinational Enterprises (OECD Guidelines for MNE), notably, were developed as an intergovernmental instrument providing recommendations by government to multinational enterprises operating in or from OECD countries.[28] They establish 'principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards'[29] and address several subjects, including human rights, employment and industrial relations, environment, bribery, consumer

[25] United Nations Global Compact, *The World's Largest Corporate Sustainability Initiative* <https://www.unglobalcompact.org/what-is-gc/>; United Nations Global Compact, *The Ten Principles of the UN Global Compact* <https://www.unglobalcompact.org/what-is-gc/mission/principles>. The 2000 United Nations Global Compact (UNGC) is a policy framework defined as 'the world's largest corporate sustainability initiative' and 'a leadership platform for the development, implementation and disclosure of responsible corporate practices. It calls companies to align their practices with ten principles in the areas of human rights, labour, environment and anti-corruption.

[26] Voluntary Principles on Security and Human Rights, *The Voluntary Principles on Security and Human Rights* <https://www.voluntaryprinciples.org/the-principles/>. Established in 2000, the Voluntary Principles on Security and Human Rights (VPs) constitute 'a set of principles designed to guide companies [in the extractive and energy sectors] in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms'.

[27] United Nations Global Compact, *Women's Empowerment Principles, the UN Global Compact and the Guiding Principles on Business and Human rights* (UNGC, 2015). In 2010 the UNGC and UN Women launched the Women's Empowerment Principles (WEPs) as a complementary tool to both the UNGC and the UNGPs. Deriving from an international multi-stakeholder consultation process, the WEPs were developed as a set of non-binding standards for corporations, 'offering seven steps for how to empower women in the workplace, marketplace and community'. See also Maureen A Kilgour, 'The Global Compact and Gender Inequality: A Work in Progress' (2013) 52(1) *Business & Society* 105, 119.

[28] *OECD Guidelines for Multinational Enterprises* (n 3) 3.

[29] Ibid.

interest, science and technology, competition and taxation.[30] The OECD Guidelines for MNE were updated in 2011 and are now fully aligned with the 'Protect, Respect and Remedy' framework implemented by the UNGPs.[31]

The Guidelines were complemented in 2018 by the OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance for Responsible Business Conduct), which constitutes the most recent set of OECD standards. It 'provides practical support to enterprises on the implementation of the OECD Guidelines for MNE by providing plain language explanations of its due diligence recommendations and associated provisions'.[32] The 2018 Guidance is important because it provides some answers, lacking in the Guidelines for MNE, on ways companies can integrate gender issues into their due diligence processes.[33] For example, it calls on companies to identify and remove potential barriers to stakeholder engagement, such as 'gender and power imbalances'.[34] It also encourages companies to account for how risks 'affect different groups, such as applying a gender perspective' in their due diligence processes.[35] The Guidance goes further than the UNGPs and expands on the necessity to increase the visibility of women in business operations. According to Joanna Bourke Martignoni and Elizabeth Umlas,

> the brief section on integrating gender issues into due diligence goes farther than industry-facing publications generally do in that it calls explicitly for elements such as identifying intersectionality, developing gender-responsive 'protection of whistleblowers', assessing 'whether women benefit equitably in compensation payments' and identifying 'gender-specific trends and patterns' in negative impacts. In this sense, the Guidance provides a start.[36]

Yet, as will be elaborated upon below, they do so in a way that does not depart significantly from the tendency in the business and human rights debate to privilege the realities of men's

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[30] Ibid.
[31] OECD, *Consultation on the Guidelines for Multinational Enterprises and the UN 'Protect, Respect and Remedy' Framework* <http://www.oecd.org/daf/inv/investmentfordevelopment/consultationontheguidelinesformultinationalenterprisesandtheunprotectrespectandremedyframework.htm>. John Ruggie was involved in the consultation process to discuss the potential role of the OECD Guidelines on MNE in the operationalisation of the UN 'protect, respect and remedy' framework. Changes to the OECD Guidelines for MNE include the addition of a Chapter IV on human rights and a new approach to human rights due diligence.
[32] OECD *Due Diligence Guidance for Responsible Business Conduct* (n 3).
[33] Ibid 41.
[34] Ibid 51.
[35] Ibid 17.
[36] Joanna Bourke-Martignoni and Elizabeth Umlas, *Gender-Responsive Due Diligence for Business Actors: Human Rights-Based Approaches* (Geneva Academy, 2018) 25.

lives and marginalise those of women.[37] For instance, they failed to mainstream women's concerns by providing concrete examples of gender issues that may be included in companies' due diligence processes. Instead, they use a general language that reveals an understanding of men's experiences of business as the basis of analysis, and of women's experiences as an addition to this basis.

2 *The OECD, Women and Mining*

The OECD has also developed international instruments precisely aimed at regulating the conduct of mining companies. Indeed, the 2010 OECD Due Diligence Guidance for responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Guidance on Minerals) applies the OECD Guidelines for MNE to mineral supply chains.[38] The OECD Guidance on Minerals provides 'detailed recommendations to help companies respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices'.[39] Although the OECD Guidance on Minerals is an influential international standard – in the sense that it is referenced and reproduced in numerous international declarations, regulations and initiatives – its actual implementation is inconsistent.[40] For example, in 2017 a coalition of NGOs established that most States that had endorsed the Guidance demonstrated limited efforts to promote and monitor its implementation.[41] This has led to substantial gaps in the implementation of the Guidance by companies themselves, with very few companies in the minerals sector actively engaged in due diligence or meeting the Guidance's due diligence standards.[42]

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[37] For a feminist critique of the way international instruments reflects men's experiences, see Anne Gallagher, 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System' (1997) 19 *Human Rights Quarterly* 283.
[38] *OECD Guidance on Minerals* (n 3). The OECD Guidance on Minerals was first adopted in 2010 and subsequently reviewed in 2013 and 2016.
[39] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Helping Industries Meet Responsible Sourcing Expectations* <http://mneguidelines.oecd.org/mining.htm>.
[40] See, eg, International Conference on the Great Lakes Region, *Lusaka Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region* (15 December 2010); SC Res 1952, UN Doc S/RES/1952 (29 November 2010); *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas*, [2017] L(30) OJ 1.
[41] Human Rights Watch, *Proposal: Improving Implementation of the OECD Due Diligence Guidance Through Reporting and Assessment* <https://www.hrw.org/news/2017/07/07/proposal-improving-implementation-oecd-due-diligence-guidance-through-reporting-and>.
[42] Ibid.

Also relevant to the mining industry is the OECD Guidance on Stakeholder Engagement adopted in 2017 as a tool to implement the OECD Guidelines for MNE. The OECD Guidance on Stakeholder Engagement 'provides practical guidance to mining, oil and gas enterprises in addressing the challenges related to stakeholder engagement',[43] and supports companies to 'engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities'.[44] The OECD Guidance on Stakeholder Engagement is the only OECD instrument regulating business due diligence processes that contains a specific section on women, elaborated in its Annex C 'Engaging with women'.[45] Annex C encourages companies to 'apply a gender perspective throughout stakeholder engagement to allow enterprises to account for the often unequal power relationships between men and women' and provides advice on measures to be taken to achieve this objective. These include, for example, consulting gender-disaggregated data, identifying women leaders with whom to engage or meeting separately with women.[46] The Guidance represents an important step in recognising the different impacts of extractive operations on men and women, including gender-based and sexual violence,[47] and a valuable effort to integrate women's concerns into supply chain regulation. Nevertheless, as with the other instruments developed by the OECD, it reproduces the gender bias present in the UNGPs and other standards on business and human rights. This is discussed in the following section.

III A FEMINIST REGULATORY APPROACH TO INTERNATIONAL REGULATION ON BUSINESS AND HUMAN RIGHTS

A *Selective Regulation and Marginalising Women*

Discussions on the international regulation of corporate conduct and its extension to specific contexts and industries have largely mirrored the mainstream narratives in international law that either ignore women's experiences of violence or address them in a way that conflicts with feminist objectives. The first feminist theme outlined in this chapter is the exclusion of women from the business and human rights discourse, and the resulting discarding of women's rights from international regulatory initiatives. Specifically, business and human rights instruments

[43] *OECD Guidance on Stakeholder Engagement* (n 3) 3.
[44] Ibid.
[45] Ibid 100.
[46] Ibid 100–102.
[47] Ibid 46, 48 and 100.

have acknowledged specific human rights treaties that international regulators have considered relevant to business operations, and pushed other standards, including those concerning women's rights, into the background. First in the UNGPs, the normative content of the corporate responsibility to respect human rights are defined, among others, in guiding principle 12 that establishes that such responsibility

> refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[48]

These documents contain 'an authoritative list of the core internationally recognized human rights'[49] and are 'the benchmarks against which other social actors assess the human rights impacts of business enterprises'.[50] The commentary on guiding principle 12 also specifies that, depending on circumstances, business enterprises may need to consider additional standards. These standards may address, for instance, the human rights of individuals belonging to specific groups or populations that require particular attention – including women – where corporate activities may have adverse human rights impacts on them.[51] In this connection, the UNGPs refer companies to United Nations instruments that elaborate further the rights of specific groups such as women.[52] The OECD Guidelines for MNE and the OECD Guidance on Minerals use very similar language, largely reproducing the UNGPs.[53] As a result, the UNGPs are the focus of this section, but my findings apply to all three instruments.

The commentary to guiding principle 12 rightly indicates that 'business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights'.[54] Based on this assertion, scholars have interpreted the responsibility to respect as applying to all such rights.[55] In his 2008 report, Ruggie mentioned that 'because companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts'.[56] However, the final formulation of the guiding principle 12 and its commentary suggests

[48] *UNGPs* (n 5) Principle 12.
[49] Ibid Principle 12 (Commentary).
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] *OECD Guidelines for Multinational Enterprises* (n 3) 32; *OECD Guidance on Minerals* (n 3) 64 (note 4).
[54] *UNGPs* (n 5).
[55] Castan Centre for Human Rights Law Monash University, *Human Rights Translated 2.0: A Business Reference Guide* (Monash University, 2016).
[56] *UNGPs* (n 5) [24].

otherwise. The phrase 'at a minimum'[57] implies that while the rights listed in the International Bill of Human Rights and the core International Labour Organization's conventions are the 'basic reference points'[58] for companies, the latter should also take into account *additional* standards depending on their specific operations and circumstances. Surya Deva has criticised this approach and described it as 'minimalist'.[59] By distinguishing between 'an authoritative list of the core internationally recognized human rights'[60] and additional standards that may be considered depending on circumstances',[61] guiding principle 12 excludes norms relating to the rights of groups such as women and fails to provide concrete guidance to companies in understanding their human rights responsibilities.[62] According to Penelope Simons and Melissa Handl, this suggests that in business and human rights, women's human rights are less relevant to corporations than other supposedly 'gender-neutral' treaties.[63] Similarly, Mona Paré and Tate Chong argue that mentioning the rights of groups or populations that require specific attention in a commentary rather than in the principle relegates them to 'a second-class consideration'.[64] They further demonstrate that the sentence 'where they may have adverse human rights impacts on them'[65] included in the commentary to guiding principle 12 indicates that such rights should not be considered in every case.[66] Guiding principle 12 thus provides companies with a set of core human rights standards as primary reference and leaves open to debate the larger spectrum of recognised rights.[67]

This approach deviates from the widely accepted doctrine that the international human rights framework is broader than the International Bill of Human Rights and extends to nine 'core international human rights instruments'.[68] The Office of the High Commissioner on Human Rights recommends that these core treaties be read as a whole and states that 'although separate and free-standing, the treaties also complement each other, with a number of principles binding

[57] Ibid Principle 12.
[58] Office of the High Commissioner on Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (OHCHR, 2012) 11.
[59] Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9 *European Company Law* 101, 105.
[60] *UNGPs* (n 5) Principle 12 (Commentary).
[61] *UNGPs.*
[62] Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (n 59) 105.
[63] Simons and Handl (n 10) 133.
[64] Mona Paré and Tate Chong, 'Human Rights Violations and Canadian Mining Companies: Exploring Access to Justice in Relation to Children's Rights' (2017) 21(7) *The International Journal of Human Rights* 908, 911.
[65] *UNGPs* (n 5) Principle 12 (Commentary).
[66] Paré and Chong (n 64) 911.
[67] Robert C Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48 *Texas International Law Journal* 33, 45.
[68] Office of the High Commissioner on Human Rights, *The Core International Human Rights Instruments and their Monitoring Bodies* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

them together'.[69] It adds that the treaties 'are interdependent, interrelated and mutually reinforcing, so that no right can be fully enjoyed in isolation, but depends on the enjoyment of all the other rights'.[70] On that matter, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) declares that 'despite [the instruments constituting the International Bill of Human Rights,] extensive discrimination against women continues to exist'.[71] Likewise, the 1993 Vienna Declaration and Programme of Action recognises that '[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis'.[72] It also states that 'the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights'.[73] The UN Working Group on Business and Human Rights, while not directly denouncing the approach adopted in the UNGPs, also emphasised that 'since women's human rights are an inalienable, integral and indivisible part of universal human rights, both States and business enterprises should take concrete steps to identify, prevent and remedy gender-based discrimination and inequalities in all areas of life'.[74]

From a feminist regulatory perspective, the divisibility of human rights implied by guiding principle 12 demonstrates that the international regulation of business activities echoes the normative structure of international law, which privileges men's interests and ignores or undermines women's experiences. It suggests that the concerns of business and human rights do not generally have particular impacts on women.[75] Only in specific circumstances that business enterprises themselves pinpoint as directly relevant to women are they encouraged to examine international standards on women's human rights. Through this approach, the UNGPs also mirror the operation of the public/private distinction common in international law, which, as explained by feminist scholars, attributes greater significance to the public, masculine sphere, than to the private, feminine one.[76] This is not surprising as the ambition of international

[69] Office of the High Commissioner on Human Rights, *Fact Sheet No. 30/Rev 1: The United Nations Human Rights Treaty System*, UN Doc No. 30/Rev.1 8.
[70] Ibid.
[71] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) Preamble ('*CEDAW*').
[72] *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993), art 5 ('*Vienna Declaration*').
[73] Ibid art 18.
[74] Human Rights Council, G*ender Dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the Issue of Human rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/41/43 (23 May 2019) [3] ('*Gender Dimensions of the UNGPs*').
[75] Charlesworth, Chinkin and Wright (n 9).
[76] Ibid 626.

standards on business and human rights is to regulate the realm of the workplace, economics, the law and politics, which all characterise the public realm and are the 'natural province[s] of men'.[77] Yet, the consequence of making women's rights secondary is that the UNGPs, and standards on business and human rights more generally, have largely silenced or dismissed women's voices and concerns in relation to business activities.

This situation is evolving. While in the UNGPs women's concerns are 'relegated to a special, limited category',[78] the UN Working Group on Business and Human Rights has explained that in its *implementation*, guiding principle 12 should be understood as encouraging companies to 'consider, among other instruments, the Convention on the Elimination of All Forms of Discrimination against Women […] relevant in *all circumstances* and throughout their operations'.[79] This would allow companies, according to the working group, 'to avoid the risk of adopting a gender-neutral reading of human rights under the International Bill of Human Rights'.[80] This recommendation, although commendable, is limited and fails to promote comprehensive corporate responses to systemic violations of women's human rights that occur in business settings. In relation to sexual violence, specifically, the CEDAW does not refer to sexual violence against women except in article 6, which prohibits 'all forms of traffic in women and exploitation of prostitution of women'.[81] Since the Working Group recognises that sexual violence is 'pervasive in all walks of life', including in extractive activities, where it is deemed an 'endemic problem',[82] it would have been appropriate to establish the regulatory framework corporations are referred to as including non-binding but influential standards specifically addressing this issue. These include, for example, the Declaration on the Elimination of Violence against Women, which proscribes physical, sexual and psychological violence against women,[83] the Vienna Declaration and Programme of Action,[84] the Beijing Declaration and Platform of Action[85] and the general comments and recommendations of treaty bodies.[86]

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[77] Ibid 126.
[78] Ibid 625.
[79] *Gender Dimensions of the UNGPs* (n 74) Principle 12 [23], emphasis added.
[80] Ibid [24].
[81] *CEDAW* (n 71) art 6.
[82] *Gender Dimensions of the UNGPs* (n 74) [14].
[83] *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN Doc A/RES/48/104 (20 December 1993) arts 1 and 2.
[84] *Vienna Declaration* (n 72) [18] and [38].
[85] *Beijing Declaration and Platform for Action*, UN Doc A/CONF.177/20 and A/CONF.177/20/Add.1 (15 September 1995) [112]–[130].
[86] See, eg, CEDAW Committee, *General Recommendation No. 19: Violence Against Women*, UN Doc

Specifying international standards that are relevant to address sexual violence and, generally, women's experiences of business operations is an essential element of a feminist regulatory framework. Indeed, despite the Special Representative's and other scholars' reluctance to delimit expansive responsibilities for companies based on an extensive list of human rights standards,[87] the selective approach adopted by the UNGPs leaves companies that are largely unfamiliar with international human rights law, with the task of identifying which standards they should consider in their industry and operational contexts. Corporate practice so far has demonstrated that most companies find this requirement confusing,[88] especially as international human rights law is a complex and specialised field characterised by legalistic language.[89] Identifying which human rights instruments apply to a particular situation and applying them with accuracy and precision requires from companies expertise in, or at the very least familiarity with,[90] several branches of international human rights law, including women's rights. The required level of expertise might be a deterrent for businesses, which might not be able to make sense of the seemingly obscure provisions that would allow them to assess effectively the potential impacts of their activities on women. [91] Although it can be argued that multinational mining companies have the resources available to hire experts for these issues, the number of lawyers who understand the linkages between large-scale mining and sexual violence is relatively limited, making this task potentially difficult.[92]

In this context, a feminist regulatory approach to mining operations aims to put women's needs and experiences at the forefront of mining companies' human rights due diligence strategies. This involves shifting away from the prevailing disposition of business and human rights regulation to select international human rights instruments of specific interest for corporations and to identify women's rights standards as secondary. Instead, in an effort to help mining companies determine the type and content of regulation that provides effective responses to sexual violence, international business and human rights standards should provide companies

A/47/38 (1992); CEDAW Committee, *General Recommendation No. 35, (2017): On Gender-Based Violence Against Women, Updating General Recommendation No. 19*, UN Doc CEDAW/C/GC/35 (14 July 2017); Rashida Manjoo, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Rashida Manjoo*, UN Doc A/HRC/26/38 (28 May 2014) [68].

[87] *UNGPs* (n 5) [51]. See also Deva (n 6).

[88] Robert McCorquodale et al, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2(2) *Business and Human Rights Journal* 195, 223. See also Global Reporting Initiative and Responsible Minerals Initiative, *Advancing Reporting on Responsible Mineral Sourcing* (2018) 36.

[89] Deanna Kemp and Frank Vanclay, 'Human Rights and Impact Assessment: Clarifying the Connections in Practice' (2013) 31(2) *Impact Assessment and Project Appraisal* 86, 90.

[90] Ibid.

[91] Ibid.

[92] See, eg, Simons (n 19).

with clear and industry-appropriate recommendations on how to mainstream gender-responsive practices in their activities.[93]

B *Regulatory Rhetoric and Making Women Vulnerable*

1 *Androcentric Business and Human Rights*

A second critique of international regulatory initiatives on business and human rights is their perpetuation of an androcentric approach to international human rights law that depicts women as vulnerable beings needing protection. This rhetoric has a long standing in the legal and human rights discourses, especially in relation to sexual violence.[94] Historians Shani D'Cruze and Anupama Rao place the emergence of the notion of 'gendered vulnerability' and of the intersection between violence against women, law, power and embodied vulnerabilities in the early modern period.[95] Feminist scholars have condemned 'the protective representations of women as a 'vulnerable group',[96] and international institutions have made visible efforts to adopt language that specifically recognises women as political actors and subjects of international law.[97] Yet public and private regulators that have engaged in the elaboration of business and human rights standards have mostly defined women primarily by their vulnerabilities, reproducing the general inclination of international law highlighted by Hilary Charlesworth:

> Women are not completely absent from the international legal order: for example, a specialized area of women's human rights law has been developed and there is some specific acknowledgment of women in other areas of international law. But, by and large, when women enter into focus at all in international law, they are viewed in a very limited way, often as victims, particularly as mothers, or potential mothers, in need of protection.[98]

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[93] Ama Marston, *Women, Business and Human Rights: A Background Paper for the UN Working Group on Discrimination Against Women in Law and Practice* (Marston Consulting, 2014) 29.
[94] See Pamela Scully, 'Vulnerable Women: A Critical Reflection on Human Rights Discourse and Sexual Violence. (Advancing the Consensus: 60 Years of the Universal Declaration of Human Rights)' (2009) 23(1) *Emory International Law Review* 113.
[95] Shani D'Cruze and Anupama Rao, 'Violence and the Vulnerabilities of Gender' (2004) 16(3) *Gender and History* 495.
[96] Dianne Otto, 'Power and Danger: Feminist Engagement With International Law Through the UN Security Council' (2010) 32(1) *Australian Feminist Law Journal* 97, 103.
[97] See, eg, Dianne Otto, 'The Exile of Inclusion: Reflections On Gender Issues In International Law Over The Last Decade' (2009) 10(1) *Melbourne Journal of International Law* 11.
[98] Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *American Journal of International Law* 379, 381.

This bias is illustrative of the silence of women that permeates all branches of international law including business and human rights. This does not mean, as demonstrated above, that business and human rights international instruments are completely oblivious to women. Instead, the 'vulnerability' account they adopt obscures many aspects of women's experience of corporate activities, including sexual violence. The OECD instruments are examples. The OECD Guidelines for MNE encourage corporations to provide training to 'women and other vulnerable groups'.[99] Likewise, the Guidance on Minerals defines 'vulnerable groups' by citing the OECD Guidelines for MNE: 'enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention […]. In this connection, United Nations instruments have elaborated further on the rights of […] women.'[100] The OECD Guidance on Responsible Business Conduct and the OECD Guidance on Stakeholder Engagement use similar language.[101]

2 *Women's Vulnerability in the UNGPs*

Like the OECD instruments, the UNGPs represent women as vulnerable. The commentary to guiding principle 3 establishes that State guidance to companies should inform them on 'how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous people, women'. This is the only instance in the UNGPs where there is an explicit connection between the notion of vulnerability and women. This may be the result of the consultative process conducted by the Special Representative during the drafting of the UNGPs. For instance, regarding commentary to guiding principle 12, which, in its 2010 version, established 'rights specific to vulnerable and/or marginalized groups, such as indigenous peoples, women, ethnic and religious minorities, and children',[102] a group of researchers and legal practitioners advised that this sentence be modified. They recommended that it should read 'rights specific **to women** and vulnerable and/or marginalized groups, such as indigenous peoples, women; national, ethnic and religious minorities; and children'.[103] This modification was suggested to prevent the

[99] *OECD Guidelines for Multinational Enterprises* (n 3) 41 [58]. The reference to 'other' suggests that women are considered a vulnerable group.
[100] *OECD Guidance on Minerals* (n 3) 64.
[101] *OECD Guidance on Stakeholder Engagement* (n 3) 29, 100 and 102*; OECD Due Diligence Guidance for Responsible Business Conduct* (n 3) 51.
[102] *UNGPs* (n 5) Principle 12 (Commentary).
[103] Kathryn Dovey et al, *Comments on the Draft 'Guiding Principles' for the Implementation of the 'Protect, Respect and Remedy' Framework: Integrating a Gender Perspective* (Consultation Paper, January 2011) <https://media.business-humanrights.org/media/documents/2de7f9e1db5b5d23e5d64b169b60de36b2017af5.pdf>;

UNGPs from portraying women only as vulnerable and marginalised.[104] However, despite the reformulation of the commentary to guiding principle 12[105] and other elements of the UNGPs to distinguish women from 'vulnerable groups', public documents that elaborate on the UNGPs demonstrate that this process was more an exercise in rhetoric than a legitimate attempt to establish women as productive political actors with whom corporations should engage. In *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, Ruggie elaborates on the rights of 'vulnerable individuals, groups and communities',[106] stating:

> Vulnerability can depend on context. For example, while women are more vulnerable to abuse than men in some contexts, they are not necessarily vulnerable in all contexts. Conversely, in some situations women from marginalized groups may be doubly vulnerable: because they are marginalized and because they are women.[107]

Specifically in relation to human rights due diligence, the Working Group on Business and Human Rights, in its report on the gender dimensions of the UNGPs, similarly referred to women's 'overlapping or accumulated vulnerabilities'[108] and recommended that companies, consider how 'lack of information disclosure could worsen the situation of disadvantaged, marginalized or vulnerable individuals and communities'.[109]

3 *Women in Mining, Sexual Violence and Perceived Vulnerability*

Considering women in mining – and in business in general – as 'vulnerable' is problematic on several levels. First, it betrays an erroneous understanding of the role of women in mining, and a lack of appreciation for their economic roles and active leadership. Indeed, research has long demonstrated that, despite the specific risks to which they are exposed, women have historically played and continue to play important productive roles, not only in local communities but also through engaging in mining operations, trade and commerce in and around mine sites.[110] Some multinational companies have themselves recognised women's

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emphasis in original. The authors made a similar comment in relation to the commentary to guiding principles 18, 24 and 25.

[104] Ibid.

[105] It now reads '[f]or instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.'

[106] Office of the High Commissioner on Human Rights (n 58) 11.

[107] Ibid.

[108] *Gender Dimensions of the UNGPs* (n 74) [32].

[109] Ibid [42].

[110] Kuntala Lahiri-Dutt, 'Gender-Based Evaluation of Development Projects: The LAST Method' in Kuntala Lahiri-Dutt (ed), *Gendering the Field: Towards Sustainable Livelihoods for Mining Communities* (ANU Press,

important contribution to their activities and to their communities,[111] although in many contexts 'company staff […] almost always chose to ignore these productive roles'.[112] Mining companies' policies, procedures and initiatives demonstrate that the generally accepted perception of women is indeed as victims.[113] The disconnect between international regulatory standards and the realities of women's roles in the mining economy may give rise to this perception. In fact, it seems to have influenced corporate due diligence practices in a way that perpetuates biases against women. Barrick Gold, for example, designed its Porgera Joint Venture Remedy Framework with the support of human rights experts, as suggested by guiding principle 19 of the UNGPs,[114] but failed to consult the survivors themselves.[115] This process led to the development of a remedy framework deemed unfair and inappropriate for the survivors.[116] It also betrays a perception by the company of survivors as victims defined by their sexuality, rather than relevant contributors to corporate policy-making and due diligence regulation. In light of these conclusions, Kuntala Lahiri-Dutt has made a case for a feminist perspective on rights-based approaches to gender in mining that encompasses women's reproductive and productive roles in large-scale mining, as a way to move forward from the predominant view of women as being outside of the mining industry and suffering the impacts of mining as victims.[117] This argument derives from her observation that a process of 'feminisation' of mining is under way – that is, 'increased space for women in mining-related policy-making and their enhanced visibility in mining'[118] – which sheds light on the roles of women as major economic actors in the industry.[119]

Second, the emphasis on women's vulnerability perpetuates a narrative of women as solely victims of corporate patriarchal oppression. Feminist scholar Ratna Kapur has called this discourse 'essentialist'. She describes it as making overgeneralised claims about women –

2013) 111–131, 123. See, eg, Kuntala Lahiri-Dutt, 'Roles and Status of Women in Extractive Industries in India: Making a Place for a Gender-Sensitive Mining Development' (2007) 37(4) *Social Change* 37.

[111] See, eg, Deanna Kemp et al, *Why Gender Matters A Resource Guide for Integrating Gender Considerations into Communities Work at Rio Tinto* (Rio Tinto, 2009).

[112] Lahiri-Dutt, 'Gender-Based Evaluation of Development Projects: The LAST Method' (n 110) 123.

[113] See, eg, Barrick Gold, *2017 Human Rights Report* (Barrick Gold, 2018); Kemp et al (n 111).

[114] *UNGPs* (n 5). The commentary to principle 19 states: '[t]he more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond'.

[115] Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned* (Columbia and Harvard Universities, 2015) 3.

[116] Ibid.

[117] Lahiri-Dutt, 'Roles and Status of Women in Extractive Industries in India' (n 110) 1–2.

[118] Kuntala Lahiri-Dutt, 'The Feminisation of Mining' (2015) 9(9) *Geography Compass* 523, 523.

[119] Ibid.

mainly from the global South – and portraying them as sexually constrained and victims of their culture and environment.[120] Others have added that international instruments essentialising women assume that they share a common experience and identity,[121] while failing to recognise the intersection between sex/gender and other intersectional characteristics such as race, ethnicity, poverty or colonial oppression, among others.[122] In a business and human rights context, the discourse used in international standards suggests a protector/protected dichotomy that creates a protective role from the State and private corporations – identified as masculine entities – and female victims in need of protection. This narrative highlights the way business and human rights international regulation affects women differently to men. In relation to the UNGPs, for instance, it betrays a process of distancing the regulatory language of the corporate responsibility to respect human rights from actual responsibility of companies to prevent and address risks against women in their operations. This will be discussed further in Section D. of this chapter. However, it can be mentioned here that the UNGPs accentuate women's vulnerability to corporate conduct, rather than 'putting the focus on activism and dissent to identify radical and systemic changes that the business should make to its mode of operation'.[123] In other words, the UNGPs distance themselves from the women's rights and feminist concerns of activists and local communities that initially prompted the UNGPs regulatory process.[124] This approach is in contradiction to regulatory theories that convey the idea of a networked governance of human rights, wherein civil society and rights-holders would have a role in challenging behaviours that violate human rights and contribute to the elaboration of human rights regulation.[125] Yet, by portraying women as vulnerable, international instruments muffle their dissenting voices, fail to acknowledge their agency and undermine their credibility as regulators involved in making and influencing regulation.

[120] Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Ressurecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1.
[121] Edwards (n 7) 71.
[122] Ibid 76.
[123] Christine Parker and John Howe, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights Foundations and Implementation* (Martinus Nijhoff Publishers, 2012) 273–302, 283.
[124] Ibid.
[125] Hilary Charlesworth, 'A Regulatory Perspective on the International Human Rights System' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 357.

C *Sexual Violence as an Exceptional Risk*

1 *The UNGPs and Making Sexual Violence an Exceptional Risk of Business Activities*

As an expected consequence of the conclusions drawn above, discussions on the regulation of human rights in business, and its application to particular industries, have so far sidelined a well-documented issue of international human rights law: violence against women, specifically sexual violence. This position is inconsistent with the realities of violence against women – UN Women referring to the phenomenon as a 'human rights violation of pandemic proportions'[126] – and the current state of international human rights law. In fact, almost every subcategory of international human rights law has identified the critical need to understand and address violence against women.[127] However, references to sexual violence against women in business and human rights standards are scarce.[128] The instruments that explicitly address sexual violence are ill suited to compensate for these shortfalls. This is because business and human rights regulation makes sexual violence an exceptional risk and, more generally, disregards women's specific experiences of business activities.

The UNGPs, remarkably, despite recognising that corporate operations may have specific adverse impacts on women,[129] mention sexual violence only in reference to corporate activities in conflict-affected areas. According to guiding principle 7:

> Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should ensure that business enterprises operating in those contexts are not involved in such abuses, including by […] [p]roviding adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence.[130]

In fact, guiding principle 7 only refers to gender-based and sexual violence, to the exclusion of other risks of abuse that may be 'heightened' in times of armed conflict, supporting the view that sexual violence against individuals who are socially constructed as vulnerable (women and girls) is inextricably linked to causes external to business enterprises themselves – in that instance, conflict. By doing so, the UNGPs fail to engage States and corporations to consider

[126] UN Women, *Violence Against Women: Facts Everyone should Know* <http://interactive.unwomen.org/multimedia/infographic/violenceagainstwomen/en/index.html#home>.
[127] Meyersfeld (n 16).
[128] Examples include the UN Global Compact and the Women's Empowerment Principles, the Voluntary Principles on Security and Human Rights and the OECD Guidelines for Multinational Enterprises, none of which consider this risk at all.
[129] *UNGPs* (n 5) Principles 3, 12 and 18.
[130] Ibid Principle 7.

other productive roles women have in conflict and multinational business operations, as well as the other systemic forms of violence they may face during conflict or peacetime.

Likewise, risks of corporate involvement in sexual violence outside conflict zones are not considered by the UNGPs, nor is sexual violence identified as a general risk associated with business operations and needing to be addressed by corporate human rights due diligence. By choosing this approach, the UNGPs set regulatory standards that exceptionalise sexual violence in several ways. First, it conveys to States and corporations the message that sexual violence is a risk worth regulating in very specific contexts and circumstances – in this case, when corporations operate in conflict-affected areas. Second, while encouraging companies to assess, address and refrain from being involved in sexual violence, the UNGPs do not regulate sexual violence as a regular risk associated with business operations. Instead, sexual violence is an external and potentially pre-existing risk, created by conflict-related factors that are out of the control of corporations, and in which companies may *a posteriori* be involved. This approach reflects a narrative that has been losing attraction among feminist scholars, and according to which '[r]ape is too frequently regarded as an unfortunate but inevitable side-effect of conflict'.[131] It is reproduced in the UNGPs despite the now well-accepted finding that

> rape in armed conflict is made possible by the prevalence of rape in times of peace. Such a focus [on individual rape in conflict] will not necessarily provide an incentive to remedy human rights abuses that are the product of a systematic failure to create the conditions necessary to guarantee the security of women.[132]

Rather, guiding principle 7 is included in the first pillar of the UNGPs, the State's duty to protect human rights, and requires that States help ensure that business enterprises operating in conflict-affected areas are not involved in human rights abuses. Guiding principle 7 thus focuses on the obligations of the State to guide business enterprises to assess, address and prevent risks of sexual violence, rather than creating a specific responsibility for companies to integrate sexual violence in their internal due diligence processes.

[131] Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) *European Journal of International Law* 326, 334.
[132] Charlesworth (n 98) 390-391.

2 *OECD Regulation and Making Sexual Violence an Exceptional Risk in Mining Operations*

The process of making risks of sexual violence exceptional or characteristic of specific contexts, identified above, is reproduced in the OECD instruments. Although its 2011 version was in part inspired by the UNGPs, the OECD Guidelines for MNEs do not address sexual violence. This question is relegated to the OECD Guidance for Responsible Business Conduct, which lists 'gender-based violence' as an example of adverse human rights impacts covered by the OECD Guidelines for MNEs.[133] Although this inclusion seeks to clarify the extent of the OECD Guidelines for MNEs and recognises risks of sexual violence in multinational business operations, the OECD Guidance on Responsible Business Conduct in practice limits the situations in which this risk may be included in corporate due diligence processes. It recommends that corporations consider 'gender issues and women's human rights' in specific situations where women 'face *severe* discrimination', 'where the enterprise's activities *significantly* affect the local economy', in 'conflict and post-conflict areas' or in 'sectors […] in which large numbers of women are employed'.[134] Although these are listed as examples, they constitute the *only* examples provided, which conveys the message that women's human rights – including the right to a life free of violence – may be considered primarily in specific situations where discrimination and violation of women's human rights are obvious, widespread or having the potential to happen on a large-scale.

In the particular context of mining, the OECD Guidance on Minerals sets specific standards for due diligence in its Annex II and lists the serious abuses that mining companies may profit from, contribute to, assist with or facilitate.[135] Among the abuses enumerated appear 'other gross human rights violations and abuses such as widespread sexual violence'.[136] The language adopted by the OECD Guidance is extremely cautious. It does not refer to any form of sexual violence or to risks of violence against women in general. Instead, it is limited to the very narrow definitions of 'gross' human rights violations and 'widespread' sexual violence, reflecting the view that sexual violence in conflict-affected and high-risk areas is fuelled by militia's access to minerals,[137] and discarding to a large extent the active role of corporate stakeholders themselves. Interviewed by Doris Buss, one Canadian government lawyer

[133] OECD *Due Diligence Guidance for Responsible Business Conduct* (n 3) 38.
[134] Ibid 41, emphasis added.
[135] *OECD Guidance on Minerals* (n 3) 20.
[136] Ibid 21.
[137] Doris Buss, 'Conflict Minerals and Sexual Violence in Central Africa: Troubling Research' (2018) 25(4) *Social Politics: International Studies in Gender, State & Society* 545, 555.

involved in the development of the OECD Guidance explained this approach by reference to a wish to prevent mining companies from disengaging with the instrument.[138]

The problem with this approach, however, is that it reproduces a narrative that focuses on the illegal exploitation of natural resources as a primary cause of violence, the widespread sexual abuse of women and girls as the main consequence, and the increase of State authority as the central solution. This narrative emerged in the late 2000s to respond to persisting violence in the Great Lakes region of Africa (and the Democratic Republic of Congo in particular). It quickly gained prominence for providing simple explanations for the violence, suggesting achievable solutions and resonating with foreign audiences.[139] The OECD Guidance having been significantly informed by the experiences of eleven countries of the Great Lakes region of Africa at a time when the narrative was at the peak of its popularity, it is not surprising that it primarily addresses 'widespread' sexual violence in relation to conflict.

Yet, this narrative has limitations. Among them, it has led international regulators, including the OECD, to focus on the trafficking of mineral resources by non-State armed forces as the main reason for violence while diverting attention from additional systemic causes of sexual violence, such as the gender stereotypes and discrimination that characterise the mining industry. For example, research has demonstrated that 'hyper-masculine' sub-cultures that encourage sexual violence against women are prevalent in several mine sites of the Democratic Republic of Congo.[140] The narrative also shifts the focus away from analysing the manner in which corporate processes and mining companies' practices may influence rates of sexual violence in conflict-affected mining communities. Given that mining companies are potentially more likely than corporations in other industries to operate in complex socio-political environments,[141] and evidence suggesting their involvement in various forms of sexual violence, the low threshold for due diligence the OECD Guidance requires from mining companies hinders the potential for effective corporate responses to prevent sexual violence.

The OECD Guidance on Stakeholder Engagement tries to depart from this portrayal of sexual violence as exceptional by encouraging multinational mining companies, while engaging with women in local communities, to consider '[w]hether physical, or sexual harassment or abuse

[138] Ibid 554.
[139] Séverine Autesserre, 'Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences' (2012) 111(443) *African Affairs* 202, 202.
[140] Siri Aas Rustad, Gudrun Østby and Ragnhild Nordås, 'Artisanal Mining, Conflict, and Sexual Violence in Eastern DRC' (2016) 3(2) *Extractive Industries and Society* 475, 478.
[141] Simons (n 19) 417.

exist in the workplace, household or community environments'.[142] It also recommends that stakeholder-facing personnel take into account '[s]ocial dislocation and gender imbalance caused by in-migration of a transient male workforce can place women at risk of health and security impacts, such as sexual violence, sexually transmitted diseases and increased alcohol abuse in the community'.[143] The OECD Guidance on Stakeholder Engagement has a broader scope than the OECD Guidance on Minerals. It recognises risks of sexual violence irrespective of the context in which the mining operation takes place. Yet, again, it fails to address the multiple and intersectional aspects of systemic sexual violence as linked to business operations. On one side, research indeed demonstrates that a temporary influx of mineworkers in local communities increase risks of sexual violence against women.[144] On the other side, the OECD Guidance on Stakeholder Engagement does not consider, for example, the risks caused by the presence of security contractors on mine sites or the contribution of mining companies – through the provision of material or financial resources – to sexual violence conducted by States. If the Guidance does not make sexual violence truly 'exceptional', as do other business and human rights instruments, it limits its manifestations to specific phenomena, thus diverting the attention of personnel engaged in stakeholder engagement from the systemic nature of sexual violence across the various spheres of mining operations and the role mining companies themselves play in facilitating risks. The fact that only specific aspects of sexual violence may be considered in stakeholder engagement may negatively influence effective dialogue with women and, in practice, perpetuate power imbalance between companies and communities.

As non-binding standards, international instruments on business and human rights and mining do not in themselves have the ability to force mining companies to adjust their practices in relation to sexual violence. In this context, the State and domestic laws framing corporate conduct, along other forms of regulation, remain essential.[145] At the same time, the UNGPs and the OECD standards are highly influential documents that reflect States' international human rights obligations and social expectations towards corporations. They have been widely adopted by States, civil society organisations and the private sector. Multinational mining companies have committed to align their policies and procedures with the UNGPs and OECD

[142] *OECD Guidance on Stakeholder Engagement* (n 3) 101.
[143] Ibid.
[144] See, eg, Simons and Handl (n 10); Isabel Cane, Amgalan Terbish and Onon Bymbasuren, *Mapping Gender Based Violence and Mining Infrastructure in Mongolian Mining Communities* (International Mining for Development Centre, 2014); Adriana Eftimie, Katherine Heller and John Strongman, *Gender Dimensions of the Extractive Industries: Mining for Equity* (The World Bank, 2009), 14–15.
[145] This question is examined in Chapter 7.

guidelines.[146] As a result, by largely portraying sexual violence as an exceptional risk, and by ignoring the systemic manifestations of discrimination and sexual violence against women in the mining industry,[147] these standards mislead companies as to what effective prevention of sexual violence across operations should entail.

Through this process, they contribute to the invisibility of women's experiences. The critique made by Hilary Charlesworth, Christine Chinkin and Shelley Wright is relevant here:

> Long-term domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while "women's concerns" are relegated to a special, limited category. Because men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored.[148]

International business and human rights standards disregard the role mining corporations may play in perpetuating and preventing sexual violence. They convey to corporations the idea that they may only need to address this risk in specific contexts and limited circumstances, when sexual violence should instead be considered an ordinary risk of mining operations. This approach is in contradiction to a feminist regulatory method that recognises the underlying, subtle and perverse forms of discrimination and violence against women in business activities and encourages corporations to address them. Minimising the risk of sexual violence also has the potential to influence, or bias, future regulation – in particular, self-regulatory initiatives from mining companies – of sexual violence in mining operations, as well as the practical and effective implementation of existing regulation.

D *The Dilution of Corporate Human Rights Responsibilities*

The final feminist critique of international instruments is the discrepancy they create between regulation and corporate responsibility for adverse human rights impacts on women. Specifically, they largely fail to recognise the responsibility of corporations for sexual violence against women, even when they explicitly recognise this risk. The OECD Guidance on Responsible Business Conduct, for example, emphasises the systemic nature of 'the widespread harassment and abuse of women and girls' as 'driven by root causes outside of the

[146] See, eg, Rio Tinto, *Human Rights* <https://www.riotinto.com/en/sustainability/human-rights>; Barrick Gold, *Putting Human Rights at The Core of How We Conduct our Business* <https://www.barrick.com/English/sustainability/human-rights/default.aspx>.
[147] In relation to the UNGPs, see Simons and Handl (n 10).
[148] Charlesworth, Chinkin and Wright (n 9) 625.

enterprise's immediate control, but that nonetheless increase the risk of adverse impacts within the enterprise's own operations or supply chain'.[149] The Guidance explains that the decision of a corporation to operate in a context where systemic risks exist increases the nature and extent of their due diligence responsibilities.[150] However, nowhere does it recognise the potential for companies' employees or security contractors to facilitate or commit sexual violence against women. Just as it makes sexual violence an exceptional issue, the Guidance also conveys the false message that violence against women is a systemic risk in certain contexts only, rather than across societies.

The OECD Guidance on Stakeholder Engagement adopts a similarly cautious position by equating sexual harassment and violence against women with marginalisation and discrimination in the workplace, household or community environments.[151] While this broad statement can be perceived as covering the involvement of mining companies themselves in sexual violence against women, it is associated with the section of the Guidance concerning how personnel undertaking stakeholder engagement can understand the context of extraction.[152] This suggests, once again, that mining companies should consider sexual violence either as a phenomenon occurring outside of their operations or as essential to address only when it happens in the workplace against women employees or contractors. This position is confirmed by the reference to sexual violence happening in the context of social dislocation caused by the temporary influx of male workers,[153] which portrays sexual violence as occurring through individual behaviours rather than as a systemic phenomenon associated with mining activities.

In the specific context of business operations in conflict areas, both the OECD Guidance on Minerals and the UNGPs specifically recognise a responsibility for mining companies not to profit from, contribute to, assist with or facilitate the commission of sexual violence,[154] as well as the role of the State in supporting companies not to be involved in sexual violence.[155] However, the approach adopted in these instruments amalgamates business-related sexual violence and conflict-related sexual violence. Specifically, they transpose the discourse of conflict-related sexual violence to the business and human rights arena by establishing sexual

[149] OECD *Due Diligence Guidance for Responsible Business Conduct* (n 3) 76.
[150] Ibid.
[151] *OECD Guidance on Stakeholder Engagement* (n 3) 101.
[152] Ibid 100.
[153] Ibid 101.
[154] *OECD Guidance on Minerals* (n 3) 20-21.
[155] *UNGPs* (n 5) Principle 7.

violence as a de facto, pre-existing, situation in which companies should avoid being involved. Instead, a feminist understanding of business and human rights international regulation requires specific recognition of the role of mining companies themselves in fuelling sexual violence in order to shed light on the different layers in which large mining operations affect women.

These limitations may arise from the nature and regulatory objectives of business and human rights international standards. Indeed, international instruments on business and human rights emerged in response to increasing objections to poor working conditions in global supply chains, and the expansion of extractive companies into high-risk geographical areas.[156] In other words, they are aimed at regulating the complex supply and production chains and corporate group relationships that not only characterise contemporary capitalism but have also 'been used to distance businesses and consumer brands in the "Global North" from responsibility for human rights and other abuses in the "Global South" and even among less powerful workers and local communities in their own countries'.[157] The UNGPs, for instance, perpetuate this pattern by distinguishing between legal human rights obligations for States and much vaguer, more ambitious social responsibilities for companies. As will be discussed further in Chapter 6, these regulatory objectives create an environment in which companies have the discretion to decide upon the extent of their human rights obligation. It also gives them the ability to hide behind arguments of complex supply chains, inability to control their business partners and cosmetic compliance with human rights due diligence to limit the extent of their involvement in human rights violations.

The regulatory strategy used in business and human rights standards exhibits deficiencies that feminists have pointed up in relation to human rights law. According to Elizabeth Gross, 'rights discourse overly simplifies complex power relations and their promise is constantly thwarted by structural inequalities of power'.[158] Similarly, Anne Orford contents that human rights regulators have not acknowledged the links between women's rights, economic liberalisation and globalisation.[159] These loopholes are in contradiction to a feminist regulatory framework to business and human rights that aims to recognise and analyse the imbalance of powers that

[156] Parker and Howe (n 123) 296.
[157] Ibid 297.
[158] Elizabeth Gross, 'What is Feminist Theory?' in Carole Pateman and Elizabeth Grosz (eds), *Feminist Challenges: Social and Political Theory* (Allen & Unwin, 1986) 190, 192.
[159] Anne Orford, 'Contesting Globalization: A Feminist Perspective on the Future of Human Rights' in Burns H Weston and Stephen P Marks (eds), *The Future of International Human Rights* (Transnational Publishers, 1999) 157, 179.

exist between multilateral corporations and affected women, as well as women's knowledge and contribution in establishing and implementing more equal regulation.

E *International Regulators and Women's Human Rights*

The failure of international instruments demonstrate a distancing of international regulators from the impacts regulation may have on women. This failure illustrates inadequate gender expertise from these regulators, who, while seeking to include women within mainstream business and human rights regulation, reproduce gender narratives that have been critiqued by feminism as sidelining women's rights and women's experiences of mining and business, in general. In contrast, a feminist regulatory approach to business and human rights standards requires the systematic inclusion in international human rights institutions of regulators and decision-makers who are qualified or have experience in women's human rights or feminist theory.[160] While essential to align business and human rights regulation with feminist objectives, this recommendation may be met by some resistance in a context where it has been alleged that specific expertise and qualifications, including in women's rights, are irrelevant to membership of UN human rights treaty bodies.[161] Men are overrepresented across international human rights bodies and mechanisms. For example in 2016, then UN Secretary-General Ban Ki-moon reported that 'out of 172 [UN] treaty body members, 44 per cent were women. Excluding the Committee on the Elimination of Discrimination against Women, the representation of women in the membership of the treaty bodies is 31 per cent.'[162]

International regulators who are women do not necessarily have an interest in women's rights simply because of their gender, nor do they always share similar experiences. This calls for stronger expertise on women's rights and women's experiences of business activities in international mechanisms, irrespective of the gender of regulators. At the same time, while there are debates among feminist scholars about the actual impact of women in decision-

[160] Edwards (n 7) 47.
[161] Ibid 94. This has been asserted by a senior official of the Office of the High Commissioner for Human Rights interviewed in 2008 by Alice Edwards. It does not suggest that there are no qualified members in UN treaty bodies or other UN bodies, including in the Human Rights Council which has been leading the business and human rights agenda. This is not the case.
[162] UN General Assembly, *Status of the Human Rights Treaty Body System: Report of the Secretary-General*, UN Doc A/71/118 (18 July 2016) [80].

making positions,[163] there is some evidence that the presence of women in international institutions has contributed to enhanced concern for gender and women's rights issues.[164]

In this context, a feminist understanding of international business and human rights regulation supports better integration of women's rights and experiences of corporate activities, through increased participation of women as regulators and strengthened knowledge of the impacts of mining on women. This would allow regulators to better address women's concerns, including sexual violence, and to move away from purely regulatory objectives – notably, the integration of human rights due diligence into business practices – that may conflict with feminist objectives such as the effective prevention of sexual violence.

IV CONCLUSION

This chapter establishes that international instruments regulating business and human rights, and mining in particular, perpetuate the shortcomings of regulatory theories by marginalising women's experiences of corporate activities, and contribute to muffling women's voices. This tendency extends to the concept of human rights due diligence, although this will be developed in more details in the next chapter of this thesis. Specifically, international standards make women's rights secondary and define women primarily in terms of their vulnerabilities. In relation to sexual violence, they 'exceptionalise' this risk while diluting the responsibility of mining corporations in acts of sexual violence. These critiques support calls for more consistent integration of women's experiences of mining into business and human rights domestic, corporate and international regulation. This may be achieved by way of increased participation of women and feminist men in international regulatory spheres.

International instruments marginalise women's experiences but they are non-binding on mining companies and simply reflect the social expectations that form the roots of the corporate responsibility to respect human rights. It is thus possible to question their potential to significantly influence corporate practice. However, in addition to being widely accepted as

[163] See, eg, Edwards (n 7); Anne-Marie Slaughter and Hilary Charlesworth, 'The Gender of International Institutions' (1995) 89 *American Society of International Law Proceedings* 79; Andrew Byrnes, 'Towards More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures' in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspective* (University of Pennsylvania Press, 1994) 189–227.

[164] See, eg, Edwards (n 7) 104. Edwards interviewed NGO representatives who reported that the presence of a single woman on the Committee Against Torture increased their interest in gender issues. See also Rachael Lorna Johnstone, 'Feminist Influences on the United Nations Human Rights Treaty Bodies' (1995) 28(1) *Human Rights Quarterly* 148, 148.

standards of conduct by companies across sectors, they are also supported by States and other non-State stakeholders. As a result, they may be reflected – fully or partly – in domestic laws that bind companies. They may also be adopted in binding contracts between companies and clients or investors, among others.[165] Such requirements may be enforced through judicial means. Hence, international standards are influential not only in themselves but as part of a regulatory sphere that involves corporate and civil society regulation, operating in the shadow of the State. Because international instruments are accepted references for other forms of regulation, it is important that they mainstream women's concerns and portray them as primary. This would allow other regulators to consider them equally relevant.

These considerations also apply to human rights due diligence. Indeed, due diligence is a way for mining companies to show that they are meeting their international responsibilities. 'Failure to do so can subject companies to the "court of public opinion"—comprising employees, communities, consumers, civil society, as well as investors.'[166] The next chapter examines the notion of human rights due diligence to analyse whether its practical and theoretical implementation moves away from the rhetoric used in international instruments and offers companies a tool to respond better to risks of sexual violence.

[165] Office of the High Commissioner on Human Rights ('OHCHR'), *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, UN Doc HR/PUB/14/3 (November 2014) 9.
[166] Ibid.

CHAPTER 5: AN ANALYSIS OF THE EFFECTIVENESS OF HUMAN RIGHTS DUE DILIGENCE IN PREVENTING MINING-RELATED SEXUAL VIOLENCE

I INTRODUCTION

In the previous chapter, I provided a detailed explanation of how the international regulation of business conduct marginalises women's experiences of corporate activities, and mining specifically. Based on an analysis of the language used in the UNGPs and four OECD guidelines, I noted inconsistencies between the 'gender perspective'[1] they seemingly adopt and the actual, lived experiences of women in mining-related contexts. I asked how the formulation of international standards fails to give international women's right their full relevance to business and human rights affairs, and adversely influences the prevention of sexual violence in mining operations.

This chapter adopts a more practical approach by focusing on the concept of human rights due diligence which has become central to most business and human rights regulatory initiatives and constitutes the core of companies' responsibility to respect human rights. I break down the notion of human rights due diligence and review each step of what constitutes a 'by-the-book' due diligence process. The objective of this task to assess the effectiveness of due diligence implementation in relation to sexual violence against women. I use a feminist regulatory framework to review the mainstream narratives and mechanisms in human rights due diligence regulation. This exercise demonstrates that regulation on human rights due diligence affects men and women differently in that it creates a de facto gender-neutral process that disadvantages women and survivors of sexual violence in mining communities. In other words, it is possible for mining companies to inappropriately address or exclude sexual violence from their due diligence procedures, while still complying with their international responsibilities under business and human rights standards.

Specific recommendations on practical steps to implement human rights due diligence vary depending on the international instrument analysed. Because mining companies tend to refer

[1] Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/RES/8/7 (18 June 2008) [4].

to the UNGPs when they develop human rights due diligence,[2] this chapter primarily focuses on that instrument. Yet, from a feminist regulatory perspective, other standards, in particular those developed by the OECD, reinforce the UNGPs in a way that brings human rights due diligence more in line with feminist objectives. In fact, on several levels, the OECD guidelines are more comprehensive than the UNGPs and highlight specific requirements for human rights due diligence that are ignored by the UNGPs. In particular, they elaborate strict policy-making, auditing and reporting conditions for corporations. This allows for a more practical approach to due diligence, the OECD referring to specific actions companies should take irrespective of the human rights risks they identify. I thus also refer to these guidelines to contribute to improved understanding of the UNGPs. In the UNGPs, human rights due diligence comprises four steps: 1) assess risks in their supply chains as well as the potential and actual human rights impacts of their activities; 2) integrate these findings into internal decisions and implement strategies to respond to identified risks; 3) track the effectiveness of their response; and 4) publicly communicate their due diligence efforts.[3]

This chapter is divided into five sections. Section II provides a detailed explanation of the notion of human rights due diligence as conceived in the UNGPs and, in order to contextualise the UNGPs, in the OECD Guidance on Minerals. The following sections follow the four steps of human rights due diligence. They first provide an account of the practical implications of the 'exceptionalisation' of sexual violence (as underlined in Chapter 4) for the recognition of sexual violence as a mining-related risk. Section III is the most detailed as the *establishment of a risk (1)* of sexual violence is the basis upon which all subsequent steps of human rights due diligence rely. It is thus fundamental to identifying the challenges and opportunities mining companies can face in identifying sexual violence as a risk. The chapter then goes on to argue that to effectively *respond to risks (2)* of sexual violence, mining companies need to go further than the measures prescribed by the UNGPs and develop comprehensive, prolonged and systematic strategies to prevent current and future acts of sexual violence in their operations. How this is achieved is developed further in ensuing chapters. In the fifth section, I highlight the difficulties of effectively monitoring cases of sexual violence and the responsibility for

[2] Robert McCorquodale et al, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2(2) *Business and Human Rights Journal* 195, 206.
[3] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011), Principle 17 ('*UNGPs*'); OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2016), 26 ('*OECD Guidance on Minerals*').

mining companies to develop varied, measurable and gender-responsive indicators to *track the effectiveness (3)* of their response to sexual violence. The chapter finishes by underlining the limited guidance the UNGPs and other standards offer companies in relation to their *reporting (4)* responsibilities and the adverse consequences this has had on mining companies' reporting practices.

II CORPORATE HUMAN RIGHTS DUE DILIGENCE IN INTERNATIONAL LAW

A *Human Rights Due Diligence in the UNGPs*

The concept of human rights due diligence, in relation to the regulation of corporate activities, was introduced under the second pillar of the UNGPs according to which business enterprises should avoid infringing on the human rights of others and should address adverse human rights impacts in which they are involved. This is achieved through three measures allowing business enterprises to 'know and show' that they respect human rights: a policy commitment to respect human rights, a human rights due diligence process and mechanisms to enable the remediation of adverse human rights impacts they cause or to which they contribute.

In the UNGPs, human rights due diligence is a 'dynamic and ongoing'[4] process allowing business enterprises to 'identify, prevent, mitigate and account for how they address their impacts on human rights'.[5] As such, human rights due diligence is primarily a preventative responsibility that requires business enterprises to take active precautionary measures to prevent the occurrence of human rights harms in their activities. It comprises four steps, detailed in guiding principles 17 to 21, according to which companies are expected to assess risks in their supply chains as well as the potential and actual human rights impacts of their activities; integrate these findings into internal decisions and implement strategies to respond to identified risks; track the effectiveness of their response; and publicly communicate their due diligence efforts. This process should cover 'adverse human rights impacts that the

[4] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/14/27 (9 April 2010) [84] ('*Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*').
[5] *UNGPs* (n 3) Principle 15.

business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'.[6]

Although not expressly stated in the UNGPs, human rights due diligence, as applied to business enterprises, is different from traditional corporate due diligence in that it goes '[b]eyond identifying and managing material risks to the company itself'.[7] That is to say, it is a business process aimed at managing human rights risks to third parties, rather than a process of investigation to identify and manage commercial risks.[8] Scholars agree that human rights due diligence and traditional corporate due diligence are not mutually exclusive. As stated by regulation theorists Christine Parker and John Howe, '"[d]ue diligence" can […] be interpreted as a complement to management discretion in relation to CSR and human rights, not necessarily a corrective'.[9] This application of human rights due diligence in business settings, however, encourages companies to put rights-holders at the forefront of any operational decisions, which is not the natural focus of corporate management systems and has been considered a significant obstacle to the practical realisation of the due diligence process.[10] Human rights due diligence is also context-specific, varying with the size of the company, the severity of actual and potential human rights impacts, and the nature and context of its operations. The identification and assessment of human rights impacts, detailed in guiding principle 18, thus allow companies to understand the impacts of their activities on specific people, given the specific context of their operations.[11] This partly explains why, despite the concept in itself leaving room for potential criticism, there have been important efforts to further refine the notion of corporate human rights due diligence in international law.

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[6] *UNGPs* (n 3) Principle 17.
[7] John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company, 2013), 98–99. See also Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22(1) *Business Ethics Quarterly* 145, 156.
[8] 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(3) *European Journal of International Law* 921, 924.
[9] Christine Parker and John Howe, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights Foundations and Implementation* (Martinus Nijhoff Publishers, 2012) 273–302, 282.
[10] Paul Redmond, 'Corporations and Human Rights in a Globalised Economy: Some Implications for the Discipline of Corporate Law' (2016) 31(1) *Australian Journal of Corporate Law* 3, 29. See also Parker and Howe (n 9) 282.
[11] *UNGPs* (n 3) Principle 18.

B *The OECD and Human Rights Due Diligence in Mining*

In relation to mining, the OECD Guidance on Minerals is an authoritative standard linking mining operations to potential human rights violations.[12] It constitutes 'a framework for detailed due diligence as a basis for responsible global supply chain management of minerals' that aims to 'help companies respect human rights and avoid contributing to conflict through their sourcing decisions'.[13] It applies expressly to conflict-affected and high-risk areas, 'identified by the presence of armed conflict, widespread violence or other risks of harm to people'.[14] The OECD Guidance recognises that in such contexts mining companies, despite their potential to generate income and foster local development, are also at risk of contributing to or being associated with serious human rights abuses and conflict.[15]

The OECD Guidance on Minerals, while using the term 'due diligence', does not specify that this concept refers directly to 'human rights due diligence'. Yet, most of the risks identified in the Guidance are related to potential human rights violations.[16] In addition, the OECD Guidance on Minerals refers to the UNGPs to define due diligence as an ongoing, proactive, reactive and risk-based process through which companies should 'identify, prevent and mitigate actual and potential adverse impacts and ensure that they respect human rights and do not contribute to conflict through their activities in the supply chain'.[17]

Due diligence is implemented through a similar process in the Guidance as it is in the UNGPs and in the OECD Guidelines for MNE.[18] In its Annex I, the OECD Guidance establishes a five-step framework for risk-based due diligence involving establishing strong company management systems; identifying and assessing risks in the mineral supply chain; designing and implementing a strategy to respond to identified risks (which includes tracking the effectiveness of the company's response); carrying out independent third-part audit of supply

[12] The OECD Guidance on Minerals is complemented by two industry-specific supplements, one on tin, tantalum and tungsten (commonly referred to as the 3 Ts), and one on gold, that provide tailored guidance on processes related to these minerals.
[13] *OECD Guidance on Minerals* (n 3) 12.
[14] Ibid 13.
[15] Ibid 12.
[16] Holly Cullen, 'The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond' (2016) 48 *The George Washington International Law Review* 743, 759.
[17] *OECD Guidance on Minerals* (n 3) 70.
[18] OECD, *OECD Guidelines for Multinational Enterprises* (2011). The OECD Guidelines for MNE explicitly draws on the 'Protect, Respect and Remedy' framework developed by John Ruggie. As opposed to the OECD Guidance on Minerals and the UNGPs, however, the OECD Guidelines for MNE do not elaborate on the steps necessary for a human rights due diligence process, 20.

chain due diligence; and reporting on supply chain due diligence.[19] The OECD Guidance establishes stronger due diligence expectations of companies than the UNGPs, with the addition of company management systems as a preliminary measure, and more detailed verification of the company's due diligence practices via independent third-party audit.

Despite the widespread acceptance by regulators in all layers of regulation of human rights due diligence as the core of the corporate responsibility to respect human rights, in practice this concept affects men and women differently. Indeed, despite recognitions of gender considerations throughout the UNGPs and other instruments, as discussed in Chapter 4, human rights due diligence has largely been formulated and implemented as a gender-neutral process.[20] The following sections demonstrate how this approach has disadvantaged women and survivors of sexual violence in mining communities.

III IDENTIFYING RISKS OF SEXUAL VIOLENCE

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. (Guiding principle 18)

A *The Risk-Based Nature of Human Rights Due Diligence*

The first step to human rights due diligence consists in 'assessing actual and potential human rights impacts',[21] also referred to in the UNGPs as human rights risks.[22] This section argues that, in practice, the requirements of the UNGPs in relation to the identification of a risk contribute to the invisibility of sexual violence rather than highlighting it as an expected risk of business – particularly mining – activities. From a purely international law perspective, human rights and risk are different notions. Human rights are normative standards designed to promote and protect the fundamental rights and freedoms of individuals or groups from encroachment by the State or other subjects of international law.[23] The contours of human rights are laid down in an array of international instruments and mechanisms.[24] Risk, on the

[19] *OECD Guidance on Minerals* (n 3) 17–19.
[20] The only reference to gender in relation to human rights due diligence is found in the commentary to GP 18, which encourages business enterprises, when identifying risks in their operations, to 'bear in mind the different risks that may be faced by women and men'.
[21] *UNGPs* (n 3) Principle 17.
[22] Ibid Principle 17 (Commentary).
[23] United Nations, *Human Rights* <https://www.un.org/en/sections/issues-depth/human-rights/>.
[24] Ibid.

other hand, 'is a functional concept applied across a range of disciplines, from finance to human development, which seeks to identify and mitigate a threat, or the potential for harm or damage'.[25] The notion of 'human rights risks'[26] combines these two concepts. It is understood as the actual or potential adverse impacts – or harm – on people, with which a business enterprise may be involved, and where these impacts constitute breaches of internationally recognised human rights.[27] It is that same notion of human rights risks that constitutes the foundation of human rights due diligence, the assessment of human rights risks informing subsequent steps in the due diligence process.[28]

Approaching human rights due diligence from the perspective of human rights risks requires companies to rethink their usual business practices. Indeed, corporations are legal entities focused on managing risks that imperil the company's capacity to make profit,[29] and their societal impacts are largely treated as externalities. A risk-based approach to due diligence also extends the international responsibilities of corporations. In addition to a purely negative responsibility not to infringe on the internationally recognised human rights of people,[30] companies are expected to take positive action to anticipate human rights risks and to refrain from complicity[31] in human rights abuses.[32] While some authors perceive this ambivalence between human rights due diligence and corporate culture as a potential barrier to the actual implementation of human rights due diligence,[33] a risk-based approach to human rights due diligence may, on the contrary, have the positive impact of mainstreaming human rights into corporate practice and performance. It has the potential to influence managerial attitudes towards human rights and lead to the development of internal policies designed to address the human rights of individuals and groups affected by the activities of the company.[34] In relation

[25] Mark B Taylor, Luc Zandvliet and Mitra Forouhar, *Due Diligence for Human Rights: A Risk-Based Approach* (Harvard University, 2009) 5.
[26] *UNGPs* (n 3) Principle 18.
[27] Ibid Principle 18 (Commentary).
[28] Ibid.
[29] Taylor, Zandvliet and Forouhar (n 25) 6.
[30] *UNGPs* (n 3) Principles 11–13.
[31] Ibid. Complicity corresponds to situations in which 'a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties': Principle 17 (Commentary).
[32] Ibid; Björn Fasterling and Geert Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116(4) *Journal of Business Ethics* 799, 804.
[33] Redmond (n 10) 29.
[34] James Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (2013) 31(2) *Impact Assessment and Project Appraisal* 107, 108.

to sexual violence, however, conditions need to be met for these potential advantages to emerge.

Indeed, where business enterprises have high numbers of entities in their supply chains – which is the case for multinational mining companies – the UNGPs recommend that while conducting human rights due diligence, companies identify human rights risks that are the most relevant to their operating context.[35] As illustrated in Chapter 2, research demonstrates that sexual violence is prevalent in large mining operations and is often linked to the use of security providers by mining companies. In theory, and from a feminist regulatory perspective, the identification of such risk as prevalent should lead mining companies to prioritise sexual violence in their human rights due diligence. This recommendation also means that for due diligence to be effective in identifying and preventing sexual violence, a multiplicity of stakeholders must work to address the human rights of women, on several levels and despite competing aims and spheres of influence. This process includes, for example, the parent company's management developing overarching policies aimed at preventing sexual violence and overseeing supply chains, mine management monitoring policy implementations and contractors, and security providers ensuring day-to-day prevention of sexual violence in mining operations. In practice, however, feminists have raised concerns about these stakeholders having conflicting views on and priorities in implementing policies to identify and prevent risks of sexual violence in mining operations.[36] In addition, a feminist approach to the regulation of sexual violence requires that international standards encourage companies to consider the universal entrenchment of violence against women that renders this violence invisible.[37] Yet, while the UN Working Group on Business and Human Rights recognises 'intersecting and multiple forms of discrimination' against women,[38] neither it nor any other international instrument acknowledges that these root causes should be specifically identified in relation to human rights due diligence. In addition to international standards portraying sexual violence as an exceptional risk, their lack of focus on the intersectional causes of sexual violence

[35] *UNGPs* (n 3) Principle 17 (Commentary).
[36] Lisa Gormley, 'Violence against Women by Non-State Actors, a Responsibility for the State under Human Rights Law: Amnesty International's Work on Domestic Violence' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers, 2008) 173, 177.
[37] Joanna Bourke-Martignoni and Elizabeth Umlas, *Gender-Responsive Due Diligence for Business Actors: Human Rights-Based Approaches* (Geneva Academy, 2018), 19.
[38] Human Rights Council, *Gender Dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the Issue of Human rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/41/43 (23 May 2019), [2], (*'Gender Dimensions of the UNGPs'*).

contribute to making this violation of women's rights 'ignored, underplayed or tolerated'.[39] The likelihood thus remains that sexual violence will not be identified by mining companies in their due diligence processes unless additional and detailed regulation – internal or external to the companies – explicitly addresses it.[40]

B *The Regulation of Human Rights Due Diligence and Preventing Risks of Sexual Violence in Mining*

In the regulatory discourse, the effectiveness of regulation that addresses an unwanted risk is largely measured by its capacity to reduce this risk.[41] From this perspective, the effectiveness of business and human rights standards in identifying and reducing risks of sexual violence in mining operations seems to be impeded by the exceptionalisation of sexual violence discussed in Chapter 4. The problem is, in fact, that such narrow understanding of the risk of sexual violence may very well result in it being excluded from any due diligence process. Genuinely implementing due diligence on sexual violence would require that sexual violence be categorised as a 'risk'[42] associated with mining operations, as a precondition for and for compliance with the first step of human rights due diligence. It would also require companies to incorporate gender-specific considerations along all the steps of their due diligence processes. These two basic regulatory requirements may be implemented only with difficulty when transposed to the context of the mining industry.

International regulatory initiatives largely overlook the effects of corporate – and large-scale mining – activities on women, especially when it comes to sexual violence. If operating in a context in which sexual violence is not perceived by the company as being 'widespread'[43] – or a salient risk according to the UNGP[44] – or which is not in conflict,[45] it is difficult to imagine how companies would proactively characterise sexual violence as a specific risk to be addressed through human rights due diligence when other risks might *appear* more prominent. This problem relates to what regulatory theorists have identified as the likelihood for the

[39] Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) *European Journal of International Law* 326, 334.
[40] Bourke-Martignoni and Umlas (n 37) 19.
[41] Fiona Haines, 'Regulation and Risk' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 181–196, 182.
[42] *UNGPs* (n 3) Principle 17.
[43] *OECD Guidance on Minerals* (n 3) 21.
[44] *UNGPs* (n 3). 'Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable' (Principle 24).
[45] Ibid Principle 7.

assessment of a particular risk to be partial or distorted.[46] According to regulatory theories, the effectiveness of regulation is gauged by its capacity to reduce several types of risks that exist in combination.[47] One of the conditions for effective regulation, thus, is that the basic assessment of a particular risk be impartial and accurate.[48] Distortions in risk assessment depend on a multiplicity of factors (e.g. the particular bias of policymakers, the way a particular risk is framed etc.),[49] and are potentially significant in relation to human rights due diligence at a time when quantifiable data on sexual violence in minerals supply chains remain limited.[50] In this context, the language used by international business and human rights instruments – in particular, the UNGPs and the OECD Guidance on Minerals – is significant and has implications for the practice of mining companies, as it has been demonstrated that regulatory texts shape the views and priorities of corporations.[51] It is thus highly probable that, more often than not, mining companies do not identify – for lack of resources, interest or ability to collect data – a need to address sexual violence in their operations, leaving sexual violence unlikely to make it through the first step of a due diligence process.

On that matter, the UN Working Group on Business and Human Rights, in its guidance on the gender dimensions of the UNGPs, urges business enterprises to 'always regard sexual harassment and gender-based violence as risks of severe human rights impacts' and to 'have zero tolerance for such impacts throughout their operations'.[52] This recommendation is particularly relevant to the mining industry. It encourages mining companies to take active measures to identify and assess risks of sexual violence as a priority, irrespective of the perceived or actual difficulties in gathering data or information on sexual violence in their operations. The current practice of mining companies, however, shows that it is not yet so, despite the industry demonstrating an overall willingness to improve its human rights due diligence processes.[53] This situation may be illustrative of uncertainty surrounding the practical adaptation of international standards into appropriate internal strategies. If they rely only on international standards on business and human rights, generally, companies lack critical

[46] Haines (n 41) 186.
[47] Ibid, 182.
[48] Ibid 186.
[49] Ibid.
[50] Doris Buss, 'Conflict Minerals and Sexual Violence in Central Africa: Troubling Research' (2018) 25(4) *Social Politics: International Studies in Gender, State & Society* 545, 559–561.
[51] Penelope Simons and Melisa Handl, 'Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction' (2019) 31(1) *Canadian Journal of Women and the Law* 113, 117.
[52] *Gender Dimensions of the UNGPs* (n 38) Principle 17 [34].
[53] McCorquodale et al (n2).

guidance on how to develop appropriate indicators to assess and track the impacts of their activities on women.[54]

This general lack of guidance creates a real impediment to the effective prevention of sexual violence in an industry that generates serious risks for women but equally appears willing to improve its due diligence practices. In fact, mining companies lead when it comes to acknowledging human rights as a business issue, with 88 per cent of KPMG's N100and 100 per cent of G250[55] mining companies doing so in 2017.[56] These results are in line with the findings of the 2015 survey conducted by Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks according to which 72.23 per cent of the mining companies consulted had undertaken human rights due diligence or a human rights impact assessment.[57] While encouraging, these numbers do not reflect the extent to which gender and sexual violence are taken into account in mining companies' human rights due diligence processes. As will be discussed in Chapter 6 of this thesis, a review of the human rights policies of some of these companies shows that, despite specifically referring international standards, most of the rules regulating their human rights due diligence either address women's rights sporadically or

[54] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018). The OECD Due Diligence Guidance for Responsible Business Conduct, however, provides some insight on what it means for a company – including a mining company – to apply a gender perspective to due diligence.

[55] José Luis Blasco et al, *The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting 2017* (KPMG, 2017). This survey, conducted in 2017 by KPMG, draws on two research samples: the N100, the largest 100 companies by revenue in each of the 49 countries assessed, and the G250, the largest 250 companies in the world. The G250 was identified as the top 250 companies listed in the Fortune Global 500 ranking for 2016 (53).

[56] Ibid 47.

[57] McCorquodale et al (n 2) 26. Corporate Human Rights Benchmark, *Key Findings 2019 Across Sectors: Agricultural Products, Apparel, Extractives and ICT Manufacturing* (CHRB, 2019); Corporate Human Rights Benchmark, *CHRB Methodology* <https://www.corporatebenchmark.org/chrb-methodology>. Despite these acknowledgements and measures, the human rights performance of mining companies is still slow-moving. The 2019 results of the Corporate Human Rights Benchmark demonstrate that across four sectors (agriculture, apparel, extractives and ICT manufacturing), nearly half of the companies assessed (49 per cent) scored zero out of two across all indicators related to human rights due diligence. The largest coal mining enterprise in the world, China Shenhua Energy, for example, scored less than 5 per cent overall performance after three years. Newmont Goldcorp and Barrick Gold were the only companies newly added to the benchmark to score more than 50 per cent. The results specific to the extractive industries demonstrate that 11 out of 56 companies scored above 50 per cent, illustrating a general upward trend for extractive companies between 2016 and 2019 (with mining companies like Rio Tinto, BHP Billiton and Freeport McMoran scoring in the 70–80 per cent band).The overall human rights performance of companies is measured based on six measurement themes: Governance and Policy Commitments (Maximum percentage in theme: 10 per cent); Embedding Respect and Human Rights Due Diligence (25 per cent); Remedies and Grievance Mechanisms (15 per cent); Performance: Company Human Rights Practices (20 per cent); Performance: Responses to Serious Allegations (20 per cent); Transparency (10 per cent). Each theme has a number of points based on which a company's percentage score for each theme is calculated.

ignore them altogether, including when they refer to other specific human rights like the rights of children.[58]

The disconnection between efforts to implement human rights due diligence (HRDD) and failure to address the risks of sexual violence in these same processes may in part result from the inadequate guidance provided by regulatory initiatives on business and human rights. It is now established that clear and detailed regulation increases rates of corporate due diligence. Ruggie stated, as early as 2008, that

> [g]overnments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.[59]

Similarly, research conducted by Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks finds that companies 'prefer clearer regulation over uncertainty and inconsistency' and that rights that are well regulated are more likely to be considered as part of due diligence processes.[60]

These conclusions are consistent with one of the critiques of regulation, which is the burden it constitutes on interested stakeholders. As expressed by Fiona Haines, '"[t]oo much regulation" raises concern' because of the significant burden it places on corporations.[61] Private companies, early in the process of regulating business activities, played a prominent role in lobbying against excessive regulation of their activities.[62] As a result, business and human rights standards, in line with responsive regulation theories, now significantly rely on self-regulation by corporations. Yet what the comments above suggest is that international business and human rights instruments designed as high-level regulatory initiatives may employ imprecise language on purpose,[63] and that it is not realistic to expect such documents to provide detailed recommendations for all human rights. However, they constitute the main – and sometimes the only – instruments to which mining companies refer when establishing their due diligence

[58] See more on this in Chapter 6.
[59] John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie,* UN Doc A/HRC/8/5 (7 April 2008) [22].
[60] McCorquodale et al (n 2) 223.
[61] Haines (n 41) 182.
[62] Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge, 2014) 3.
[63] Justine Nolan, 'Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?' (2018) 15 *Brazilian Journal of International Law* 65, 74.

processes.[64] As no appropriate recommendation is made to address systemic violations of the human rights of women, including sexual violence, the practical consequence is that mining companies discharge themselves – either voluntarily or because of the invisibility of violence against women in their operations – of all responsibility to do so. This justifies, if not a profusion of regulatory standards governing mining-related sexual violence, at least detailed standards aimed at increasing the effectiveness of international regulation.

C *Assessing Risks of Sexual Violence from a Feminist Regulatory Perspective*

The intention behind viewing risk-based due diligence regulation from a feminist regulatory perspective is to ensure that regulation works to protect women from violence. Seen through that lens, the notion of effectiveness goes further than the purely regulatory definition focused on the capacity of human rights due diligence to reduce risks of sexual violence. It encompasses efforts to align human rights due diligence with feminist objectives and emphasises the preventative nature of duly diligent risk assessment. In other words, feminist international regulation should call on companies to tailor their due diligence processes for specific risks, and to take into account how these risks differentially and disproportionately affect women.

According to the UN Working Group on Business and Human Rights and the OECD Guidance for Responsible Business Conduct, this may be achieved by the adoption of a gender perspective to human rights due diligence, as 'unless business enterprises adopt a gender perspective, they will not be able to identify differentiated and disproportionate adverse impacts that their operations may have on women'.[65] The Working Group and the OECD are vague as to what a 'gender perspective' is. The Working Group, however, provides a broad definition of 'gender' as 'socially constructed roles of and power relations among men, women and gender non-binary persons', then moving on to state the guidance in their report focuses on women.[66] From a feminist approach to international regulation, indeed, a gender perspective recognises that gender considerations include the realities of men, as well as gender and sexual minorities. Yet, it also frames women's specific experiences within unequal structures of power. As such, it emphasises the expectation that mining companies take pre-emptive measures to identify and manage the specific risks to women, including sexual violence, that

[64] Regarding the UNGPs, see McCorquodale et al (n 2) 206.
[65] *Gender Dimensions of the UNGPs* (n 38) Principles 17 and 18. See also *OECD Due Diligence Guidance for Responsible Business Conduct* (n 54) 17.
[66] *Gender Dimensions of the UNGPs* (n 38) [9].

arise in their operations rather than simply responding to acts already perpetrated, which has mainly been the attitude of mining companies so far. It suggests that mining companies be required by international standards to make proactive efforts to understand the risks faced by women and the patterns of violence inside their workplace and operations, as well as in local communities.[67]

Translating these considerations into a due diligence framework that meets feminist objectives could mean that during their human rights impact assessments, mining companies be expected to actively collect gender-disaggregated data on sexual violence in host States and communities, and to consider allegations of sexual violence against other companies in the same sector, country or context. It could also mean that any due diligence policy and program implemented by a mining company explicitly address the root causes of sexual violence in mining operations, i.e. the multiple and intersecting forms of discrimination that generate sexual violence, as well as the normalising justifications for sexual violence.[68] Understanding these root causes requires companies to identify and assess them within a broad scheme of human rights instruments that goes beyond the one proposed in the UNGPs.[69] It could refer to, among others, the Declaration on the Elimination of Violence against Women (DEVAW), which, despite its non-binding nature, is widely relied upon in the international human rights discourse.[70] Such scheme could also include other standards on violence against women, including instruments that address sexual violence in conflict areas, either as a war crime or a crime against humanity, to understand the intersectional nature of sexual violence.[71] Such prerequisites will undeniably constitute a learning process for mining companies, as current general business practice is one of gender-neutral human rights due diligence, and may require them to draw on gender expertise to elaborate meaningful and gender-responsive human rights due diligence.

[67] Bourke-Martignoni and Umlas (n 37) 39.
[68] Julie Goldscheid and Debra J Liebowitz, 'Due Diligence and Gender Violence: Parsing its Power and its Perils' (2015) 48(2) *Cornell International Law Journal* 301, 306.
[69] *UNGPs* (n 3) Principle 12.
[70] Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011) xiii, 21.
[71] *Rome Statute of the International Criminal Court (last amended 2010)*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 7 and 8.

Academics,[72] governments[73] and especially NGOs have recently proposed practical tools to support companies across industries to move away from gender-neutral human rights due diligence and anchor gender in the process, specifically in relation to its risk identification step. OXFAM Australia, for instance, has developed a four-step framework for gender impact assessments as a component of due diligence in oil, gas and mining operations.[74] The four steps the organisation recommends are the collection of baseline information about the community, including information on the likely impacts of extractive activities on women; discussion and analysis of the information collected with women and other members of the community; planning and actions to avoid risk; and review and ongoing consultation with women and other members of the community.[75] Similarly, the Danish Institute for Human Rights has identified good practices for gender-responsive due diligence in extractive projects, including, in relation to risk and impact analysis, the inclusion of gender-specific human rights risks in the company's risk assessment plans and taking a gender-responsive approach to community relations policies and practices.[76] While these initiatives aim to influence corporate self-regulation towards more consideration of women's experiences of mining operations, it is crucial that they be adapted to evaluate properly risks of sexual violence. This is notably because of the stigma and silence surrounding sexual violence, which require specific measures aimed at protecting and empowering survivors.

As human rights due diligence is to be tailored to the context and nature of a company's operations,[77] so is a feminist perspective to human rights regulation. As discussed earlier, both the UNGPs and the OECD Guidance on Minerals misguidedly focus on widespread sexual violence in conflict zones and areas of weak governance, overlooking the systemic and multiple forms of sexual violence in the mining industry. At the same time, several multinational mining companies do operate in these areas. In these contexts, mining companies may be involved in sexual violence through their security forces or in complicity with State entities. They may also lack control over some of their human rights impacts. This is why the Institute for Human

[72] See, eg, Bourke-Martignoni and Umlas (n 37).
[73] See, eg, Women's Rights and Mining, *10 Dos: A Guide for Governments, Companies and Practitioners to Support Women's Rights and Mitigate Gender Risks during OECD Due Diligence Implementation* (Factsheet, 2019).
[74] Christina Hill, Chris Madden and Nina Collins, *A Guide to Gender Impact Assessment for the Extractive Industries* (OXFAM, 2017) 6.
[75] Ibid.
[76] Nora Götzmann, Linnea Kristiansson, Julia Hillenbrand, *Towards Gender Responsive Implementation of Extractive Industries Projects* (Danish Institute for human Rights, 2019) 14, 34.
[77] *UNGPs* (n 3) Principle 17.

Rights and Business has called for enhanced human rights due diligence.[78] The enhanced version of human rights due diligence relies on companies deliberately exceeding their basic due diligence responsibilities, including, for example, to address issues of possible deficiencies and weakness in international and domestic regulatory standards, the profusion of State and non-State armed groups, heightened intra-community tensions and the flourishing of shadow economies.[79] Mining companies are expected to incorporate gender considerations into their enhanced due diligence processes. They can achieve this through measures that range from including a gender analysis across all risk identification mechanisms, to assessing how the presence of the company might contribute to or enhance risks of sexual violence in communities of operation, to developing tailored strategies for mitigating these negative impacts.[80] In relation to risks related to public and private security forces, the Geneva Centre for the Democratic Control of Armed Forces and the International Committee of the Red Cross have made similar recommendations while emphasising the need for companies to assess 'the scope and dynamics of sexual and gender-based violence'[81] in their due diligence risk analysis.

IV INTEGRATING FINDINGS AND RESPONDING TO RISKS OF SEXUAL VIOLENCE

In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action. (Guiding principle 19)

The second step in human rights due diligence is for companies to take regulatory and practical action to integrate the potential and actual risks they have identified across all their internal functions and processes, as well as design and implement strategies to respond to these risks.[82] In the UNGPs, this integration is expected to be horizontal and vertical. When horizontal, it consists of corporations embedding human rights policy commitments and due diligence findings across all relevant business functions.[83] Vertical integration requires companies to use

[78] Nick Killick, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries* (Institute for Human Rights and Business, 2011). See also Bourke-Martignoni and Umlas (n 37) 60–63.
[79] Killick (n 78) 129–133.
[80] Ibid 130.
[81] Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the International Committee of the Red Cross (ICRC), *Addressing Security and Human Rights Challenges in Complex Environments* (DCAF-ICRC, 2018), 43.
[82] *UNGPs* (n 3) Principle 19. See also *OECD Guidance on Minerals* (n 3) 18.
[83] *UNGPs* (n 3) Principle 19 (Commentary).

their leverage over subsidiaries, suppliers, contractors and business partners in order to make them act upon the findings of impacts assessments and cease their wrongful practices.[84] Both horizontal and vertical integration are analysed below to demonstrate that the standards established by international regulation do not effectively spur the development of comprehensive, prolonged and systematic corporate strategies to prevent current and future acts of sexual violence in their operations.

A *Horizontal Integration and Risks of Sexual Violence*

1 *Sexual Violence and Policy-Making*

According to the UNGPs, '[t]he horizontal integration across the business enterprise of specific findings from assessing human rights impacts can only be effective if its human rights policy commitment has been embedded into all relevant business functions'.[85] If read with a feminist lens, this requirement creates as a necessary prerequisite of due diligence that mining companies either have in place or develop internal policies and procedures that comprehensively address the differentiated and intersectional impacts of their activities on women and the risks of sexual violence that seem to systematically emerge in mining operations. Yet, the UNGPs do not make the establishment of human rights policies a specific requirement of due diligence but, rather, a basis for companies to embed their responsibility to respect human rights.[86] They do not say much either on what should be included in a company's human rights policies and procedures, relying instead on corporations' own appreciation of the standards needed to regulate human rights risks in their operations.

The OECD, however, focuses on the regulatory nature of human rights due diligence and recommends that companies – including mining companies – adopt effective policies as the first step of their due diligence processes. The OECD Guidance for Responsible Business Conduct advises companies to '[d]evise, adopt and disseminate a combination of policies on RBC issues that articulate the enterprise's commitments to the principles and standards contained in the OECD Guidelines for MNEs and its plans for implementing due diligence'.[87] Similarly, in relation to the mining industry, the OECD Guidance on Minerals recommends that companies establish strong company management systems that include adopting and

[84] Ibid.
[85] Ibid.
[86] *UNGPs* (n 3) Principle 16.
[87] *OECD Due Diligence Guidance for Responsible Business Conduct* (n 54) 22.

communicating to suppliers and to the public 'a company policy for the supply chain of minerals originating from conflict-affected and high-risk areas'.[88]

2 *A Feminist Regulatory Perspective on Corporate Culture and International Law*

From a feminist regulatory perspective, the OECD's approach to embedding policy-making as a specific element of human rights due diligence seems more effective than the position taken by the UNGPs. I have underlined in Chapter 4 the challenges associated with regulatory initiatives making the rights of women secondary, and the adverse impacts their language may have on the potential of corporate policies to address sexual violence against women. Yet, having strong and detailed internal regulation addressing this issue seems to be an essential step for mining companies wanting to implement human rights due diligence, as rights that are well regulated inside and outside the company are more likely to make it through a due diligence process.[89] As rightly mentioned in the OECD Guidance for Responsible Business Conduct, this means, in relation to sexual violence, '[d]eveloping, designing and evaluating gender sensitive and gender responsive policies and plans to mitigate and address real and potential adverse impacts identified'.[90] The reach of these policies should apply to sexual violence in the workplace but also in mining communities and, more broadly, in society. The non-governmental organisation Business for Social Responsibility (BSR), for instance, conducted research with women in Africa's mining regions and concluded that 'women felt one of the most important actions companies can take is to communicate a clear policy and discipline employees who abuse or make unwanted sexual advances'.[91] In another study, BSR stated that companies should 'aim to understand vulnerabilities and patterns of harassment and violence outside of the workplace, tap into public systems and work to strengthen those systems'.[92]

Such self-regulatory practices would assuredly increase the visibility of women's experiences of mining activities, and influence the entirety of due diligence processes undertaken by mining companies according to the feminist objective of allowing expanded space for women and

[88] *OECD Guidance on Minerals* (n 3) 17.
[89] McCorquodale et al (n 2) 223.
[90] *OECD Due Diligence Guidance for Responsible Business Conduct* (n 54) 41.
[91] Ouida Chichester, Jessica Davis Pluess, and Alison Taylor, *Women's Economic Empowerment in Sub-Saharan Africa: Recommendations for the Mining Sector* (BSR-William & Flora Hewlett Foundation, 2017) 22.
[92] Christine Svarer, Racheal Meiers, and Berkley Rothmeier, *Empowering Female Workers in the Apparel Industry: Three Areas for Business Action* (BSR, 2017) 3. This statement was made in the context of the garment industry but is applicable to the mining sector.

survivors' voices and agency across corporate functions.[93] A stronger feminist approach to regulation, however, would also expect international standards to prompt mining companies to include intersectionality considerations into policy-making. This may include, for example, acknowledgment of the structural causes of poverty in several communities of operation and of ongoing inequalities that contribute to the perpetuation of sexual violence related to mining. It would also require companies to self-regulate and act upon the 'racist, sexist and ethnocentric attitudes played within corporations' still composed mainly of 'wealthy, white men'.[94] For example, in 2011, when interviewed about rapes in Porgera, Barrick Gold founder and then chairman Peter Munk contested allegations of the company's involvement, claiming that 'gang rape is a cultural habit' in Papua New Guinea.[95] According to Susan Manning, in this situation 'sexism works in conjunction with wider racist and ethnocentric attitudes present within Canadian society, and within Barrick itself, to represent sexual and structural violence as beyond Canada's concern'.[96] These conclusions call for mining companies to systematically review their internal cultural responses to international regulation and to exceed international regulatory expectations by developing policies and procedures that address corporate cultural bias and imbalances of power between companies, States and communities.

Finally, corporate policies that meet feminist regulatory standards would be aligned with international and domestic norms regulating women's rights. This is not a straightforward process for corporations as definitions of sexual violence in international human rights law are inconsistent and incomplete. Domestic regulation of sexual violence may also, in many countries where mining operations take place, be inadequate or inexistent, or inconsistent with international law. There are some legal challenges to the effective regulation of sexual violence through corporate policies. However, mining companies may look, in addition to normative standards, into the works of NGOs, academics and UN treaty bodies, for instance, that elaborate further on State and non-State entities' role in addressing sexual violence against women.

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[93] On the invisibility of women in international law, see, eg, Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613; Andrew Byrnes, 'Using International Human Rights Law and Procedures to Advance Women's Human Rights' in Kelly Dawn Askin and Dorean Koenig (eds), *Women and International Human Rights Law* (Brill, Transnational Publishers, 2000) 79.

[94] Susan M Manning, 'Intersectionality in Resource Extraction: A Case Study of Sexual Violence at the Porgera Mine in Papua New Guinea' (2016) 18(4) *International Feminist Journal of Politics* 574, 585.

[95] Rob Annandale, 'Barrick Gold's Offer to Rape Victims Slammed by NGOs', *The Tyee* (British Columbia) <https://thetyee.ca/News/2013/02/02/Barrick-Gold-Offer/>.

[96] Manning (n 94) 585.

On that matter, the UNGPs recommend that companies refer to experts[97] to receive informed advice on how to prevent and address sexual violence in their operations. In reality, the number of experts who understand the linkages between large-scale mining and sexual violence is relatively limited. Yet, recent research and emerging initiatives encourage broader discussions on gender-responsive human rights due diligence, and provide mining companies with opportunities to learn from programmes that are addressing the challenges of gendered relations and sexual violence in mineral supply chains.[98] Joanna Bourke Martignoni and Elizabeth Umlas state that

> [a] comprehensive approach to addressing sexual harassment and abuse involves incorporating independent, gender-related expertise into the design and ongoing implementation of HRDD, allowing for independent investigation of allegations and having "heightened sensitivity to cultural context and gender relations".[99]

B *Vertical Integration and Stakeholder Engagement in Preventing Sexual Violence*

1 *Causation, Contribution and Vertical Integration*

The appropriateness of the actions taken by a mining company to integrate its findings on risks of sexual violence also depends on the extent of its contribution to this adverse impact and its leverage in addressing it. In other words, interest must be given to whether the company has caused or contributed to sexual violence or whether it is involved through the actions of a business relationship.[100] This is an important element of guiding principle 19. Indeed, ensuring that the company identifies its own contribution to sexual violence is critical to inform the actions it takes to respond effectively to sexual violence. More significantly, guiding principle 19 requires that a company have in place policies, procedures and measures that aim not only to prevent and respond to its own involvement sexual violence but also to prevent subsidiaries, contractors and other businesses involved in the mining operations from being involved in such practices.[101]

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[97] *UNGPs* (n 3) Principle 16 (Commentary).
[98] Bourke-Martignoni and Umlas (n 37) 36. For examples of initiatives see Götzmann, Kristiansson and Hillenbrand (n 76).
[99] Bourke-Martignoni and Umlas (n 37) 36.
[100] *UNGPs* (n 3) Principle 19.
[101] Nicola Jägers and Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations' (2014) 12(1) *Northwestern Journal of Human Rights* 47, 63.

On that point, two elements are important: the company's response to the identified risk and its leverage over its business relationships.[102] Where the company has caused sexual violence – through its employees, for instance – principle 19 suggests that it take the necessary steps to cease and prevent it. If it has contributed to it, it is expected to cease and prevent repetition of its contribution and use its leverage to mitigate remaining impacts. If sexual violence derives from the activities of a business relation, the company is expected to use its leverage to make sexual violence cease or, if necessary, to cease the relationship.[103]

The wording used in guiding principle 19 and its commentary is problematic. In the first two scenarios – i.e. if the company has caused or contributed to sexual violence – the only recommendation made by the UNGPs is that the company cease or prevent the impact or use its leverage to reduce the extent and severity of any remaining risks of sexual violence to the greatest extent possible. The issue with this approach is that it calls for punctual responses to identified risks and acts of sexual violence. It allows companies to take limited mitigation measures, which would fulfil their human rights due diligence responsibilities. Rather, a regulatory response meeting feminist objectives would compel mining companies to develop a comprehensive, prolonged and systematic strategy to prevent current and future acts of sexual violence in their operations.

This response goes further than simply 'revising [companies'] gender-equality policy and management processes and practices', as recommended by the UN Working Group on Business and Human Rights.[104] It requires mining companies to plan and elaborate gender-responsive schemes across *all* their policies and procedures in order to change the patriarchal and ethnocentric corporate culture identified earlier. Without doing so, it is difficult to see how mining companies can influence their contractors and business partners, or 'build the capacity of the enterprise's own personnel and business partners to effectively handle sexual harassment and gender-based violence',[105] in a way that effectively addresses the existing imbalances of power that contribute to sexual violence in mining operations. Such strategy should extend across the company and to all actions related to responding to the risk. It would include, for

[102] *UNGPs* (n 3) Principle 19 (Commentary).
[103] Ibid.
[104] *Gender Dimensions of the UNGPs* (n 38) Principle 19 [38].
[105] Ibid.

instance, the provision of transformative remedies in cases where sexual violence has already happened.[106]

Yet, as an example, Barrick's Gold's response to sexual violence in its Porgera and North Mara mines demonstrates that one-off remedy frameworks considered inadequate by non-corporate and non-State regulators, including survivors, and elaborated without any long-term gender-responsive strategy, can be considered, in light of international regulation, effective responses to identified risks of sexual violence. Similarly, in its 2017 human rights report, Barrick Gold mentioned that the Porgera events encouraged the company to develop a comprehensive human rights program. The company added that since the implementation of that program it has seen no 'impacts reflective of the incidents at Porgera' in their operations.[107] However, except for occasional mentions of sexual violence, Barrick Gold's human rights program does not exhibit a specific, systematic and comprehensive strategy to address actual and potential risks of sexual violence in the company's operations.

2 *Linkage and Vertical Integration*

Regarding the integration of human rights impacts perpetrated by business partners, companies are expected to use leverage, understood as their ability to effect change in the wrongful practice of a business partner.[108] Some business and human rights scholars have criticised this position for being unrealistic.[109] In fact, many companies across sectors find it challenging to define their supply chain and business partners for the purposes of human rights due diligence, and may have varied levels of leverage with different business partners.[110] The UNGPs are silent on the practical realisation of this requirement in relation to the principle of separation

[106] See Ruth Rubio-Marín, *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press, 2009); Sarah Williams and Emma Palmer, 'Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia' (2016) 10(2) *International Journal of Transitional Justice* 311.
[107] Barrick Gold, *2017 Human Rights Report* (Barrick Gold, 2018) 7.
[108] *UNGPs* (n 3) Principle 19 (Commentary).
[109] See, eg, Radu Mares, 'Responsibility to Respect: Why the Core Company Should Act when Affiliates Infringe Human Rights' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, 2011), 169. It should be noted, however, that a significant part of the supply chain literature considers that lead companies have considerable leverage over other supply chains actors. See, eg, Igor Nossar et al, 'Protective Legal Regulation for Home-Based Workers in Australian Textile, Clothing and Footwear Supply Chains' (2015) 57(4) *Journal of Industrial Relations* 585.
[110] Lise Smit et al, *Study on Due Diligence Requirements Through the Supply Chain* (European Commission, 2020) 5.

of corporate entities.[111] The commentary to guiding principle 19 recognises that this requirement is 'complex'.[112]

To respond to this complexity, guiding principle 19 relies on a variety of factors that should be considered by a company before it makes a decision to respond to the risks created by a business relationship. These factors are 'the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences'.[113] If the company does not have enough leverage, it should increase it and, if that is impossible, should end the relationship.[114] In situations where the relationship is crucial to the enterprise – meaning a relationship that provides essential products or services to the company and for which no alternative source exists[115] – the severity of the abuse is the criteria that the company should take into account to decide whether or not to terminate the relationship.

Regarding such a serious and systemic abuse as sexual violence, the expectation would thus be that the company monitor the actions of its business partners to cease and prevent recurrence of sexual violence. The business partner's response should be fast and effective, or the company should end the relationship. According to Nicola Jägers and Conny Rijken, then, in the case of severe human rights violations the commitment from companies to integrate their findings should not only be horizontal throughout the oversight and control mechanism of the company but also vertical, with this oversight and control incorporating businesses to which the corporation is linked.[116] In practice, however, companies have considerable leeway in determining their involvement in acts of sexual violence and the seriousness of these acts. It is also up to the corporation to assess the limits of its responsibility for the acts of other business and security stakeholders.[117] This makes integrating the findings strongly dependent upon the company's actual commitment to prevent sexual violence and the value it gives to any potential reputational damage in the event the response provided is deemed inadequate.

[111] Jägers and Rijken (n 101) 63.
[112] *UNGPs* (n 3) Principle 19 (Commentary).
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Jägers and Rijken (n 101) 69.
[117] Fasterling and Demuijnck (n 32) 809.

V TRACKING THE EFFECTIVENESS OF CORPORATE RESPONSE

In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. (Guiding principle 20)

A *Corporate Indicators and Tracking Responses to Sexual Violence*

1 *The Challenges of Using Quantitative Data*

The third step of human rights due diligence is the requirement for companies to track the effectiveness of their response to the identified risk. The objective of this exercise is long term and is focused on sustaining the positive effects of human rights due diligence over time. It is aimed at making sure that the human rights policies and strategies put in place are implemented to their full potential, that the response to the human rights impacts are effective and that continuous improvement is possible.[118] In practice, however, the tracking requirements established by international standards do not allow for the transformative process that is necessary to address both identified risks of sexual violence and systemic intersectional contributors to take place.

One aspect of tracking, according to the UNGPs, is that it should be based on appropriate qualitative and quantitative factors.[119] For example, one way for mining companies to measure the effectiveness of their response to sexual violence could be by counting the number of women who have reported sexual violence in relation to mining activities.[120] From corporate and purely regulatory perspectives, indeed, a successful strategy to prevent sexual violence would lead to a reduction in the numbers of survivors.[121] Barrick Gold, for instance, reported in 2018 that it was 'continuing to consider different ways to gather objective, *quantifiable* information about the effectiveness of [their human rights] programs'.[122] In relation to its Porgera mine, it added that '[a]t Porgera itself, there have been no credible allegations of similar abuses by PJV security personnel since 2010',[123] and that in relation to alleged sexual

[118] *UNGPs* (n 3) Principle 20 (Commentary).
[119] Ibid Principle 19.
[120] For similar argument in relation to human trafficking, see Jägers and Rijken (n 101) 70.
[121] Ibid.
[122] Barrick Gold (n 107) 8, emphasis added.
[123] Ibid 7.

assault committed in March 2017 by the police near the mine, '[n]o individual [had] come forward for medical or humanitarian assistance'.[124]

The problem is that it is extremely difficult to collect reliable quantitative information in relation to sexual violence against women, let alone in mining operations. Sexual violence in all contexts is a largely underreported human rights violation[125] and stigma associated with it often constrains survivors to preserve their anonymity. Thus, when in relation to its investigation of the March 2017 events Barrick Gold requested that the organisation representing survivors provide mine management with '[t]he names of any individuals who may have been assaulted or victimized by the police, or those who may know such victims',[126] it is not surprising that the investigation led to no result. In the absence of hard figures on the existence and continuation of sexual violence in their operations, not only can mining companies easily assert that sexual violence does not exist, or no longer exists, in their operations, but it is also difficult to measure the impact of the corporate actions taken by looking at the number of survivors.[127]

As a result, companies that want to demonstrate commitment to tackling sexual violence in their operations need to rely on more than one type of measurable indicator to track the effectiveness of their response. Tracking that meets feminist objectives needs to go further than just counting survivors and requires the development of appropriate quantitative and qualitative indicators that help companies understand when gender equality in relation to risks is achieved.[128] It requires a strategy that addresses not only the systemic risks of violence against women but also ingrained and generalised forms of discrimination that contribute to sexual violence against women in and outside mining operations.

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[124] Ibid 39.
[125] UN Department of Economic and Social Affairs, *The World's Women 2015: Trends and Statistics* (United Nations, 2015) 159.
[126] Letter from Peter Sinclair, Toronto, to McDiyan Robert Yapari, 27 March 2017 <http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/788666289/files/porgera/Barrick-Response-ATA-032717.pdf>.
[127] Jägers and Rijken (n 101) 70.
[128] Linnea Kristiansson, *Embedding Gender in the Business and Human Rights Agenda* (Master's Thesis, Lund University, 2017) 54.

2 *Tracking and Auditing Practice*

One of the tools most frequently used for tracking a company's response to human rights impacts, in addition to performance reviews for instance, is external audits. In fact, while the OECD Guidance for Responsible Business Conduct, similarly to the UNGPs, generally recommends that companies track the implementation and effectiveness of their due diligence activities,[129] the OECD Guidance on Minerals uses a different language and recommends that mining companies 'carry out independent third-party audit of supply chain due diligence at identified points in the supply chain'.[130] The problem with this recommendation is that traditional auditing processes are often insufficient to detect, report and correct human rights impacts.[131]

In research conducted by Lise Smit, Gabrielle Holly, Robert McCorquodale and Stuart Neely, for example, '[o]ne interviewee confirmed this by indicating that the large auditing firm they use for other purposes, including their communications, "do not have the expertise for human rights"'.[132] This has led to recognition of the importance of auditors being credible and independent.[133] For instance, the organisation Enodo Rights conducted an external audit of the Porgera Remedy Framework. While claiming to be independent, its research was funded by Barrick Gold and concluded that 'successful claimants received remedies that were equitable, even generous, under international law'.[134] This conclusion contradicts almost all other civil society and academic reports on the subject and raises questions about the independence of auditors when funded by the company as part of their its diligence process.

It is also crucial for effective monitoring of responses to sexual violence that auditors be trusted and respected in the affected community.[135] From a regulatory perspective this is important because of the likely mistrust by local communities of mining companies as both perpetrators of human rights violations and regulators.[136] Auditors must therefore be perceived by the community as independent evaluators who will take the survivors' requests seriously. This requirement also suggests that the tracking process should be participatory and include

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[129] *OECD Due Diligence Guidance for Responsible Business Conduct* (n 54) 32.
[130] Ibid 19.
[131] Genevieve Le Baron and Jane Lister, *Ethical Audits and the Supply Chains of Global Corporations* (Sheffield Political Economy Research Institute, 2016) 1.
[132] Smit et al (n 110) 13.
[133] See, eg, Harrison (n 34) 114.
[134] Yousuf Aftab, *Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework* (Enodo Rights, 2016) 2.
[135] Hill, Madden and Collins (n 74) 20.
[136] This question is developed in Chapter 6.

members of the community, be aimed at ensuring gender equality and be compatible with a commitment to prevent violence against women. According to the UN Working Group on Business and Human Rights, for instance, 'business enterprises should engage women, women's organizations and local community groups to assess the effectiveness of their gender-transformative responses'.[137] In addition, collecting data and auditing on sexual violence should be conducted following ethical considerations (refraining from re-abusing the survivors, for instance) and in collaboration with experts in the field.[138]

Guiding principle 20 does not specifically require that this tracking process be extended to the human rights impacts of companies' business relationships. However, as guiding principle 20 is linked to guiding principle 17, an expectation would be that tracking the response of business relationships constitutes a requirement where a significant human rights impact is identified.[139] On that point, and regarding audits, the position of the OECD Guidance on Minerals is stronger than that of the UNGPs, which do not create a strict condition for audits to be external. Instead, it states that

> [t]racking should be integrated into relevant internal reporting processes. Business enterprises might employ tools they already use in relation to other issues. This could include performance contracts and reviews as well as surveys and audits, using gender-disaggregated data where relevant.[140]

This makes one wonder whether a company would meet its due diligence responsibilities if it relied only on private voluntary regulation, as has been common practice in companies across sectors so far.[141] Also called social auditing, this self-regulatory process is understood as an internal monitoring process often involving third-party inspections.[142] In other words, social auditing would allow a parent mining company to track the response of its contractors or subsidiaries by organising inspections, among other measures. Social auditing is a widely used practice in the mining industry[143] but has been criticised by academic researchers and human rights organisations over the years. It has also been discredited as a human rights due diligence methodology as it focuses on managing the risks for the company rather than the risks for

[137] *Gender Dimensions of the UNGPs* (n 38) Principle 20 [40].
[138] United Nations Population Fund, *The Role of Data in Addressing Violence against Women and Girls* (Report, 2013).
[139] *UNGPs* (n 3) Principle 17 (Commentary).
[140] Ibid Principle 20 (Commentary).
[141] Deanna Kemp, John R Owen and Shashi Van de Graaff, 'Corporate Social Responsibility, Mining and "Audit Culture"' (2012) 24 *Journal of Cleaner Production* 1.
[142] Simon Zadek and Richard Evans, *Auditing the Market: A Practical Approach to Social Auditing* (Traidcraft, 1993). The authors define social auditing as 'a process of defining, observing and reporting measures of an organisation's ethical behaviour and social impact against its objectives' (7).
[143] Kemp, Owen and Graaff (n 141).

rights-holders.[144] This is partly due to the self-regulatory nature of social auditing, which is not set up to address the larger context of discrimination against women and the gendered and legal norms that might lead to increased violence against women in certain settings, including mining.[145]

B *Tracking Responses and the Use of Gender-Disaggregated Data*

Recent initiatives have started exposing the significant limitations of social auditing in aligning to human rights due diligence expectations and in shedding light on women's specific experiences of mining – and business more generally – activities. The Business for Social Responsibility's Gender Equality in Social Auditing Guidance, for example, aims at adapting 'existing auditing processes so that women's issues are better surfaced',[146] including through a gender analysis of policies and practices, and the use of gender-disaggregated data. The use of gender-disaggregated data is also recommended in international instruments on business and human rights. The commentary to guiding principle 20 and the OECD Guidance for Responsible Business Conduct both refer to this type of data collection as a tool to make sure violations of the human rights of women are responded to and tracked in a way that is effective and appropriate.[147] Similarly, in its guidance on the gender dimensions of the UNGPs, the UN Working Group on Business and Human Rights urges corporations to 'track the effectiveness of their responses by using sex-disaggregated data, collected in line with a human rights-based approach'.[148]

Indeed, under international human rights law, gender-disaggregated data has long been supported to understand and address the specific needs and experiences of women. The CEDAW Committee stated in its 1989 General Recommendation[149] 9 that

> [S]tates parties should make every effort to ensure that their national statistical services responsible for planning national censuses and other social and economic surveys formulate their questionnaires in such a way that data can be disaggregated according to gender, with regard to both absolute

[144] Bourke-Martignoni and Umlas (n 37) 33–35.
[145] Ibid 34.
[146] Magali Barraja, *Gender Equality in Social Auditing Guidance* (BSR, 2018) 2.
[147] *OECD Due Diligence Guidance for Responsible Business Conduct* (n 54) 41.
[148] *Gender Dimensions of the UNGPs* (n 38) Principle 20 [39].
[149] 'General Comments' or 'General Recommendations' are issued by each international human rights treaty body to interpret the provisions of its respective human rights treaty, thematic issues or its methods of work. They are non-binding forms of regulation that seek to clarify the duties of State parties with respect to certain provisions and to suggest approaches to implementing treaty provisions.

> numbers and percentages, so that interested users can easily obtain information on the situation of women in the particular sector in which they are interested.[150]

More recently, in relation to violence against women, the Committee reiterated that in order to meet their obligation under international law, States should '[e]stablish a system to regularly collect, analyse and publish statistical data on […] all forms of gender-based violence against women', and that '[a]ll data should be disaggregated by type of violence, relationship between the victim/survivor and the perpetrator, as well as in relation to intersecting forms of discrimination against women and other relevant socio-demographic characteristics, including the age of the victim'.[151] Similarly, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, requires that States 'collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence [against women]'.[152]

In that context, while international human rights law has so far concentrated on the obligations of States, the collection of gender-disaggregated data to analyse and monitor risks of sexual violence may equally prove a reliable tool that can be used by mining companies. Indeed, the provision of gender-disaggregated data is crucial for monitoring gender-specific trends within mining companies and throughout their operations, and for identifying problems that contribute to sexual violence against women. According to Rachel Perks and Katrin Schulz, for instance,

> [t]he importance of quality, gender-disaggregated data cannot be understated. Good-quality data can lead to better-informed decision-making. When it comes to the extractive industries, statistics on a variety of challenges facing men and women are not universally available, reliable or comparable. This can lead to the drafting and implementation of inappropriate policies and programs, and an underreporting of activities' impact.[153]

In other words, the collection of gender-disaggregated data can help mining companies to understand the range of situations in which sexual violence prevails, to assess factors that have led to sexual violence occurring, and to identify gaps in their due diligence policies and practices. Regarding sexual violence in mining communities, data may be disaggregated in several ways, including by sex, age, ethnicity, indigeneity or relationship between the survivors

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[150] CEDAW Committee, *General Recommendation No. 9: Statistical Data Concerning the Situation of Women*, 8th sess (1989).
[151] CEDAW Committee, *General Recommendation No. 35, (2017): On Gender-Based Violence Against Women, Updating General Recommendation No. 19*, UN Doc CEDAW/C/GC/35 (14 July 2017) [49].
[152] *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, opened for signature 11 May 2011, CETS No 2010 (entered into force 1 August 2014) art 11.a.
[153] Rachel Perks and Katrin Schulz, 'Gender in Oil, Gas and Mining: An Overview of the Global State-Of-Play' (2020) 7(2) *The Extractive Industries and Society* 380, 382.

and the perpetrators. Disaggregation processes must be designed to protect the privacy of survivors. This process would contribute to shedding light on the risks of sexual violence women face in mining activities, and to more systematic responses from companies. The visibility of women is a feminist concern that is critical to reinforcing the effectiveness of human rights due diligence processes. However, the tracking and monitoring of corporate efforts needs to respond also to intersectionality concerns for mining companies' activities to be effective in preventing sexual violence, in addition to being more systematic. I have demonstrated earlier that understanding by companies of all the intersecting direct and indirect causes of discrimination and sexual violence against women is essential to implement due diligence processes that, by considering these causes, are also more effective in addressing them. In practice, future international regulation may require companies to collect gender-disaggregated data on the poverty status of their community of operation, on women's level of education, on women's activity status, and on any form of identity or marginalisation relevant to the community,[154] among other indicators.

VI REPORTING ON DUE DILIGENCE EFFORTS REGARDING SEXUAL VIOLENCE

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. (Guiding principle 21)

A *Corporate Reluctance and Invisible Sexual Violence*

From a regulatory perspective, the reporting requirement of human rights due diligence is interesting. Ruggie goes as far as calling human rights due diligence a 'game changer' for companies. Indeed, it moves them from a system of 'naming and shaming', as a response by external regulators to the failure of companies to respect human rights, to a situation of 'knowing and showing'.[155] The process is shifted from a responsive one to a proactive system wherein companies actively self-regulate their human rights obligations by internalising them

[154] Hill, Madden and Collins (n 74) 8.
[155] *Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework* (n 4) [80].

in their due diligence policies, procedures and practices (knowing) and proactively demonstrate the results of their efforts (showing). According to some authors, this regulatory shift can produce benefits. James Harrison, for instance, argues that it might compel companies to develop greater ownership of their human rights performance and to reflect on their existing practice, rather than only engaging with human rights when they are subject to external shaming.[156] In theory, the requirement for companies to report on human rights issues is an important tool to combat a lack of transparency in mining operations, which are particularly prone to corruption.[157] Yet, when analysed in light of feminist objectives, it raises concerns as to its potential to increase visibility on women's experiences and to contribute effectively to the prevention of sexual violence in mining communities.

The first issue is that risks of sexual violence are likely to stay invisible for many mining companies. It is thus highly probable – and necessary – that despite the UNGPs' reporting requirements, external regulators (mainly NGOs and academics) will need to keep shedding light on cases of mining-related sexual violence and shaming mining companies into integrating risks of sexual violence in their internal rules.[158] In fact, research conducted in 2019 by the Global Reporting Initiative (GRI) and the Responsible Minerals Initiative demonstrates that several years after the launch of the UNGPs, there remains significant confusion among mineral supply chains corporate actors about what information needs to be collected and reported, what information is reasonable to report and what information should be disclosed publicly.[159] The organisation also analysed corporate human rights performance disclosure in the mining, energy and financial sectors in 2016. It discovered that only 26 per cent of companies in the three sectors reported on human rights impact assessments despite 57 per cent of them making reference to the UNGPs, 53 per cent referring to a due diligence process and 87 per cent identifying human rights as a material topic.[160] Similarly, low levels of reporting were found among mining companies on issues including security practices, despite them being clearly material to the sector.[161] From a qualitative perspective, the GRI concluded that the

[156] Harrison (n 34) 108.
[157] See, eg, Andrea Petermann, Juan Ignacio Guzmán and John E Tilton, 'Mining and Corruption' (2007) 32(3) *Resources Policy* 91.
[158] This question is discussed in Chapter 8.
[159] Global Reporting Initiative (GRI) and Responsible Minerals Initiative (RMI), *Advancing Reporting on Responsible Mineral Sourcing* (GRI-RMI, 2018) 36.
[160] Global Reporting Initiative, *Shining a Light on Human Rights: Corporate Human Rights Performance Disclosure in The Mining, Energy and Financial Sectors* (GRI, 2016) 14, 18. In the mining sector specifically, 100 per cent of the companies identified human rights as a material topic, and 70 per cent made reference to the UNGPs and to a due diligence process (14).
[161] Ibid 17.

information companies reported on human rights issues were broad, generalised statements that were confusing for readers and lacked sufficient quantitative detail on results.[162] These findings are supported by a 2020 study conducted with companies across various sectors, which found that 'despite an increase in reporting requirements, information contained in corporate reports often differs significantly from the companies' actual practices'.[163]

Whether these results illustrate a real confusion from companies about their reporting responsibilities or a lack of willingness to commit to and manage human rights impacts and risks, they justify more monitoring from other regulators. They also call for more partnerships between companies, civil society and States so that mining companies can understand the social expectations of them, how they can meet them and how they can report on their achievements. This point will be developed further in Chapter 8. It should be said here, however, that from a feminist regulatory perspective, further cooperation between regulators allows for increased awareness among corporations of mining-related risks of sexual violence. Better visibility of women's experiences, and better understanding of the importance of gender mainstreaming throughout due diligence processes would lead companies to give more prominence to women's concerns in corporate reporting systems.[164]

This conclusion is particularly important in a context where mining companies so far have demonstrated no willingness to integrate gender issues in their reporting practices in a significant (rather than a purely cosmetic) way. Indeed, feminist scholars have argued that there has been a 'shift in framing of feminist analysis from autonomous, radical, opposition based on anti-system outrage at oppression to one which is inclusionary, mainstream and based on human rights',[165] which has made gender issues more amenable to the corporate agenda.[166] Yet, in practice, mining companies have so far exhibited no evidence of tracking and disclosing data on their performance on managing impacts of their activities on women.[167] Similarly, in relation to sexual violence linked to their operations, while Barrick Gold reported on actions

[162] Ibid 18.
[163] Smit et al (n 110) 2.
[164] For similar arguments in relation to reporting on women in the workplace, see Kate Grosser and Jeremy Moon, 'Gender Mainstreaming and Corporate Social Responsibility: Reporting Workplace Issues' (2005) 62 *Journal of Business Ethics* 327.
[165] Sylvia Walby, 'Feminism in a Global Era' (2002) 31(4) *Economy and Society* 533, 546.
[166] Grosser and Moon (n 164) 329.
[167] Responsible Mining Foundation, *Responsible Mining Index 2020: Results* <https://2020.responsibleminingindex.org/en/results/thematic/318>. Only one of the 38 mining companies reviewed in 2020 in the Responsible Mining Index, Newmont, 'shows minimal evidence of tracking and disclosing data on its performance on managing any impacts of its activities on women'.

taken to prevent further cases in their Porgera mine it did not elaborate on systemic strategies in place to achieve this objective.[168]

B *Sexual Violence in Mining: Viable Reporting Processes?*

The second issue deals with the viability of the reporting process. According to guiding principle 21, '[b]usiness enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them'.[169] This means two things. First, guiding principle 21 requests formal reporting only in cases where severe human rights risks are identified. It is unclear – and potentially unlikely – that mining companies would identify sexual violence as a severe risk. Second, if they do consider sexual violence a severe human rights impact of mining operations, mining companies should demonstrate established and strict reporting mechanisms that not only report on measures taken to identify and respond to actual and potential risk of sexual violence in their operations, but also exhibit a long-term strategy that addresses the systemic manifestations of violence against women in and outside of the mining sites. On that matter, Women in Mining and the OECD encourage all regulators (mining companies, States and civil society) to '[d]evelop reporting instruments and methodologies to collect and disclose disaggregated data (according to gender and other social identities) to address the invisibility of women in mining and mineral supply chains, highlight gender inequalities, and monitor change'.[170] A feminist approach to international regulation, however, indicates that there are many challenges to the implementation of such objectives. Indeed, the UNGPs do not go far enough in making transparency a sine qua non condition of human rights due diligence,[171] with guiding principle 21 giving extensive latitude to companies by creating different responsibilities depending on the perceived seriousness of the human rights impact.[172]

The OECD goes further than the UNGPs by highlighting practical actions companies should take irrespective of the human rights risk identified. The OECD Guidance for Responsible Business Conduct, in particular, requests that companies include in their reporting process their policies; the risks identified, prioritised and assessed; the prioritisation criteria; the actions taken to mitigate those risks; timelines and benchmarks for improvement; measures to track

[168] Barrick Gold (n 107).
[169] *UNGPs* (n 3) Principle 21.
[170] *Gender Dimensions of the UNGPs* (n 38) 1.
[171] Harrison (n 34) 112.
[172] *UNGPs* (n 3) Principle 21.

implementation and results; and the company's provision of or cooperation in any remediation.[173] The Guidance also recommends that information published be accessible for readers and communicated to impacted rights-holders.[174] However, despite recommending that companies adjust their actions to integrate gender issues into the way they identify, prevent, mitigate and address their impacts on women, it does not do so respecting the reporting step of human rights due diligence.[175]

Similarly, in relation to 'occurrences of sexual violence', identified as a risk in the OECD Guidance on Minerals, the GRI recommends that companies disclose important but gender-neutral information that relates to 'human rights' in general:

> Disclosure 406-1 Incidents of discrimination and corrective actions taken
>
> Disclosure 410-1 Security personnel trained in human rights policies or procedures
>
> Disclosure 411-1 Incidents of violations involving rights of indigenous peoples
>
> Disclosure 412-1 Operations that have been subject to human rights reviews or impact assessments
>
> Disclosure 412-2 Significant investment agreements and contracts that include human rights clauses or that underwent human rights screening[176]

This illustrates a disregard within the international regulation for feminist literature that has long highlighted the importance of corporations communicating externally on gender equality. According to Kate Grosser and Jeremy Moon, for instance, the increased transparency afforded by monitoring and reporting on gender issues improves gender equality in business activities.[177] Indeed, making the activities of corporations more transparent to external stakeholders, through the publication of detailed information about their gender policies and practices, has been shown to empower these stakeholders to monitor company performance and hold corporate management accountable for their actions towards women.[178] These feminist findings are in

[173] *OECD Due Diligence Guidance for Responsible Business Conduct* (n 54) 33.
[174] Ibid.
[175] Ibid 41.
[176] Global Reporting Initiative and Responsible Minerals Initiative (n 159) 56. See also Blasco et al (n 55). According to the authors, the standards developed by the Global Reporting Initiative are the sustainability reporting framework that is the most commonly used by companies across sectors with 63 per cent of N100 reports and 75 per cent of G250 reports applying it in 2017 (28).
[177] Kate Grosser and Jeremy Moon, 'Developments in Company Reporting on Workplace Gender Equality?: A Corporate Social Responsibility Perspective' (2008) 32(3) *Accounting Forum* 179, 181.
[178] Ibid. See also Carol A Adams and George Harte, 'The Changing Portrayal of the Employment of Women in British Banks' and Retail Companies' Corporate Annual Reports' (1998) 23(8) *Accounting, Organizations and*

line with regulatory scholarship, which recognises that civil society, international organisations, States and consumers need to have enough information about a company's due diligence process and the outcomes achieved to become educated about the performance of the company and monitor it in an effective way.[179] It is worth noting, however, that despite persistent gaps between regulatory requirements on reporting and feminist objectives of effective reporting – and consequent prevention of sexual violence in mining operations – international regulators are progressively integrating feminist concerns in business and human rights standards. The UN Working Group on Business and Human Rights, in particular, recommended in its guidance on the gender dimensions of the UNGPs that companies communicate adequate and easily accessible information to potentially affected women regularly.[180] It also recognised that 'a lack of information disclosure could worsen the situation of disadvantaged, marginalized or vulnerable individuals and communities'.[181]

While I am arguing for stronger regulation of reporting, effective reporting of sexual violence needs to come with specific practices and safeguards to protect the confidentiality and safety of survivors. As the UN Working Group on Business and Human Rights rightly states:

> If the information communicated concerns sexual harassment and gender-based violence, business enterprises should respect the victims' right to privacy and should not disclose the identity or other personally identifiable information of victims to avoid social stigmatization and further victimization.[182]

While it is indeed crucial to ensure the confidentiality of survivors, a feminist framework to international regulation requires more. It calls for international standards to provide effective responses to sexual violence, in line with feminist objectives. In that sense, reporting standards should invite mining companies to abstain from victimising survivors and perpetuating stereotypes against them in *all* reported information. This involves, for example, refraining from picturing survivors as 'victims' or 'vulnerable', which feminist scholars have identified as further stigmatising women and obscuring several aspects of their experiences, including in business settings.[183] A feminist understanding of regulation also aims at reinforcing international standards so as to guide companies to report on systemic measures implemented

Society 781; Carol Adams and George Harte, 'Making Discrimination Visible: The Potential for Social Accounting' (2000) 24(1) *Accounting Forum* 56.

[179] Harrison (n 34) 113.

[180] *Gender Dimensions of the UNGPs* (n 38) Principle 21 [41].

[181] Ibid Principle 21 [42].

[182] Ibid.

[183] See, eg, Dianne Otto, 'Power and Danger: Feminist Engagement With International Law Through the UN Security Council' (2010) 32(1) *Australian Feminist Law Journal* 97, 103.

to prevent cases of sexual violence in their operations, as well as the steps taken to communicate these efforts (e.g. allowing complainants to make anonymous reports, nominating specialised officers to work with survivors etc.).

VII CONCLUSION

This chapter elaborates on the development of human rights due diligence as the cornerstone of business and human rights international instruments. It establishes that, while they are not entirely oblivious to gender issues and to sexual violence, international regulatory initiatives have designed human rights due diligence in a way that allows for marginalisation of women's experiences of mining activities. An analysis of each step of due diligence demonstrates significant gaps between a de facto gender neutral mechanism – one that disadvantages women and survivors in mining communities – and feminist objectives of systematic and comprehensive processes to prevent current and future acts of sexual violence in an effective way.

To respond to the differentiated and gendered patterns that emerge in large-scale mining and that are supported by international due diligence regulation, this chapter uses a feminist regulatory framework to identify alternative approaches to international standards. These recommendations are not exhaustive. Yet, they allow for the identification of specific regulatory requirements that may be included in future standards in order for them to guide companies in responding effectively to sexual violence through reinforced human rights due diligence. This is particularly relevant in a context in which additional international standards on human rights due diligence are being requested by State, corporate and civil society stakeholders. Alongside current negotiations for a treaty on business and human rights (discussed further in Chapter 7 of this thesis), the European Union Commissioner for Justice, Didier Reynders, committed to a legislative initiative on mandatory human rights and environmental due diligence obligations for EU companies in early 2021.[184] Consideration of how international standards may integrate stronger gender perspectives in human rights due diligence and address women's concerns better is needed.

In both this and the previous chapter, I have highlighted how the mainstream narratives in business and human rights international regulation address mining-related sexual violence

[184] European Coalition for Corporate Justice, *Commissioner Reynders Announces EU Corporate Due Diligence Legislation* <https://corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation>.

inappropriately. Given the limitations of international instruments in addressing the risks of sexual violence in mining operations, a feminist regulatory framework requires an examination of other types of regulation that may provide meaningful solutions. I undertake this process in the following part of this thesis. I argue in the next three chapters that, given the deficiencies of international standards on human rights due diligence, a regulatory system combining corporate self-regulation, State law and civil society monitoring, if implemented in a way that encourages gender-responsive human rights due diligence, may constitute an avenue for more effective prevention of mining-related sexual violence.

PART III: SEXUAL VIOLENCE IN MINING AND REINFORCING THE REGULATION OF HUMAN RIGHTS DUE DILIGENCE

In Part II, I used a feminist regulatory framework to comment on how international instruments on business and human rights perpetuate narratives that both support and obscure structural violence against women in large-scale mining. I reviewed each of the steps constitutive of human rights due diligence to assess its potential to effectively address sexual violence in mining operations. I highlighted some of the theoretical and practical limitations of human rights due diligence and analysed how its implementation may conflict with feminist objectives regarding the prevention of sexual violence. I concluded that it is possible for mining companies to not adequately address or exclude sexual violence from their due diligence process while still complying with their international responsibilities under international business and human rights standards. Given the limitations of international regulation, this part of the thesis explores what type of regulation might contribute to increasing the visibility of women's experiences of mining activities, and might compel mining companies to effectively prevent intersectional risks of sexual violence in their operations. In line with regulatory theories, I argue that corporate, State and civil society regulators have competing but complementary roles to play. This interlocking system of regulation needs, however, to be reinforced by integrating feminist considerations aimed at making women key recipients of and contributors to the regulation of mining.

CHAPTER 6: A FEMINIST APPROACH TO ENFORCED SELF-REGULATION

I INTRODUCTION

In regulatory theories, the role of companies in creating internal standards to manage the adverse impacts of their activities is an essential layer of regulation. Likewise, relying on companies to self-regulate their conduct and manage the adverse impacts of their operations has long been a strategy of international business-related initiatives. This approach is a reflection of the complex, sometimes conflictual, relations between States and corporations, as well as persisting uncertainties as to the status and responsibilities of business entities under international law. Over the past five decades, corporate self-regulation has made its way into the business and human rights debate. The UNGPs recognise that corporate governance is one of the three governance systems that shape corporate conduct, along with public law and governance, and civil governance systems involving stakeholders affected by business enterprises.[1] The UNGPs also conceive self-regulation as a cornerstone of human rights due diligence.[2]

Self-regulation is not a precise concept. Some scholars primarily use it to define a process through which an organised group (an industry-level organisation like the International Council of Mining and Metals, for example) sets standards to regulate the conduct of its members.[3] Others, while recognising self-regulation by industry associations, focus on the voluntary and unilateral practice of companies designing and implementing internal rules such as policies, codes of conducts, social audits and reporting.[4] Neil Gunningham and Joseph Rees recommend additional distinctions be drawn between economic and social self-regulation, and voluntary,

[1] These governance systems include other stakeholders such as insurers, investors, industry associations, NGOs, international organisations and consumers.
[2] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) Principle 17 (Commentary) ('*UNGPs*').
[3] Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 133–148, 140; Michael J Lenox and Jennifer Nash, 'Industry Self-Regulation and Adverse Selection: A Comparison across Four Trade Association Programs' (2003) 12(6) *Business Strategy and the Environment* 343.
[4] Peter Utting, 'Regulating Business via Multistakeholder Initiatives: A Preliminary Assessment' in UN Non-Governmental Liaison Service and UN Research Institute for Social Development (UNRISD) (ed), *Voluntary Approaches to Corporate Responsibility: Readings and a Resource Guide* (UNRISD, 2002) 1, 6.

mandated and mandated partial self-regulation.[5] Because of the UNGPs' emphasis on the responsibility of corporations themselves to regulate their human rights due diligence process, I will focus in this chapter on self-regulation as a 'system of regulation in which [a] regulatory target – [at the individual-firm level] – imposes commands and consequences upon itself'.[6]

Defining self-regulation is essential to understanding the role of corporations in polycentric regulation. However, it is also important to recognise the significant limitations of self-regulation in its purest form, i.e. as an entirely *voluntary* system. Regulatory theorists early on recognised that while corporations are in a better position than States to regulate their activities, they are not necessarily *willing* to regulate effectively.[7] In this chapter, I therefore argue that a better approach to human rights due diligence involves *enforced* corporate self-regulation in addition to State and civil regulation. Enforced self-regulation recognises the significance of voluntary corporate self-regulation, deemed more flexible than State law, but suggests that it should be monitored and, if necessary, sanctioned by the State.[8] Such monitoring is essential to ensure that corporations self-regulate in a way that is compliant with State and international law and with social expectations. The notion of enforced self-regulation is a phenomenon examined by the more recent 'meta-regulation' theories that create further obligations for companies, as discussed below.

In this chapter, I analyse how corporate self-regulation influences the practice of mining companies when it comes to addressing sexual violence in light of human rights due diligence. To do so, I look at self-regulation through the lens of regulatory theories that recognise the value of this practice, but also condition its effectiveness on monitoring and sanctioning by other regulators, in particular the State. I use feminist theories to accentuate the challenges of relying purely on voluntary self-regulation to address women's rights and specifically sexual violence. This exercise demonstrates that in multiple ways self-regulation impedes the effective implementation of human rights due diligence to prevent sexual violence.

However, my main argument in this chapter is that, despite its faults, self-regulated due diligence may be strengthened through integration of feminist concerns in the process. I

[5] Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) *Law & Policy* 363, 365.
[6] Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave, and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press (online), 2010) 6.
[7] John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80(7) *Michigan Law Review* 1467, 1469. For examples of the reluctance of companies to regulate effectively in the context of international regulation, see, eg, Peter Utting, Rethinking Business Regulation: From Self-Regulation to Social Control (UN Research Institute for Social Development, 2005) 14–16.
[8] Braithwaite (n 7) 1470.

contend that if developed and reinforced in the shadow of the State and other non-corporate regulators, meta-regulation that is aligned with feminist goals is important. It creates incentive and opportunities for mining companies to engage with the risks their activities generate for women by giving them the autonomy and latitude to design and implement internal systems that are adjusted to their managerial and operational realities, while committing to compliance with international, State and social expectations.

To frame this argument, this chapter is divided into four sections. Highlighting the role of regulatory theories, I first provide an overview of the development of corporate self-regulation in an increasingly globalised world. I also detail how the business and human rights sphere has integrated this concept to make it one of the key elements of human rights due diligence. In that context, self-regulation and State law are intertwined and operate concurrently as a meta-regulation system. In the third section, I emphasise two of the inherent flaws of self-regulation that contribute to the process perpetuating discrimination against women and failing to deal with sexual violence. These are the primacy of corporate self-interest and the risk of cosmetic compliance. At the same time, I argue in the fifth section that discarding self-regulation from regulatory processes on human rights due diligence is unrealistic and unnecessary. Indeed, meta- regulation is flexible enough to address feminist objectives. Strategies to attenuate the limitations of self-regulation and to allow mining companies to respond effectively to risks of sexual violence include anchoring corporate due diligence practices within international human rights law. They also encompass integrating women into the regulatory sphere. This means increasing the role of women as corporate regulators and addressing the specific and intersectional risks of sexual violence women face.

II SELF-REGULATION AS A BUSINESS AND HUMAN RIGHTS ISSUE

A *Self-Regulation in a Globalised World*

To understand how self-regulation became a fundamental element of the business and human rights debate, it is important to first analyse its evolution in the international human rights space. Without it being necessary to address the historical development of international human rights law, one needs to highlight that it emerged as a specific field of international law in the aftermaths of the Second World War[9] as a way to compel States to respect, protect and fulfil

[9] Michelo Hansungule, 'The Historical Development of International Human Rights' in Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan (eds), *An Introduction to International Human Rights Law* (Brill, 2010) 1–30, 1. The *Universal Declaration of Human Rights*, GA Res 217 A (III) was adopted on 10 December 1948.

human rights. International human rights law has thus traditionally been understood as only creating obligations for States, States being perceived as the primary perpetrators of human rights violations. The non-existence of direct human rights obligations for corporations has constituted fertile ground for the 'creation of a permissive international "human rights free" environment in which some corporations seem to now operate and the parallel increase in the development of soft law mechanisms to regulate corporate behaviour'.[10]

While private entities, including multinational corporations, have largely continued to operate in this 'legal vacuum',[11] the UN started in the 1970s a process aimed at addressing the existing legal void by regulating foreign direct investments and corporate observance of human rights.[12] These efforts have remained unsuccessful for a large part of the past few decades, particularly because of lobbying led by corporations, largely united in preventing what they considered State intervention in their internal affairs. If the 1970s saw governments and international organisations trying to regulate the activities of multinational corporations, the 1980s were a time of deregulation and increased efforts to attract foreign investment at both international and domestic levels.[13] It is in this context of globalisation, when it was believed that the market could be regulated by limited State intervention and corporate self-regulation, that the discourse of corporate social responsibility blossomed.[14] This discourse promoted corporate voluntary initiatives to improve the 'social, environmental and human rights dimensions of business performance'.[15] It was accompanied by a profusion of corporate voluntary codes of conduct that started emerging in the early to mid-1990s and ranged from general declarations of business principles to actual efforts at self-regulation.[16]

It is also at that time that the UN started developing partnerships or long-term projects with multinational businesses, as well as adopting a softer approach to the regulation of corporations.[17] International and domestic soft law mechanisms and voluntary guidelines that

[10]Justine Nolan, 'The Corporate Responsibility to Respect: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 138–161, 146. See also Upendra Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?' (2016) 1(1) *Business and Human Rights Journal* 21, 21.
[11] Nolan (n 10) 146.
[12] See Chapter 3 for more details.
[13] Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy* (UN Research Institute for Social Development, 2001) iii.
[14] Utting (n 7) iii.
[15] Ibid.
[16] Jenkins (n 13) iii.
[17] Nolan (n 10) 147.

had been developed since the 1970s attracted renewed interest[18] while new ones, including the prominent 2000 UN Global Compact, emerged. The increasing pressure on companies to acknowledge the human, social and environmental impacts of their activities and to formally incorporate rules addressing these issues throughout their operations also led to the development within large companies of sector-specific codes and policies, in particular in industries with significant impacts, such as the mining industry.[19]

B *The Integration of Self-Regulation in the UNGPs*

It is in this context that the UNGPs emerged with a view to addressing issues resulting from persistent governance gaps. On the one hand, international law and policy faced – and still face – important limitations in regulating the conduct and activities of corporate stakeholders. Similarly, States often failed to implement their obligations under international human rights law appropriately.[20] On the other hand, despite some corporations recognising human rights and beginning, to a certain extent, to ensure basic protection for right-holders, the voluntary commitments made remained generally weak and inconsistent.[21] In this situation, the expectation of the UNGPs is that businesses have the tools to step in where public policies and laws are ineffective in preventing and addressing human rights violations.[22]

In practice, this means that in addition to elaborating specific actions to be taken by States to enhance corporate respect for human rights, the UNGPs recommend that companies undertake their own human rights due diligence to address human rights violations in their activities, as a response to the social expectations of them.[23] As early as 2007, the Special Representative on Business and Human Rights, John Ruggie, explained:

> In addition to legal standards, hard or soft, the SRSG's mandate includes evolving social expectations regarding responsible corporate citizenship, including human rights. One key indicator consists of the policies and practices that business itself adopts *voluntarily*, triggered by its

[18] For example, the *OECD Guidelines for Multinational Enterprises* were first adopted in 1976 and updated in 2011 for the fifth time.
[19] Nolan (n 10) 150.
[20] Karin Buhmann, 'Public Regulators and CSR: The "Social Licence to Operate" in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136(4) *Journal of Business Ethics* 699, 701.
[21] John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/4/035 (9 February 2007) [74] ('*Mapping International Standards of Responsibility and Accountability for Corporate Acts*').
[22] Buhmann (n 20) 701.
[23] *UNGPs* (n 2) Principles 17–21.

> assessment of human rights-related risks and opportunities, often under pressure from civil society and local communities.[24]

The concept of human rights due diligence thus reflects certain reliance from the Special Representative on largely voluntary self-regulatory practices by corporations.[25] According to guiding principle 16, for instance,

> [a]s the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that: e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.[26]

Similarly, the commentary to guiding principle 17 establishes that '[h]uman rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders'.[27] In other words, human rights due diligence is flexible enough that it can be established and implemented as a component of self-regulatory management mechanisms.

It is important to note, however, that human rights due diligence, and broader the corporate responsibility to respect human rights, is not solely based on self-regulation. Instead, self-regulation should be understood in the context of polycentric governance. In that context and in the UNGPs, self-regulation is one of the three global governance systems that shape corporate conduct.[28] Ruggie explains the first two systems as being 'the traditional system of public law and governance, domestic and international' and the 'system of civil governance involving stakeholders concerned about adverse effects of business conduct'.[29] The third governance system is 'corporate governance, which internalizes elements of the other two (unevenly to be sure), and shapes enterprise-wide strategy and policies, including risk management'.[30] This last statement indicates that while corporations' human rights responsibilities rely to a considerable extent upon their autonomous and voluntary regulatory practice, self-regulation is closely related to external hard and soft regulation in that, for example, it is supposed to build upon and 'internalise' them. As a result, self-regulation and

[24] *Mapping International Standards of Responsibility and Accountability for Corporate Acts* (n 21) [63].
[25] Nolan (n 10) 153.
[26] *UNGPs* (n 2) Principle 16
[27] Ibid Principle 17 (Commentary).
[28] John G Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights* (Harvard Kennedy School Working Paper No. RWP17-030, 2017) 12.
[29] Ibid.
[30] Ibid.

external mandatory regulation are 'inextricably intertwined and not mutually exclusive'.[31] This interconnection also suggests that the role of the UNGPs is to serve as one of these external (soft) types of regulation that inform self-regulation. They do so by referring companies to external processes (e.g. State laws, societal expectations etc.) that may shape and influence their conduct, while envisioning that human rights due diligence will be monitored at least by hard State regulation.

C *Regulatory Theories and Meta-Regulation of Human Rights Due Diligence*

Building on the idea of an interlocking system of self-regulation and external mandatory regulation, Ingrid Landau has analysed the evolving nature of human rights due diligence. She contends that, initially, human rights due diligence is a form of voluntary business regulation in that it aims at influencing the behaviour of corporations for public good:

> As elaborated upon in the *UNGPs*, it is a form of voluntary self-regulation: 'voluntary' in that there is no legal obligation on the individual business enterprise to undertake the exercise, and 'self-regulation' in that it 'turns [companies] into regulators through their own internal management systems and via contracts with suppliers and service providers'.[32]

She argues, however, that international and national legal and policy developments that have emerged since the adoption of the UNGPs (domestic due diligence legislation, for example) have led human rights due diligence to emerge 'as a form of public process-based regulation, through which improved management of specific risks is sought in order to meet public goals or objectives'.[33]

Referring to human rights due diligence as a process-based type of regulation situates it within regulatory theories, and demonstrates its value – despite its many flaws, as will be discussed in Section III – in addressing mining-related sexual violence. This value lies in the realism of process-based due diligence in the current neoliberal context, in which companies are primary and influential stakeholders. It allows for adaptability of due diligence mechanisms to the specific managerial realities of multinational corporations, while featuring the monitoring and redressing roles of the State and other external regulators where corporations have tried to meet their human rights responsibilities but have failed. Indeed, process-oriented regulation allows

[31] Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22(1) *Business Ethics Quarterly* 145, 150.
[32] Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20 *Melbourne Journal of International Law* 221, 233.
[33] Ibid.

corporations to self-regulate in a way that is in line with their individual circumstances and interests, while holding them accountable for the suitability and effectiveness of their internal control systems.[34] According to Sharon Gilad, it 'mandates and monitors organizations' self-evaluation, design, and management of their first-tier operations […] and their second-tier governance and controls'.[35] In relation to business and human rights, first-tier operations could refer to adverse human rights impacts while second-tier governance and control would mean, for example, the internal management of these impacts.

Process-based regulation is a regulatory governance system that covers various regulatory sub-configurations including, among others, enforced self-regulation and meta-regulation.[36] A strand of responsive regulation, the initial model of enforced self-regulation was developed by John Braithwaite in 1982 as a response to the incapacity – primarily for lack of resources – of the State to implement regulatory strategies to address corporate crime.[37] It is based upon a critique of voluntary self-regulation and the postulate that despite corporations being more capable than governments of regulating their business activities, they are not necessarily more willing to regulate effectively.[38] The concept of enforced self-regulation thus combines two elements: a focus on voluntary corporate self-regulation, considered versatile and flexible,[39] as the object of regulation, coupled with monitoring from the State aimed at strengthening self-regulation and enhancing its potential for generating the social benefits of compliance.[40] In other words, as expressed by Peter Drahos and Martin Krygier:

> [T]his means the state requiring corporations to develop credible rules around, for example, accounting standards and then enhancing the capacity of corporate compliance units to act independently in the enforcement of those rules. Enforced self-regulation is all about finding ways to tilt the exercise of the discretionary core of self-regulation into the zone of socially responsible decision-making.[41]

Enforced self-regulation has become one of the two phenomena examined by a more recently developed type of responsiveness: 'meta-regulation'.[42] Meta-regulation shifts from the purely

[34] Sharon Gilad, 'It Runs in the Family: Meta-Regulation and its Siblings' (2010) 4 *Regulation & Governance* 435, 485.
[35] Ibid 486.
[36] Ibid.
[37] Braithwaite (n 7) 1469.
[38] Ibid 1469.
[39] Ibid 1470.
[40] Peter Drahos and Martin Krygier, 'Regulation, Institutions and Networks' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 1–24, 13.
[41] Ibid 12.
[42] Ibid. The authors explain the two phenomena: '[t]he first is that regulation is not just something that applies directly to objects but may itself be an object of regulation. The answer to the question of what lies beyond regulation is more regulation. The point of the second use of the term is to redraw the map more radically: it is

State-based monitoring and enforcement of self-regulation proposed by Braithwaite – although the State maintains a role as meta-regulator – and recognises the regulatory power of other stakeholders. It can be understood as a process of 'regulating the regulators, whether they be public agencies, private corporate regulators or third party gatekeepers'.[43] Meta-regulation also goes further than enforced self-regulation in that it expects corporations to not only identify risks and establish internal control systems, but also to keep evaluating their performance and the effectiveness of their internal systems with the view of learning from their practices and incrementally improving them.[44] This explains why it is the focus of this chapter.

Thinking about the theoretical foundations of human rights due diligence allows us to understand the emphasis it places on self-regulation, how self-regulation can be used in combination with other types of regulation and the crucial role corporations may play in achieving business and human rights goals. The UNGPs embrace the interrelation between public and private regulation, take the role of corporations as regulators seriously and expect companies to respond to public and civil norms and expectations by developing what would otherwise be considered a purely voluntary self-regulatory system.

III THE CHALLENGES OF SELF-REGULATING HUMAN RIGHTS DUE DILIGENCE

A *Sexual Violence on the Corporate Radar? An Overview of Mining Companies' Practices*

In the first part of this chapter, I elaborated upon the relevance of relying on meta-regulation as part of a regulatory system where self-regulated due diligence co-exists with other types of external regulation aimed at monitoring and enforcing the processes implemented by corporations. Yet discussions of the theoretical expectations around self-regulating human rights due diligence raises questions as to whether mining companies' self-regulatory practices meet social expectations in regards to sexual violence. This section demonstrates that they do not, highlighting inherent flaws in the self-regulatory practice of mining companies, and arguing for further monitoring action from the State and other non-corporate regulators.

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that the activity of regulation has many sources other than the state (multisource regulation).' For authors who have developed the notion of meta-regulation, see, eg, Peter N Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8(4) *Governance* 527; Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002).

[43] Parker (n 42) 15.

[44] Gilad (n 34) 488.

In order to assess mining companies' self-regulatory action in relation to sexual violence, I reviewed the human rights policies, codes of conduct, human rights reports and 'human rights' web pages of twenty multinational mining companies. The objective of this review is to identify whether these companies identify sexual violence as a risk of their activities and refer to sexual violence in relation to their due diligence processes, either as a salient or non-salient human rights abuse. The review was conducted in November 2020 and the resources made publicly available by the selected companies might have evolved since that date. In order to avoid repetitive data, only nine of these companies are listed below, as a sample of the general findings identified among the twenty mining companies reviewed. The companies chosen in this sample include eight of the biggest mining companies in 2018 according to PricewaterhouseCoopers, a consultancy firm that has for some years conducted an annual review of global trends in the mining industry, as represented by the top-forty mining companies by market capitalisation.[45] Four of these eight companies have been linked to allegations of sexual violence in their overseas activities (in yellow in the table below). Barrick Gold is one of the examples in this thesis, while Zijin Mining Group Co. Limited has been included for its association with now defunct Monterrico Metals Plc[46] and for its ownership, since 2015, of 50 per cent of the Porgera Joint Venture.[47] Allegations against Rio Tinto and Freeport-McMoRan rely on isolated claims that have not been investigated. However, these companies are highlighted in the table as it is assumed these allegations would have made them aware of potential risks of sexual violence in their operations.[48] Hudbay Minerals was added to the list for defending a lawsuit over the involvement of its corporate predecessor, Skye

[45] PricewaterhouseCoopers, *Mine 2018: Tempting Times* (PwC, 2018) 22. The twenty multinational mining company reviewed are: BHP Billiton Limited, Rio Tinto Limited, Glencore plc, China Shenhua Energy Company Limited, Vale S.A., MMC Norilsk Nickel, Anglo American plc, Freeport-McMoRan Copper & Gold Inc., Grupo México S.A.B. de C.V., Coal India Limited, China Molybdenum Co. Limited, Newmont Mining Corporation, Barrick Gold Corporation, Saudi Arabian Mining Company, Teck Resources Limited, Zijin Mining Group Co. Limited, Fresnillo plc, South32 Limited, Newcrest Mining Limited, and Hudbay Minerals. Because this thesis focuses on the activities of Western multinational mining companies in the global South, the sample chosen includes only mining companies that are incorporated in Australia, the United Kingdom, Switzerland, the United States and Canada. The exception is Zijin Mining Group, incorporated in China, but which is linked to allegations of sexual violence through its association with now defunct Monterrico Metals and with the Porgera Joint Venture. The companies chosen are: BHP Group Ltd (Rank: 1), Rio Tinto Ltd (2), Glencore Plc (4), Anglo American plc (7), Newmont Mining Corporation (9), Barrick Gold Corporation (11), Freeport-McMoRan Copper & Gold Inc. (13), Zijin Mining Group Co. Limited (20). Hudbay Minerals is not in the top 40 but was accused of involvement of sexual violence.

[46] Zijing Mining Group Co. Ltd. acquired a majority shareholding in Monterrico Metals PLC on 27 April 2007. See *Guerrero v Monterrico Metals Plc* [2009] EWHC 2475 (QB) [4].

[47] Porgera: Joint Venture, *Our Story* <http://www.porgerajv.com/Company/Our-Story>.

[48] See, eg, Down to Earth, *Illegal Military Payments by Freeport/Rio Tinto* <https://www.downtoearth-indonesia.org/story/illegal-military-payments-freeportrio-tinto>; Down to Earth, *Rio Tinto: Practice What You Preach!* <https://www.downtoearth-indonesia.org/story/rio-tinto-practise-what-you-preach>.

Resources, in acts of sexual violence against Mayan Q'eqchi women (see Chapter 2). Using nine companies as a sample is sufficient to demonstrate that some of the largest multinational mining companies, including those accused of involvement in sexual violence, do not consider sexual violence in their communities of operations a risk worth self-regulating.

Table 1: Review of Nine Mining Companies' Policies and Procedures

Company / Country	Documents reviewed	Reference to BHR standards	Reference to HRDD	Reference to sexual violence[49]
BHP Group Ltd Australia/UK	- HR Webpage[50] - HR Policy Statement (2019)[51] - Code of Conduct (2019)[52] - Sustainability Report (2019)[53]	UDHR, UNGPs, UNGC, VPs[54]	Yes[55]	Yes, in reference to both employees and community members[56]
Rio Tinto Ltd Australia/UK	- HR Webpage[57] - HR Policy (2015)[58] - Code of Conduct (2017)[59] - Supplier Code of Conduct (2016)[60] - Annual Report (2019)[61]	UDHR, UNGPs, UNGC, VPs, OECD MNE[62]	Yes[63]	No
Glencore Plc Switzerland	- HR Q&A Webpage[64] - HR Webpage[65] - HR Policy (2015)[66] - Code of Conduct (2017)[67] - HR Report (2018)[68]	UNDHR, UNGPs, VPs, ILO Conventions[69]	Yes[70]	No

[49] Other than sexual harassment in the workplace, to which all companies refer. None of the other 11 companies reviewed made reference to sexual violence or to the CEDAW.
[50] BHP, *Respecting Human Rights* <https://www.bhp.com/our-approach/operating-with-integrity/respecting-human-rights/>. In this table, the meaning of acronyms is as follows: 'BHR': Business and Human Rights; 'NA': No information available; 'HR': Human Rights; 'HRDD': Human Rights Due Diligence; 'ILO Conventions': Eight core conventions of the International Labour Organization; 'OECD MNE': OECD Guidelines for Multinational Enterprises; 'UDHR': Universal Declaration of Human Rights; 'UNGC': UN Global Compact; 'VPs': Voluntary Principles on Security and Human Rights; 'WEPs': Women's Empowerment Principles.
[51] BHP, *Human Rights Policy Statement* (BHP, 2019).
[52] BHP, *Our Code of Conduct – Respecting Human Rights* <https://www.bhp.com/our-approach/our-company/our-code-of-conduct/caring-about-society/respecting-human-rights/>.
[53] BHP, *Sustainability Report 2019* (BHP, 2019).
[54] BHP, *Respecting Human Rights* (n 50); BHP, *Code of Conduct* (n 52).
[55] BHP, *Code of Conduct* (n 52); BHP, *Human Rights Policy Statement* (n 51), 2.
[56] BHP, *Respecting Human Rights* (n 50).
[57] Rio Tinto, *Human Rights* <https://www.riotinto.com/en/sustainability/human-rights>.
[58] Ibid.
[59] Rio Tinto, *Ethics & Integrity* <https://www.riotinto.com/en/sustainability/ethics-integrity>.
[60] Rio Tinto, *Policies & Standards* <https://www.riotinto.com/en/sustainability/policies#policy-results_e=50>.
[61] Rio Tinto, *Annual Report 2019* (Rio Tinto, 2019).
[62] Rio Tinto, *Human Rights* (n 57).
[63] Ibid.
[64] Glencore, *Human Rights – Ask Glencore* <https://www.glencore.com/ask-glencore/human-rights>.
[65] Glencore, *Sustainability: Human Rights* <https://www.glencore.com/sustainability/human-rights>.
[66] Glencore, *Human Rights Policy* (Glencore, 2015).
[67] Glencore, *Code of Conduct* (Glencore, 2017).
[68] Glencore, *Human Rights Report 2018* (Report, 2018).
[69] *Glencore, Human Rights – Ask Glencore* (n 64); Glencore, *Code of Conduct* (n 67) 8.
[70] *Glencore, Human Rights - Ask Glencore* (n 64).

Anglo American plc UK/South Africa	- Sustainability Webpage[71] - HR Policy (2018)[72] - HR Framework[73] - Code of Conduct (2016)[74] - Report for VPs (2019)[75] - Sustainability Report (2018)[76]	UNGPs, UNGC, VPs,[77] WEPs[78]	Yes[79]	No
Newmont Mining Corporation United States	- HR Webpage[80] - HR Standard (2020)[81] - HR Guide (2019)[82] - Code of Conduct (2017)[83] - Supplier Code of Conduct[84]	UDHR,[85] UNGPs, UNGC,[86] VPs[87]	Yes[88]	No (other salient human rights)
Barrick Gold Corporation Canada	- HR Webpage[89] - HR policy[90] - Code of Conduct (2020)[91] - Sustainability Report (2019)[92] - HR Report (2017)[93]	UNGPs, VPs, OECD MNE, ILO Conventions[94]	Yes[95]	Yes in relation to security,[96] human rights violations,[97] community engagement strategies,[98] stakeholder engagement,[99] the workplace,[100] Porgera response,[101] and as a risk of the mining industry[102]

[71] Anglo American, *Sustainability* <https://www.angloamerican.com/sustainability>.
[72] Anglo American, *Group Human Rights Policy* (Anglo American, 2018).
[73] Anglo American, *Anglo American Human Rights Framework* <https://www.angloamerican.com/~/media/Images/A/Anglo-American-Group/PLC/sustainability/approach-and-policies/framework.jpg>.
[74]Anglo American, *Our Code of Conduct: Our Values in Action* (Anglo American, 2016).
[75] Anglo American, *Anglo American Plc: Update Report for Voluntary Principles on Security and Human Rights for the Year Ending 31 December 2019* (Anglo American, 20).
[76] Anglo American, *Sustainability Report 2018* (Anglo American, 2018).
[77] Anglo American, *Approach and Policies* <https://www.angloamerican.com/sustainability/approach-and-policies>.
[78] *Anglo American, Sustainability Report 2018* (n 76) 88.
[79] *Anglo American, Anglo American Human Rights Framework* (n 73).
[80] Newmont, *Respecting Human Rights* <https://www.newmont.com/sustainability/social-responsibility/respecting-human-rights/default.aspx>.
[81] Newmont, *Human Rights Standard* (Newmont, 2020).
[82] Newmont, *Guide to Respecting Human Rights* (Newmont, 2009).
[83] Newmont, *Our Code of Conduct* (Newmont, 2017).
[84] Newmont, *Governance and Ethics* <https://www.newmont.com/about-us/governance-and-ethics/default.aspx>.
[85] Ibid.
[86] Newmont, *Guide to Respecting Human Rights* (n 82).
[87] Newmont, *Respecting Human Rights* (n 80).
[88] Newmont, *Guide to Respecting Human Rights* (n 82).
[89] Barrick Gold, *Putting Human Rights at the Core of How We Conduct Our Business* <https://www.barrick.com/sustainability/human-rights/default.aspx>.
[90] Barrick Gold, *Human Rights Policy* (Barrick Gold, nd).
[91] Barrick Gold, *One Team, One Mission: Code of Business Conduct and Ethics* (Barrick Gold, 2020).
[92] Barrick Gold, *Sustainability Report 2019* (Barrick Gold, 2019).
[93] Barrick Gold, *2017 Human Rights Report* (Barrick Gold, 2018).
[94] Barrick Gold, *Putting Human Rights at the Core of How We Conduct Our Business* (n 89).
[95] Ibid.
[96] Ibid; Barrick Gold, *Sustainability Report 2019* (n 92).
[97]Barrick Gold, *Human Rights Policy* (n 90). See, in particular, question 2 'What kinds of activities constitute human rights violations? The kinds of activities vary greatly and can include murder, extrajudicial killing, and physical abuse such as torture, beatings, rape, assault, kidnapping, or attacking peaceful lawful protestors.'
[98] Barrick Gold, *Sustainability Report 2019* (n 92).
[99] Ibid.
[100] Barrick Gold, *2017 Human Rights Report* (n 93).
[101] Ibid.
[102] Ibid.

Freeport-McMoRan Copper & Gold Inc. United States	- HR Webpage[103] - HR Policy (2017)[104] - Code of Conduct[105] - Supplier Code of Conduct (2018)[106] - Sustainability Report (2018)[107]	UDHR, UNGPs, VPs[108]	Yes[109]	Yes, as example of their community investment strategy[110]
Zijin Mining Group Co. Limited China/Hong Kong	- Sustainability Webpage[111] - Annual Report (2018)[112] - Environmental, Social and Governance Report (2017)[113]	NA	No	No
Hudbay Minerals Canada	- HR Webpage[114] - HR Policy (2015)[115] - Code of Conduct (2017)[116] - Annual CSR Report (2018)[117]	UDHR, UNGPs, VPs[118]	Yes[119]	No

Both the general and sexual violence-specific data reveal that, despite increased awareness on risks of mining-related sexual violence, general commitments to human rights, as well as the development of measures to limit the adverse impacts of their activities, in practice companies do not integrate sexual violence (other than sexual harassment in the workplace, to which all companies refer) in their due diligence mechanisms. Only two of the companies assessed referred to sexual violence in their internal policies (in addition to Freeport-McMoRan, which only refers to violence against women in one instance, in relation to their financial investment to implement additional activities focused on women's empowerment in Chile, Peru, Indonesia and the United States) and only one, Barrick Gold, addressed it as a salient human right risk associated with mining. This is despite the recommendations made by the UN Working Group on Business and Human Rights that corporations should always regard sexual violence as risks of severe human rights impacts.[120] These findings are problematic as the effectiveness of meta-

[103] Freeport-McMoran, *People* <https://www.fcx.com/sustainability/people#human>.
[104] Freeport-McMoran, *Human Rights Policy* (Freeport-McMoran, 2020)
[105] Freeport-McMoran, *Principles of Business Conduct: Strength in Values* (Freeport-McMoran, nd).
[106] Freeport-McMoran, *Supplier Code of Conduct* (Freeport-McMoran, 2018).
[107] Freeport-McMoran, *2018 Working Toward Sustainable Development Report* (Freeport-McMoran, 2018).
[108] Freeport-McMoran, *People* (n 103).
[109] Ibid.
[110] Freeport-McMoran, *2018 Working Toward Sustainable Development Report* (n 107).
[111] Zijin, *Sustainability* <http://www.zijinmining.com/sustainability/Social-Responsibility.jsp>.
[112] Zijin Mining Group, *Annual Report 2018* (Zijin Mining Group, 2019).
[113] Zijin Mining Group, *2017 Environmental, Social and Governance Report* (Zijin Mining Group, 2018).
[114] Hudbay, *Ethics and Human Rights* <https://hudbayminerals.com/sustainability/ethics-and-human-rights/default.aspx>.
[115] Hudbay Minerals, *Human Rights Policy* (Hudbay Minerals, 2015).
[116] Hudbay Minerals, *Code of Business Conduct and Ethics* (Hudbay Minerals, 2017).
[117] Hudbay Minerals, *What Guides Us: 2018 Annual and CSR Report* (Hudbay Minerals, 2019).
[118] Hudbay, *Ethics and Human Rights* (n 114).
[119] Ibid.
[120] Human Rights Council, *Gender Dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the Issue of Human rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/41/43 (23 May 2019) Principle 17 [34] ('Gender Dimensions of the UNGPs').

regulated self-regulation substantially relies on companies having both the will and the organisational capacity to comply with international and domestic regulation.[121] These two conditions need to be met to ensure that mining companies exercise human rights due diligence in a way that is meaningful for women at risk of sexual violence. However, when it comes to multinational mining companies the first – much more so than the second – often constitutes an obstacle to due diligence self-regulation, which might partially explain the generally weak performance of the mining industry.

B *Corporate Self-Interest and Cosmetic Compliance: Two Obstacles to Effective Self-Regulation*

1 *Corporate Self-Interest*

In theory, self-regulation can be perceived as one of the strengths of business and human rights. The business and human rights sphere, influenced by regulatory scholarship, focuses on how policies may be best implemented.[122] In addition, 'self-regulation offers greater speed, flexibility, sensitivity to market circumstances, efficiency, and less government intervention',[123] which gives it greater responsiveness – as opposed to government regulation, for instance – to the specific circumstances, evolution and needs of a particular industry. From an external point of view, encouraging companies to regulate their own human rights due diligence practice provides a point of leverage over corporate behaviour.[124] Indeed, even if the UNGPs are aimed at moving away from the traditional regulatory practice of naming and shaming, meta-regulated self-regulation allows external regulators – in particular, civil society, international organisations, States and, to a certain extent, consumers – to scrutinise and monitor the quality (in terms of scope and coverage) of corporate self-regulatory standards and the performance of the company in light of its corporate responsibilities against international human rights standards. Meta-regulation has also demonstrated its value where industries are heterogeneous and complex – as is the mining industry – or where there is a lack of

[121] Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103, 126.
[122] Gabrielle Simm, *Sex in Peace Operations* (Cambridge University Press, 2013), 44.
[123] Neil Gunningham, Peter N Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 52.
[124] Jenkins (n 13) 28.

commitment to compliance among large parts of the business community,[125] as is the case for the mining industry, at least in relation to preventing sexual violence in its operations.

At the same time, self-regulation in itself contains important flaws that need to be addressed to render it effective in preventing mining-related sexual violence. Indeed, while its flexibility is meaningful – in that it allows mining companies to focus on human rights issues that are particularly relevant or predominant in the sector – the effectiveness of self-regulated human rights due diligence will depend, as argued above, on the moral commitment of mining companies to limiting sexual violence in their operations, and on their willingness to adhere to and implement efficiently the UNGPs and other business and human rights standards in their internal policies and practices. The review conducted in the previous section of this chapter shows that the performance of multinational mining companies on that matter is poor.

Similarly, this heavy reliance on corporate goodwill has generated mixed results across industries, with a profusion of self-regulatory initiatives in the past few decades that have not produced real change. In fact, the Special Representative himself identified very early in his mandate the limitations of corporate and industry self-regulation and codes of conduct, with a focus on the extractive industry. After referring, among others, to the Extractive Industries Transparency Initiative, the Kimberly Process Certification Scheme and the Voluntary Principles on Security and Human Rights, he concluded:

> One weakness is that most choose their own definitions and standards of human rights, influenced by but rarely based directly on internationally agreed standards. Those choices have as much to do with what is politically acceptable within and among the participating entities than with objective human rights needs. Much the same is true of their accountability provisions […] Finally, even when taken together these "fragments" leave many areas of human rights uncovered and human rights in many geographical areas poorly protected. The challenge for the human rights community, then, is to make the promotion and protection of human rights a more standard and uniform corporate practice.[126]

While the UNGPs tried to refer industry groups and corporations to specific human rights standards,[127] the gaps identified in Chapter 4 in relation to their addressing women's rights perpetuate the risk of corporate self-regulation omitting certain areas of human rights, including, as the review of mining companies' policies illustrates, sexual violence. In doing so,

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[125] Landau (n 32) 234.
[126] John Ruggie, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN.4/2006/97 (22 February 2006) [53].
[127] *UNGPs* (n 2), Principle 12.

international instruments on business and human rights, alongside the industry standards they were aimed at reinforcing, struggle to ensure that corporate self-regulation is exercised in a way that is compatible with purposes of protecting all human rights relevant to the mining sector, as opposed to profit-maximising purposes.

Yet, it must be recognised that moving corporate interest away from profit-oriented goals is a difficult endeavour that relies on a vision of corporations as being more than 'an organization for the accumulation of capital in order to maximize profits, in order to accumulate more capital, leading to more profits, *etc*'.[128] I argue, however, that in addition to the measures examined below to reinforce corporate self-regulation in line with feminist objectives, the moral hazards created by allowing mining companies to self-regulate can be mitigated. According to Stanley Beck, for instance, '[v]ague social issues need not be substituted for profit-maximization. That is not the issue. The issue is one of responsible profit-maximization rather than maximum profits at all costs. [Problems] could be remedied within a regime of responsible profit-maximization.'[129] In other words, human rights concerns can exist *alongside* profit-maximisation concerns, rather than *instead* of them. Harry Glasbeek adds that 'the power of the non-elite members of society to participate in politics and in economics should be increased dramatically'.[130] He contends that

> the various constituencies (workers, consumers, even government) are to have representatives on boards of directors to help generate a form of commitment from corporate management to develop and to support socially responsible corporate behaviour. These representatives, however, are to continue to act in a setting where they are to participate in the promotion of profit-earning, albeit only *responsible profit-earning*.[131]

This is one the arguments this thesis defends. It is unrealistic to turn companies away from their profit-making objectives. Yet it is possible, through a meta-regulation system of counterbalancing levels of regulation involving State and civil society stakeholders, to engage corporations in more human rights-oriented – and women's rights-oriented – self-regulatory practices. While this comes with concerns and safeguards that are developed later in this thesis

[128] H J Glasbeek, 'The Corporate Social Responsibility Movement – The Latest in Maginot Lines to Save Capitalism' (1988) 11(2) *Dalhousie Law Journal* 363, 373.
[129] Stanley M Beck, 'Corporate Power and Public Policy' in Ivan Bernier and Andrée Lajoie (eds), *Consumer Protection, Environmental Law, and Corporate Power* (University of Toronto Press, 1985) 181, 242.
[130] Glasbeek (n 128) 400.
[131] Ibid, emphasis in original.

(for example, the interference of business in State affairs), the idea is that States and civil society can provide a counter-weight to dominant business interests.[132]

2 *Cosmetic Compliance*

Many see self-regulation as no more than public relations,[133] and human rights due diligence as a tick-box exercise allowing mining companies to show their compliance with the UNGPs while, in reality, continuing a state of business as usual. Developed by Kimberly Krawiec, the idea of cosmetic compliance conveys the idea that 'internal compliance structures do not deter prohibited conduct within firms and may largely serve a window-dressing function that provides both market legitimacy and reduced legal liability'.[134] In relation to human rights due diligence, this would mean that companies would adopt policies and structures that display the formal requirements of the UNGPs, but fail in practice to achieve the human rights goals expected of them.

Recent research demonstrates the validity of concerns regarding cosmetic compliance.[135] Christine Parker and John Howe have pointed out that

> self-regulating organisations and sectors may engage in activity that looks impressive, but does not actually achieve public policy goals such as respect for human rights. Rather it neutralises critique of human rights abuses by appearing to do something about them while at the same time maintaining business priorities.[136]

Similarly, the UN Working Group on Business and Human Rights[137] has deplored that in business practice,

> [t]oo many human rights impact assessments [are] done as exercises to tick the box, without meaningful engagement with stakeholders',[138] and that corporate '[p]erformance seems to be particularly weak on the 'taking action' and 'tracking of responses' components of human rights due diligence set out in the Guiding Principles.[139]

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[132] Ibid.
[133] Utting (n 7) 6. See also Parker (n 42) 22–28.
[134] Kimberly D Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81(2) *Washington University Law Quarterly* 487, 487.
[135] For examples, see Landau (n 32) 235.
[136] Christine Parker and John Howe, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights Foundations and Implementation* (Martinus Nijhoff Publishers, 2012) 273–302, 293.
[137] The complete name is the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.
[138] António Guterres, *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Note by the Secretary-General*, UN Doc A/73/163 (16 July 2018) [25].
[139] Ibid [26].

These conclusions extend to the integration of women's concerns in corporate policies, which, according to the working group, is a 'notable gap'.[140] Concerns about cosmetic compliance extend to the mining industry, where public commitments and sophisticated human rights reports referring to sexual violence have rarely been followed by concrete measures to tackle risks against women in large mining operations.

Ingrid Landau has added to these analyses by arguing that, intertwined with risks of both corporate self-interest and cosmetic compliance, human rights due diligence, as a process-based form of regulation, carries the risk of focusing on processes rather than on outcomes.[141] The issue with this focus, she contends, is that processes – such as human rights due diligence – that internalise public goals into corporate systems are inevitably directed towards the company's own commercial objectives.[142] In practice, this may mean that companies may be more likely to self-regulate to address risks that are easier or cheaper to manage, or that may have greater financial or reputational repercussions, over other risks that may be as or more severe.[143] Given the nature of sexual violence – including that it is severely underreported – and the limited damage its existence may create for a company, this may explain why mining companies have allocated limited resources to address this risk.

This focus on the process illustrates what Radu Mares has qualified as a 'shift in the centre of gravity' of the UNGPs from responsibility to respect to human rights due diligence.[144] Apart from being a more pragmatic, familiar and reasonable standard for corporate executives than the responsibility to respect,[145] human rights due diligence has become the regulatory standard in the UNGPs, not corporate responsibility and human rights.[146] The specific attention put on processes is observable in relation to mining-related sexual violence. Only one company so far, Barrick Gold, has responded to allegations of sexual violence in PNG and Tanzania by referring to the UNGPs and human rights due diligence. Yet in its human rights report, Barrick Gold only refers to measures implemented to respond to human rights due diligence requirements under the UNGPs. There is no available evidence that it has developed a systemic gendered

[140] Ibid.
[141] Landau (n 32) 238.
[142] Ibid. See also Julia Black, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3(4) *Capital Markets Law Journal* 425.
[143] Landau (n 32) 238.
[144] Radu Mares, '"Respect" Human Rights: Concept and Convergence' in Robert C Bird, Daniel R Cahoy and Jamie Darin Prenkert (eds), *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar Publishing, 2014) 3–47, 43.
[145] Ibid.
[146] Landau (n 32) 238.

approach aimed at addressing the root causes of sexual violence in its operations – that is, specifically aimed at preventing future risks of sexual violence and that encompasses women's rights standards.[147] In fact, nowhere do the reports on the company's strategy refer to international women rights standards.

C *External Pressure as a Remedy to Self-Interest and Cosmetic Compliance?*

If mining companies do not necessarily have a natural incentive to respond to risks of sexual violence in a way that is non-cosmetic and consistent with international human rights law, the effectiveness of self-regulatory strategies will depend on companies deciding that it is in their best interest to do so. This, in turn, depends on the external pressures placed upon them.[148] Robert Kagan, Neil Gunningham and Dorothy Thornton, in relation to environmental regulation, have identified three types of external pressure that are relevant to the regulation of the mining industry. These are economic pressure (the obligation of a company to meet the financial expectations of its investors and creditors), regulatory (or legal) motivation (which encompasses applicable laws and regulations) and social licence (pressure from community groups, the media, employees, customers etc.).[149]

Likewise, the UNGPs recognise the need for external pressure to encourage companies to implement their human rights due diligence. For example, the instrument refers to the State's regulatory functions and requires States to 'consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights'.[150] It also warns corporations maintaining a relationship with another business contributing to human rights violations of the possible 'reputational, financial or legal' consequences of the continuing connection.[151] The UNGPs identify some international human rights instruments as 'the benchmarks against which other social actors assess the human rights impacts of business enterprises',[152] indirectly referring to social pressure. By doing so, the UNGPs encourage

[147] Barrick Gold, *2017 Human Rights Report* (n 93).
[148] Coglianese and Mendelson (n 6) 24.
[149] Robert A Kagan, Neil Gunningham and Dorothy Thornton, 'Fear, Duty, and Regulatory Compliance: Lessons from Three Research Projects' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing, 2011) 37–58, 42.
[150] *UNGPs* (n 2) Principle 3.
[151] Ibid Principle 19.
[152] Ibid Principle 12.

businesses to be more proactive in addressing the human rights impacts of their operations[153] and to transfer some processes they may already apply to other risks to the human rights sphere.[154]

However, one wonders if this is enough to address self-interest and cosmetic compliance, which may also be one of the limitations of meta-regulation. For example, these two practices could discourage States, who may rely on the assumed positive performance exhibited by companies, from developing legal and regulatory measures to compel companies to respect human rights (if they already seem to do so).[155] The 'regulatory' pressure put on companies to effectively self-regulate human rights due diligence may, as a result, be hindered despite the hope of the Special Representative that due diligence processes be monitored through by States' hard law (among others).[156] In fact, nearly a decade after the adoption of the UNGPs, while State-based legislative initiatives are developing, few States have adopted corporate due diligence legislation.[157] Some even show reluctance to do so. In Switzerland, for instance, the Responsible Business Initiative created by the Swiss Coalition for Corporate Justice won widespread popular support but was rejected in cantonal vote. A milder reporting-centred counter-proposal without liability rules adopted by the Swiss Parliament is now set to enter into force in 2021.[158] Even when domestic legislation is adopted, recent reports suggest that the lack of deterring consequences included in the law leads to it not being effectively implemented.[159]

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[153] John Ruggie, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/11/13 (22 April 2009) [82] and [83].

[154] Ibid [51]. See also Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899, 911.

[155] Ibid, 910.

[156] *UNGPs* (n 2) Principles 1–10.

[157] Examples of human rights due diligence-focused laws are: *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre French Parliament* ([Law No 2017-399 of 27 March 2017 on Corporate Duty of Vigilance] (France) JO, 28 March 2017, 1; *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, § 1502, 124 Stat 1376, 2213 (2010); *Illegal Logging Prohibition Act 2012* (Cth).

[158] Business and Human Rights Resource Centre, *Switzerland: Responsible Business Initiative Rejected at Ballot Box Despite Gaining 50.7% of Popular Vote* <https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/>.

[159] In relation to the French *Duty of Corporate Vigilance Law*, see eg, Anne Duthilleul and Matthias de Jouvenel, *Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Evaluation of the Implementation of the Law No 2017-399 of 27 March 2017 on Corporate Duty of Vigilance)* (French Ministry of the Economy, Finance and Recovery, 2020).

When it comes to social pressure, influential international NGOs have been highly active in raising awareness about cases of mining-related rapes and sexual assaults against women. This has had mixed results. Barrick Gold developed remedy frameworks for women survivors in Tanzania and Papua New Guinea, and Monterrico Metals provided compensation payments. Yet, concerns about the remedies provided remain and numerous other cases across the world have not been investigated. In addition, recent research conducted among Australian companies demonstrates that peer pressure (the will to match competitor practice), as well as reputational concerns, adverse publicity, and civil society expectation, are less significant drivers for companies than legal requirements (penalties for not conducting effective due diligence), with advocacy pressure even lower than other concerns.[160]

Self-regulated human rights due diligence, if part of an intersecting system of regulation including, among others, States as meta-regulators, has the potential to constitute an important tool for the effective prevention of sexual violence in large-scale mining. However, self-regulation contains important flaws as a regulatory mechanism. It allows mining companies to regulate within the limits of business and managerial priorities, and to implement human rights due diligence in a purely ritualistic way. The practice of mining companies in relation to sexual violence indeed shows a lack of commitment and a tendency towards a cosmetic understanding of due diligence. Additional concerns emerge from a feminist analysis of self-regulation. In fact, this process not only pushes sexual violence further into the 'private' realm, but also perpetuates the discriminatory causes of sexual violence by permitting violators to regulate on women's lives.

[160] Justine Nolan, Jolyon Ford and M Azizul Islam, *Regulating Transparency and Disclosures on Modern Slavery in Global Supply Chains: A 'Conversation Starter' or a 'Tick-Box Exercise'?* (CPA Australia, 2019), 14.

IV SELF-REGULATING RESPONSES TO SEXUAL VIOLENCE AND RISKS OF PERPETUATED DISCRIMINATION

A *Self-Regulation and Public Objectives: Maintaining Sexual Violence in the Private Realm*

While self-interest and cosmetic compliance are challenges associated with a due diligence response to mining-related sexual violence, a feminist understanding of regulation raises additional concerns that may not be perceptible from a purely regulatory perspective. Indeed, not only do meta-regulated processes, such as human rights due diligence, focus on the self-regulation of specific risks, they also assume that companies can, to a certain extent, generate their own constraints in order to meet public objectives. In other words, through meta-regulation, 'a government regulator would identify a problem and command the [company] to develop plans aimed at solving that problem, and then the [company] would respond by developing its own internal regulations'.[161]

In fact, literature on the division of tasks between States and corporations is growing and is giving way to 'a more integrated approach in which companies not only assume social responsibilities that go beyond legal requirements, but also assume tasks which are basically of a political nature'.[162] According to Buhmann, these tasks are 'legal obligations or policy objectives of governments or authorities at international, supranational, national or local levels', and include 'the implementation of human rights or the provision of labour and inclusive employment practices'.[163] Julia Black goes as far as claiming that the decentred understanding of regulation leads to 'the collapse of the public/private distinction[164] in socio-political terms, and a rethinking of the role of formal authority in governance and regulation'.[165] In conclusion, one of the characteristics of human rights due diligence – and business and human rights more generally – is its reliance on the regulatory capacity of corporations for public policy ends.

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[161] Coglianese and Mendelson (n 6) 24.
[162] Buhmann (n 20) 10.
[163] Ibid.
[164] Black (n 121) The public/private distinction mentioned by Julia Black is different to the public/private divide identified by feminist scholars and elaborated upon in Chapter 3. What Julia Black is referring to here the 'public' sphere of State governments as opposed to the 'private' realm of social actors (including corporations and civil society). She argues that the collapse of the public/private distinction is manifested in new forms of governance identified by ''hybrid' organizations or networks that combine governmental and non-governmental actors in a variety of ways' (110).
[165] Ibid.

This conclusion is critical, from a theoretical point of view, to understanding the challenges faced by, and the potential disinterest of, mining companies in minimising risks of sexual violence in their activities. It can be intimately connected to what feminist scholars have identified as the public/private dichotomy that characterises the various spheres of domestic and international law. This dichotomy distinguishes the 'public' world of politics, the law and the State – which is dominated by men – from the 'private' world of home – which is perceived as the domain of women – with greater value attached to the public sphere.[166] The invisibility of women, their voices and their concerns in international law is considered a direct consequence of this public/private distinction. Indeed, according to Christine Chinkin,

> the liberal opposition between public life, the domain of business, economics, politics and law, and private life, the domestic sphere of family, has both supported and obscured the structural subordination of women. […] The representation of the public world as superior to the private, and the traditional location of women within the latter, renders them largely invisible in public life. […] It is further entrenched by the sexual division of labour (unpaid work within the family and undervalued 'women's' jobs in the paid sector) upon which the maintenance of the public sector depends.[167]

This statement illustrates layers of complexity in the public/private divide. While business and the market are part of the public sphere for their 'masculine' character, women's concerns in relation to these spheres, either in or outside the workplace, are considered private because they are wrongly feminised. In that context, sexual violence thus becomes a human rights violation only if connected with the public realm.[168]

These considerations have transpired in the debate on the attribution of international human rights obligations to corporations. Feminist writers have argued that the public/private divide acts as a smokescreen concealing infringements to the rights of women perpetrated by private actors.[169] In one way, these observations have reinforced opinions in favour of moving away from the traditional view of human rights law as only binding States and recognising direct

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[166] Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *American Journal of International Law* 379, 382.
[167] Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10(2) *European Journal of International Law* 387, 390.
[168] Charlesworth (n 166) 382.
[169] Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' [1] (2004) 5 *Melbourne Journal of International Law* 1, 3. See also Celina Romany, 'State Responsibility goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 85–115; Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 2.

human rights obligations on multinational corporations.[170] In another way, caution is needed in transposing the public/private dichotomy to the business and human rights arena, because corporations are neither traditionally subjects of international law nor 'public' stakeholders, and because this concept has been developed in relation to the role of the State.[171]

The public/private divide is particularly challenging in a context in which the State has penetrated the realm of corporations, allocating them the power to self-regulate to address public concerns and serve public interests. At first sight, the business and human rights debate seems to challenge the public/private dichotomy by putting under the spotlight the fact that acts of sexual violence committed in relation to the activities of corporations are human rights violations.[172] It recognises the political nature of so-called private activities and brings violations of women's rights in the business sphere under scrutiny.

Yet, under the surface, this decentred regulatory model maintains a harmful public/private dichotomy in the conceptualisation of sexual violence, for two reasons.[173] First, the recurring silencing of survivors' voices in regulatory initiatives on business and human rights[174] conveys the idea that sexual violence remains a private matter between individuals. As a result, even if the role of mining companies combines private and public responsibilities, their public duties do not seem to make them more accountable when they are involved in sexual violence. Instead, companies are highly likely to consider that sexual violence committed by their employees, their security forces or their contractors are private acts performed outside of their duties – and therefore not attributable to the company. In this situation, the responsibility for mining-related sexual violence is transferred to individuals. It ignores the direct effects of corporate self-regulation in creating conditions for sexual violence to take place and to be perpetuated. The internal policies of the mining companies studied above demonstrate this tendency. Apart from Barrick Gold, which specifically recognises sexual violence as a mining-

[170] Chirwa (n 169) 3.
[171] On debates regarding the public or private nature of corporations, see, eg, Charlie Cray and Lee Drutman, 'Corporations and the Public Purpose: Restoring the Balance' (2005) 4(1) *Seattle Journal of Social Justice* 305; Olufemi O Amao, 'Reconstructing the Role of the Corporation: Multinational Corporations as Public Actors in Nigeria' (2007) 29 *Dublin University Law Journal* 312; William H Simon, 'What Difference Does it Make Whether Corporate Managers Have Public Responsibilities' (1993) 50(4) *Washington and Lee Law Review* 1697.
[172] For similar arguments made in relation to the State, see, eg, Julie Goldscheid and Debra J Liebowitz, 'Due Diligence and Gender Violence: Parsing its Power and its Perils' (2015) 48(2) *Cornell International Law Journal* 301, 306.
[173] For similar argument in relation to State human rights due diligence, see Amy J Sennett, 'Lenahan (Gonzalez) v. United States of America: Defining Due Diligence' (2012) 53 *Harvard International Law Journal* 537, 545.
[174] However, this is slowly evolving thanks to the work of the UN Working Group on Business and Human Rights.

related human rights violation in which it may be complicit,[175] the only other company that mentions sexual violence in its operations, BHP Billiton, does so only in relation to individual suppliers and their employees, without considering potential implication of the company itself.[176]

Second, the responsibility of corporations to establish due diligence processes is understood as a responsibility of means according to which companies are expected to take 'every reasonable step to avoid involvement with an alleged human rights abuse'.[177] Under business and human rights regulation, companies are thus not directly responsible for acts sexual violence but, rather, for their failure to take reasonable preventative action to identify and address these external, private acts.[178]

From a feminist regulatory perspective on human rights due diligence, self-regulation pushes sexual violence further within the 'private' element of the public/private divide. International standards aim to bring light to sexual violence in business activities. However, their heavy reliance on corporate self-regulation creates additional, deeper layers in the 'privatisation' of sexual violence. Mining companies maintain a separate regime of responsibility that is different to that of States' human rights obligations. This regime allows them to escape scrutiny by focusing on the actions of individual perpetrators and by engaging in self-regulatory initiatives that look impressive but do not actually achieve public goals such as the prevention of sexual violence. Sexual violence, while remaining a human rights concern in the public sphere, becomes less of a concern when public affairs are implemented by private actors as the latter contains sexual violence in an additional layer that is the 'private within the private'.

B *Self-Regulation, Trust and Discrimination*

Another issue that raises feminist concerns is the potential for self-regulation to perpetuate discrimination against women. In fact, despite their rapid expansion since the mid-1970s, international multistakeholder or industry-specific regulatory initiatives have had relatively limited success.[179] This may be explained by the fact that regulatory mechanisms created by single actor groups – such as corporate policies, codes of conducts and remedy frameworks –

[175] Barrick Gold, *Human Rights Policy* (n 90).
[176] BHP, *Respecting Human Rights* (n 50).
[177] *UNGPs* (n 2), Principles 17 (Commentary) and 22 (Commentary).
[178] For questions of State due diligence and public/private dichotomy, see, eg, Sennett (n 173).
[179] See, eg, Colin Scott, 'The Regulatory State and Beyond' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 265, 276.

seem to be generally inadequate because isolated groups lack the necessary competencies to regulate effectively.[180] NGOs may lack expertise and resources, while intergovernmental organisations may lack authority for direct regulation and capacity enforcement.[181] Corporations, according to Kenneth Abbot and Duncan Snidal, lack credibility as self-regulators.[182] In their study on 'management-based' regulation[183] in the Australian coalmining industry, Neil Gunningham and Darren Sinclair highlighted several criteria that led to the relative failure of process-based regulation, including meta-regulation. According to the authors, the main brakes on effective self-regulation were lack of organisational trust (including between management and workers, between corporate and mine site management, and among workers themselves),[184] nurtured by unequal power between management and workers.[185] Both mistrust and perceptions of powerlessness were justified by ritualism, meaning, in this context, that any internal regulation would not impose substantial change.[186]

Applied to the context of mining-related sexual violence, these arguments lead to two conclusions. First, the 'illegitimacy' of corporations to self-regulate and their lack of the experience needed to adequately address women's rights constrain the potential for strong regulation of human rights due diligence. It is, indeed, difficult to conceive that survivors would trust and perceive as legitimate regulators the exact same institutions they consider the origin of the violations of their human rights. Second, internal regulatory challenges demonstrate that practical implementation of corporate regulation might have limited, if any, results, as employees and mine management might not feel committed to the human rights objectives of the parent mining company. In such context, it is unclear to what extent self-regulating human rights due diligence to address sexual violence would be effective on its own.

The practices of mining companies themselves illustrate this legitimate lack of trust, in that through appearances of effective regulation, many perpetuate discrimination against women. This concern relates directly to risks of cosmetic compliance with human rights due diligence.

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[180] Kenneth W Abbott and Duncan Snidal, 'Taking Responsive Regulation Transnational: Strategies for International Organizations' (2013) 7(1) *Regulation & Governance* 95, 100.
[181] Abbott and Snidal (n 180) 100.
[182] Ibid.
[183] Neil Gunningham and Darren Sinclair, 'Trust, Culture and the Limits of Management-Based Regulation: Lessons from the Mining Industry' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 711. The authors define 'management-based regulation' as the process in which mining companies develop their own processes and management standards and practices to achieve business and regulatory goals (711).
[184] Ibid 715.
[185] Ibid 717.
[186] Ibid.

For example, to develop its remedy framework in Papua New Guinea, Barrick Gold did not appropriately consult the survivors,[187] silencing the voices of women. Through the confidential remedy framework, Barrick Gold offered women monetary packages – criticised by academics and civil society as unfair and ineffective[188] – in exchange for a waiver of their right to sue the company in front of State courts.[189] This self-regulatory initiative, based on secretly drafted criteria, unobservable processes and non-existent appeal processes, raises significant issues in relation to transparency, accountability and legitimacy.[190] By silencing and depriving survivors of their political rights, such regulatory sleight of hand largely favours corporate impunity where a feminist response to sexual violence would require thorough investigation and prosecution.[191] Apart from demonstrating how a practical application of self-regulation in relation to mining-related sexual violence may, in fact, perpetuate imbalances of power and discrimination against women, the example of Barrick Gold raises the question of whether companies understand the nature and extent of their responsibility towards women's human rights. The invisibility of women in most private, public-private and multistakeholder standards on business and human rights leads one to believe that it might not in fact be the case.

Relying on self-regulation to prevent risks of sexual violence in mining operations comes with significant challenges, from both regulatory and feminist perspectives. Practically, however, mining companies' influence is increasing alongside growing demand for minerals[192] and States have failed to protect women from violence in their domestic and international endeavours. In this context, meta-regulated self-regulation, if reinforced in line with feminist objectives, may constitute an important piece of a larger regulatory mechanism aimed at making women's experiences better addressed.

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[187] Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned* (Columbia and Harvard Universities, 2015) 3–4.
[188] Ibid 4–5.
[189] Ibid. According to the authors, many of the claimants were not informed of alternative legal avenues, raising questions about the validity of their consent to the remedy package. The legal advisor provided, paid by the mechanism office, lacked sufficient independence to overcome the power imbalance between the company and the survivors (5).
[190] Natasha Tusikov, 'Transnational Non-State Regulatory Regimes' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 339, 349.
[191] Simm (n 122) 50.
[192] See, eg, Christopher Knaus, 'Mining firms worked to kill off climate action in Australia, says ex-PM', *The Guardian* (Online) <https://www.theguardian.com/environment/2019/oct/10/mining-firms-worked-kill-off-climate-action-australia-ex-pm-kevin-rudd>. See also John M Luiz and Meshal Ruplal, 'Foreign Direct Investment, Institutional Voids, and the Internationalization of Mining Companies into Africa' (2013) 49(4) *Emerging Markets Finance and Trade* 113.

V STRATEGIES FOR MORE EFFECTIVE SELF-REGULATION

A *Reinforcing Self-Regulation to Address Sexual Violence Better*

While there are many flaws in self-regulation, the multinational enterprise remains the principal mode of organising economic activities.[193] This means that in the absence of an international regime creating human rights obligations for corporations – who are not subjects of international law, despite international human rights law 'contemplating' corporate duties[194] – the strongest approach to ensure that mining companies effectively respond to risks of sexual violence is to ensure companies have all the necessary tools and incentives to self-regulate effectively. This includes reinforcing the regulatory powers of the State, through the development of new international standards such as a binding instrument on business and human rights, for example. Emphasising the international obligations of States allows for stronger monitoring of corporate self-regulation from this meta-regulator.

In that model, enforced self-regulation is used in combination with other forms of regulation that are elaborated in chapters 7 and 8. Meta-regulation permits moving beyond the confrontations between different types of stakeholders and power-holders that characterise the dominant political climate of globalised competition and neo-liberalism. Instead, it encourages a focus on the way these stakeholders' regulatory functions may best be implemented or, as first recommended by Neil Gunningham, Peter Grabosky and Darren Sinclair, to understand how different regulatory instruments, strategies and techniques can be best combined to achieve, in our case, women's rights' goals. In the context of environmental regulation, they contend that:

> In the majority of circumstances, the use of multiple rather than single policy instruments, and a broader range of regulatory actors, will produce better regulation […] By implication, this means a far more imaginative, flexible, and pluralistic approach to environmental regulation than has so far been adopted in most jurisdictions: the essence of 'smart' regulation.[195]

Taking into consideration 'smart' regulation and the current business and human rights debate, encourages us to understand that addressing mining-related sexual violence does not mean departing from self-regulation – despite the trust and gender imbalance issues that seems to be

[193] John Gerard Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy' (2018) 12(3) *Regulation & Governance* 317, 319.
[194] John Knox, 'Horizontal Human Rights Law' (2008) 102(1) *American Journal of International Law* 1.
[195] Gunningham, Grabosky and Sinclair (n 163) 4.

inherent to self-regulation – but instead reinforcing corporate self-regulation, among other regulatory instruments, to align it to feminist objectives.

Many have discussed ways of better integrating gender into corporate self-regulation practices in order to enhance business' responsiveness to women's human rights both internally and externally. Most of this guidance developed focuses on women's empowerment in the workplace, and most includes, directly or indirectly, freedom from violence.[196] So far, most companies have not responded, or have responded in a cosmetic way, to such guidance. The 2018 Global Trends Report for the Women's Empowerment Principles, for example, demonstrates that although 69 per cent of the companies using the Women's Empowerment Principles Gender Gap Analysis Tool[197] had a leadership commitment to gender equality and women's empowerment, only 30 per cent had set time-bound, measurable goals and targets in strategy.[198] Only 19 per cent were applying a gender perspective to their community engagement efforts, human rights impact assessments or due diligence.[199] On the other hand, some companies have developed internal policies, procedures and recommendations to ensure respect for women's rights in their operations. In the mining industry, for example, Rio Tinto has led the way by developing in 2009 a guide for integrating gender considerations into its community engagement programmes, including considerations of a potential increase in risks of violence against women due to Rio Tinto's activities.[200]

Although the impacts of gender guidance are so far limited, meta-regulation theorists believe it is possible to improve and enhance the effectiveness of self-regulation. Christine Parker, notably, stresses that one of the characteristics of meta-regulation is its potential to generate corporate learning. Corporate regulators should continuously engage in learning about their industry and the risks they are to manage, *and* evaluate their own self-regulatory performance and failures in order to improve their regulatory strategies (double-loop learning).[201] Indeed, while the mining industry still practises self-regulation in a cosmetic and interest-oriented way,

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[196] See, eg, Calvert, *The Calvert Women's Principles* (2018); United Nations Global Compact, *Women's Empowerment Principles, the UN Global Compact and the Guiding Principles on Business and Human rights* (UNGC, 2015).
[197] United Nations Global Compact, *WEPs Gender Gap Analysis Tool: From Principles to Practice* <https://weps-gapanalysis.org/>. The tool was launched in 2017 to provide businesses with a self-assessment of their performance, policies and practices on women's empowerment and gender equality.
[198] United Nations Global Compact, *Women's Empowerment Principles: Global Trends Report 2018* (UNGC, 2018) 4.
[199] Ibid.
[200] Deanna Kemp et al, *Why Gender Matters A Resource Guide for Integrating Gender Considerations into Communities Work at Rio Tinto* (Rio Tinto, 2009) 44.
[201] Parker (n 42) x. The third loop of learning involves non-corporate 'regulators and law test companies' self-evaluations, and learn from them how to improve law and regulatory practice' (xi).

it also seems willing to learn and improve its human rights due diligence.[202] Yet, this focus on progressive learning requires that companies, despite being aware of their due diligence responsibilities under international standards, gain higher levels of certainty as to the exact nature of the regulatory goals they are expected to achieve (respect for women's rights), and the most effective ways of achieving these goals.[203]

B *Anchoring Human Rights Due Diligence in International Human Rights*

The problem of mining companies possibly being unaware of the extent under international human rights law of their responsibilities towards women, associated with concerns of self-interest and cosmetic compliance, might be related to the issue mentioned earlier of human rights due diligence as a process becoming the centre of gravity of the UNGPs. This has led some scholars to approach the UNGPs and human rights due diligence from a philosophical-normative approach focusing on the moral and ethical substance of human rights. Björn Fasterling and Geert Demuijnck, for example, have argued that the UNGPs leave too much leeway to corporations when performing human rights due diligence. This not only prevents effective implementation of the UNGPs but also, and importantly, makes due diligence fall short of 'the requirements implied by the respect of human rights as a perfect moral duty'. They understand a perfect moral duty as 'a duty admitting no exception in favour of inclinations to refrain from acting on it'.[204] In other words, having a due diligence process in place should not discharge a company from its moral duties.[205]

Ingrid Landau reaches similar conclusions from a more pragmatic legal perspective. She has identified, as one of the ways to undertake human rights due diligence substantively and meaningfully, the anchoring of human rights due diligence into the corporate responsibility to respect human rights.[206] In other words, she recommend that a company's human rights due diligence be directed towards and evaluated against clear human rights standards and

[202] See, eg, Kemp et al (n200); EITI, *2019 EITI Standard: What's New on Gender?* (EITI, 2019).
[203] Landau (n 32) 240.
[204] Björn Fasterling and Geert Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116(4) *Journal of Business Ethics* 799, 799. See also, eg, Denis G Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20(3) *Business Ethics Quarterly* 371; Wesley Cragg, 'Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework' (2012) 22(1) *Business Ethics Quarterly* 9; Florian Wettstein, 'Beyond Voluntariness, Beyond CSR: Making a Case for Human Rights and Justice' (2009) 114(1) *Business and Society Review* 125.
[205] Fasterling and Demuijnck (n 204) 805.
[206] Landau (n 32) 240.

outcomes.[207] If considering the business and human rights sphere, the evident choice would be the corporate responsibility to respect and the set of human rights to which the UNGPs refer. I have demonstrated in Chapter 4, however, that these are, if not inappropriate, at least incomplete in addressing mining-related sexual violence, thus calling for a re-grounding of human rights due diligence into substantive women's rights. As expressed by the UN Working Group on Business and Human Rights, '[b]usiness enterprises should avoid undermining women's human rights at a minimum and promote such rights by adopting, and applying in practice throughout their operations, a gender equality policy'.[208] This would direct the focus of mining companies from human rights due diligence as the expected standard of conduct towards respect for international women's rights and prevention of sexual violence as the expected outcome and evaluation standard. Using women's rights as the evaluation benchmark for corporate policies, procedures and practices would also lead to a reduction of cosmetic compliance, making it more difficult for mining companies to hide limited human rights performance behind efforts to institutionalise human rights due diligence processes. It would also limit self-interest-oriented self-regulation, with the attention of companies shifting towards the interests of women right-holders.

C *Women as Corporate Regulators*

1 *Women as Managers*

While this may seem an evident strategy, implementing it in a way that is meaningful for women survivors of sexual violence may be more challenging. Meta-regulation theorists provide the beginning of an answer. According to Christine Parker, '[e]ffective corporate self-regulation […] means putting 'stakeholders' in a position where they can influence corporate management'.[209] In relation to mining-related sexual violence, this means that putting women's rights at the centre of human rights due diligence also means addressing the role of women as both corporate regulators and corporate management influencers.

This conclusion is in line with feminist perspectives on mining. Kuntala Lahiri-Dutt has demonstrated that the mining industry is currently experiencing a process of 'feminisation' that she associates with an increased space for women in mining-related policy-making and in civil

[207] Ibid.
[208] *Gender Dimensions of the UNGPs* (n 120) [26].
[209] Parker (n 42) 10.

society action, as well as the growing visibility of women in the mining industry.[210] While in comparison to men the participation of women in large-scale mining has not increased significantly,[211] Lahiri-Dutt's findings demonstrate, with more women navigating the industry, the relevance and potentially transformative power of considering and reinforcing the role of women as regulators. They also mean that if self-regulation of the risks that mining operations generate for women is to be re-anchored in a rights-based approach to large-scale mining, this approach needs to shift away from depicting women as outside the mining industry and as victims of the impacts of a male-dominated industry.[212] Instead, a feminist approach to rights-based self-regulation in mining encourages corporate regulators to embrace the productive and transformative roles of women as agents of mining. These agency roles take place in the workplace, where women can make decisions that actively change the manner mining companies approach risks to women and incorporate them in their due diligence processes. They also take place in the communities where mining companies operate, with women endorsing their regulatory role by directly collaborating with companies to influence corporate self-regulation, make women's rights more visible and mainstream gender into human rights due diligence, and by monitoring the company's performance.[213]

Legal research on the visibility and impacts of women regulators in the mining industry remains limited. Business management and economic literatures have been more prolific in assessing the evolution and relevance of women's representation and contribution to decision-making in corporate settings in general.[214] The mining industry, in practice, is gradually shifting to mainstreaming gender across its internal and external operations.[215] Mining companies increasingly discuss gender equality in the sector,[216] include gender considerations

[210] Kuntala Lahiri-Dutt, 'The Feminisation of Mining' (2015) 9(9) *Geography Compass* 523, 523.
[211] Ibid.
[212]Kuntala Lahiri-Dutt, 'Do Women Have a Right to Mine?' (2019) 31 *Canadian Journal of Women and the Law* 1, 2.
[213] This last point is developed in Chapter 8.
[214] See, eg, Diana Bilimoria, 'Building the Business Case for Women Corporate Directors' in Ronald J Burke and Mary C Mattis (eds), *Women on Corporate Boards of Directors: International Challenges and Opportunities* (Springer Science + Business Media, 2000), 25–40; Ronald J. Burke and Mary C Mattis (eds), *Women on Corporate Boards of Directors: International Challenges and Opportunities* (Kluwer Academic Publishers, 2000).
[215] See, eg, Kuntala Lahiri-Dutt and Ronald J Burke, 'Gender Mainstreaming in Asian Mining: A Development Perspective' in Kuntala Lahiri-Dutt (ed), *Gendering the Field Towards Sustainable Livelihoods for Mining Communities* (ANU E Press, 2011) 213.
[216] See, eg, International Council on Mining and Metals, *#ChoosetoChallenge: Advancing Gender Equality in the Mining Sector* < https://www.icmm.com/en-gb/events/2021/advancing-gender-equality-in-the-mining-sector >; The World Bank, *Events: Gender and Oil, Gas and Mining: New Frontiers of Progress, Challenges and Solutions* <https://www.worldbank.org/en/events/2018/03/07/gender-and-oil-gas-and-mining-new-frontiers-of-progress-challenges-and-solutions#2>.

in their policies,[217] and seek to hire more women across roles.[218] This mainstreaming, however, is slow; the sector maintains the lowest number of women on boards of any industry group in the world, with less than one in five mining leaders being women.[219] A 2020 study conducted by market intelligence company S&P Global demonstrates, for example, that across 247 top globally listed mining companies, only 18.1 per cent of board seats are held by women, while women make up 14.9 per cent of mining companies' executive ranks and 13.2 per cent of the sector's C-suite executive roles.[220] Additional research conducted in 2018 shows that less than three per cent of Chief Executive Officers and 16.3 per cent of all managers in mining are female.[221]

In parallel to these low numbers, however, research demonstrates that more gender diversity in senior management levels and decision-making positions has positive impacts on the financial and social success of companies, as well as on their level of innovation.[222] It also shows that more women in decision-making positions leads to more effective enforcement of the ethical attitude of a company and better stakeholder engagement, which, in turn, impacts the environmental and social elements of sustainability.[223] In other words, women play a strategic role in helping companies manage their human rights standards and their social responsibility and sustainable practices,[224] including in activities directed at increasing gender equality internally and externally.[225] It has been demonstrated that the actual influence of women

[217] See, eg, Kemp et al (n 200).
[218] See, eg, BHP, *The Gender Equation* < https://www.bhp.com/media-and-insights/prospects/2019/10/the-gender-equation/>; AngloAmerican, *Landmark Female Trainee Program Recognised at the QLD Resources Awards for Women* < https://australia.angloamerican.com/media/press-releases/pr-2020/05-03-2020>.
[219] Mining Journal, *ASX 200's Mining Gender Diversity Leaders* <https://www.mining-journal.com/leadership/news/1358198/asx-200s-mining-gender-diversity-leaders>; S&P Global Market Intelligence, *Despite Diversification Efforts, Fewer than 1 in 5 Mining Leaders are Women* <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/despite-diversification-efforts-fewer-than-1-in-5-mining-leaders-are-women-59101897>.
[220] S&P Global Market Intelligence (n 219).
[221] Cecilia Connell and David Claughton, 'Women in Mining: Dig the Changing Face of Australia's Mining Industry', *ABC News* <https://www.abc.net.au/news/2018-05-22/dig-the-changing-face-of-mining-as-women-make-inroads/9786020>.
[222] See, eg, Yu Liu, Zuobao Wei and Feixue Xie, 'Do Women Directors Improve Firm Performance in China?' (2014) 28 *Journal of Corporate Finance* 169; Mariateresa Torchia, Andrea Calabrò and Morten Huse, 'Women Directors on Corporate Boards: From Tokenism to Critical Mass' (2011) 102 *Journal of Business Ethics* 299; David A Carter, Betty J Simkins and W Gary Simpson, 'Corporate Governance, Board Diversity, and Firm Value' (2003) 38(1) *Financial Review* 33.
[223] Jeremy Galbreath, 'Are There Gender-Related Influences on Corporate Sustainability? A Study of Women on Boards of Directors' (2011) 17(1) *Journal of Management and Organization* 17, 18.
[224] Dolors Setó-Pamies, 'The Relationship between Women Directors and Corporate Social Responsibility' (2013) 22(6) *Corporate Social Responsibility and Environmental Management* 334.
[225] Larrieta-Rubín de Celis et al, 'Does Having Women Managers Lead to Increased Gender Equality Practices in Corporate Social Responsibility?' (2015) 24(1) *Business Ethics: A European Review* 91.

managers is somewhat limited by stereotypes and discrimination.[226] These findings highlight the importance of integrating more women, but also feminist men, male champions of gender equality and male peer educators,[227] in management positions within mining companies and, outside of employment and workplace equity considerations, across mineral supply chains to increase the gender-responsiveness of mining companies' self-regulatory practices.

Relying on women's presence in higher management to reinforce self-regulation depends on mining companies actively engaging in hiring more women in senior positions, but not on this alone. According to Asanda Benya, who conducted in research in South African mines:

> For women to feel included in mining from the onset, it is important that mines have female instructors and assessors, not only administrators. These female instructors should not only be in occupations deemed less arduous, but especially in those that are seen as bastions of masculinity like rock drilling and winch operation. Seeing female instructors will not only facilitate the inclusion of women and make them feel more welcome, but will also help in 'de-gendering' some of these occupations that are seen as exclusively and hyper masculine. It is important that women see bodies like theirs from the onset at the training centre.[228]

While female instructors and assessors may less be involved than administrators in self-regulation and policy-making, they have a role in influencing self-regulation based on their experience working directly with male and female miners. As demonstrated above, the hiring performance of mining companies on that matter is low. However, recent practice demonstrates greater engagement of mining companies with gender diversity among internal decision-makers. For example, Vale SA recently set a goal of doubling the number of women it employs (from 13 per cent to 26 per cent) by 2030.[229] Similarly, in 2020 Rio Tinto appointed three female non-executive directors in order to address the lack of diversity on its board.[230]

From a feminist regulatory perspective, increased numbers of women holding the role of internal regulators increases the potential of mining companies to self-regulate effectively in order to allow better integration of extensive and long-term due diligence strategies to prevent

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[226] Galbreath (n 223).
[227] See, eg, David Collinson and Jeff Hearn, 'Naming Men as Men: Implications for Work, Organization and Management' (1994) 1(1) *Gender, Work & Organization* 2; Juanita Elias, 'Hegemonic Masculinities, the Multinational Corporation, and the Developmental State: Constructing Gender in "Progressive" Firms (2008) 10(4) *Men and Masculinities* 405; Men Engage Alliance, *What we Believe* <http://menengage.org/>.
[228] Asanda Benya, 'Going Underground in South African Platinum Mines to Explore Women Miners' Experiences' (2017) 25(3) *Gender and Development* 509, 520.
[229] Vale, *Gender Equity: Vale and Vale Foundation Support Guide with Data and Constructive Actions for Paradigm Shift in Mining* <http://www.vale.com/brasil/PT/aboutvale/news/Paginas/equidade-de-genero-vale-e-fundacao-vale-apoiam-guia-com-dados-e-acoes-construtivas-para-mudanca-de-paradigma-na-mineracao.aspx>.
[230] Rio Tinto, *Rio Tinto Board Changes* <https://www.riotinto.com/news/releases/2020/Rio-Tinto-board-changes>.

sexual violence in their operations. Increasing the number of female lower-level employees in mining companies and encouraging their engagement into decision-making and process implementation would also contribute to such outcomes.[231] Rather than cosmetically responding to gender and sexual violence as a tick-box exercise, as seems to have been the practice of companies across sectors so far,[232] reinforcing the active role of women as corporate regulators allows them to ask 'the woman question', make the interests of women more visible and meaningfully address structural forms of violence against women in mining. However, while reinforcing the role of women as agents and regulators of mining may offer tools to support systemic human rights due diligence practices that respond to the need to prevent sexual violence in mining operations, this solution must come with several safeguards.

2 *The Business Case for Gender Equality*

The first caution is linked to the flip side of the literature highlighting the economic and performance value for corporations of hiring more women as directors, managers and employees. It relates to the emergence in the 1990s of the political economy of 'transnational business feminism', which connects to both notions of cosmetic compliance and self-interested self-regulation. Transnational business feminism stresses the 'business case' for gender equality 'by arguing that investments made in women can (and should) be measured in terms of the cost savings to families and communities, as well as in terms of boosting corporate profitability and national competitiveness'.[233]

This business case has been enthusiastically adopted by corporations, international organisations, civil society and others.[234] However, feminist writer Adrienne Roberts has critiqued it for perpetuating the neoliberal logic in business 'that has created and sustained gender-based inequality and oppression',[235] and for promoting a 'naturalised view of women and gender relations that ignores the historical and structural causes of poverty and gender-based inequality'.[236] In the context of business and human rights, the practice of corporations

[231] For feminist literature on how decentralisation of power within a company can increase creativity and innovation, increase trust, and increase awareness on work and community issues, see, eg, Andrew C Wicks, Daniel R Gilbert Jr and R Edward Freeman, 'A Feminist Reinterpretation of the Stakeholder Concept' (1994) 4(4) *Business Ethics Quarterly* 475.
[232] *Gender Dimensions of the UNGPs* (n 120), [3].
[233] Adrienne Roberts, 'The Political Economy of "Transnational Business Feminism": Problematizing the Corporate-Led Equality Agenda' (2015) 17(2) *International Feminist Journal of Politics* 209, 209.
[234] See, eg, International Finance Corporation, *Investing in Women: New Evidence for the Business Case* (IFC, 2017); International Labour Organisation, *Women in Business and Management: The Business Case for Change* (ILO, 2019).
[235] Roberts (n 233) 217.
[236] Ibid 209.

to invest in women because it constitutes 'smart economics'[237] perpetuates gender stereotypes and jeopardises the effective implementation of human rights due diligence. For example, the input of women regulators in decision-making processes is often welcome only in 'soft' areas (e.g. human resources, occupational health and safety, ethics etc.) as opposed to strategic ones.[238] Likewise, self-regulatory processes that relate to gender issues may reproduce international business and human rights standards and portray women in communities as a vulnerable group needing to be 'empowered' or 'saved' by Western corporate powers. They would then be perpetuating (neo)colonialist relations of power and marginalising the voices of women from the global South.[239] While the notion of transnational business feminism was not built specifically in the business and human rights debate, but, rather, in relation to corporate social responsibility, it is relevant. Indeed, the business and human rights sphere is becoming increasingly sensitive to gender equality and women's rights and, consequently, needs to recognise and address the risks associated with promoting the business case for gender equality. In that sense, transnational business feminism encourages stakeholders across layers of regulation to bolster the hiring of women in decision-making positions not for their business value but rather for the relevance of their input and agency in corporate self-regulation.

A feminist approach to corporate self-regulation aims to ground human rights due diligence in women's rights, and to achieve this objective by reinforcing the role of women in mining companies as regulators and agents. It does not mean that mining companies should rely on women to drive the gender-responsive due diligence agenda solely because they are women. In fact, feminist literature across domains has called against expecting women, who are a minority in 'public' (and thus male-dominated) sectors, to solve organisational problems and to mainstream women's rights just because of their gender. In the context of peace and security, for instance, Laura Shepherd draws attention to the fact that women's agency and participation has become conflated with unrealistic expectations and pressures on women to create transformation towards gender equality in their given environments.[240] She further argues that the additional burden women are expected to bear by participating in decision-making can only be alleviated through discursive and material changes in attitudes towards equality and

[237] The World Bank, *World Development Report 2012: Gender Equality and Development* (World Bank, 2011) xiii.
[238] Galbreath (n 223) 23.
[239] Roberts (n 233) 225.
[240] Laura J Shepherd, 'Sex, Security and Superhero(in)es: From 1325 to 1820 and Beyond' (2011) 13(4) *International Feminist Journal of Politics* 504.

empowerment.[241] These changes include adequate budgeting for the gender components of projects, training and skills development, effective supervision of the implementation of gender components and a true commitment from the organisation towards change.[242] In the judicial context, Erika Rackley and Rosemary Hunter recognise women's important contribution to fostering feminist reasoning in judgements. Yet, they contend, feminist outcomes are better achieved when males 'who share feminism's social justice and inclusionary concerns' contribute to the decisions.[243] In relation self-regulated due diligence, these feminist critiques highlight the need for cultural and organisational changes in corporate contexts. Women can positively influence corporate performance and self-regulation regarding gender issues and the prevention of sexual violence. However, they need commitment and support from their male counterparts and from their company to do so.

3 *Intersectionality, Corporate Culture and Women Regulators*

From this derives another important safeguard linked to the assumption across sectors that some women speak for all women. Indeed, human rights due diligence that effectively addresses risks of sexual violence requires self-regulatory practices that demonstrates understanding of the intersectional and socioeconomic circumstances of survivors. In practice, even if mining companies are increasingly seeking the hiring of more women managers and employees, human rights due diligence is still very much exercised in a gender-neutral way.[244] Importantly, this observation illustrates the fact that in reality the hiring of women in decision-making positions within multinational mining companies is not necessarily a guarantee of unbiased perceptions about women in communities of operations.

On one side, female administrators may very well be driven by the cultural constraints of, and the profit-centred performance indicators established by, their companies. In these circumstances, they may have no interest in making internal due diligence policies and practices more aligned to feminist objectives. On the other side, as mostly Western women working in mining companies incorporated in Western countries,[245] female corporate

[241] Ibid.
[242] Hilary Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18(1) *Harvard Human Rights Journal* 1, 11.
[243] Rosemary Hunter and Erika Rackley, 'Feminist Judgments on the UK Supreme Court' (2020) 32(1) *Canadian Journal of Women and the Law* 85, 110.
[244] *Gender Dimensions of the UNGPs* (n 120) [21].
[245] The mining industry has a historical lack of multicultural diversity in management and governance positions. See, eg, Deloitte, *Tracking the Trends 2018: the Top 10 Issues Shaping Mining in the Year Ahead* (Deloitte, 2018) 16–22.

regulators may very well develop general regulation applicable to the entirety of their operations based on their own assumptions about sexual violence and its consequences for survivors. As pointed out by feminist scholars, such approaches are not representative of the diversity of women and their intersectional circumstances.[246]

Feminist literature proposes various responses to the diversity of women, including for instance the notion of world travelling.[247] Applied to the context of human rights due diligence, effective self-regulation would require real efforts from corporate regulators, regardless of their sex or gender, to challenge their assumptions about survivors of sexual violence. It also calls for corporate regulators to recognise their own role, as exploitative powers, in nurturing power imbalances and perpetuating intersectional discrimination and violence against women. This highlights the importance of opening the regulatory space to women who are external to the company and recognising their necessary role in influencing and monitoring corporate self-regulation. At the same time, it remains important that these external women remain independent from the company in order to maintain their credibility as regulators. As mining companies may invite women to become part of advisory boards or other corporate systems, risks of managerial surveillance and control exist.[248] These may lead to an 'incorporation' of these women's dissenting opinions and a reduction of external pressure on the company to self-regulate more effectively.[249] The role of external regulators is discussed in Chapter 8.

[246] See, eg, Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1984) 12(3) *Boundary 2* 333.
[247] Isabelle R Gunning, 'Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries' (1991) 23 *Columbia Human Rights Law Review* 189. According to the author, world travelling requires 'multicultural dialogue and a shared search for areas of overlap, shared concerns and values' (191).
[248] Paul Thompson and Stephen Ackroyd, 'All Quiet on the Workplace Front? A Critique of Recent Trends in British Industrial Sociology' (1995) 29(4) *Sociology* 615; Francis Wilson, 'Cultural Control within the Virtual Organization' (1999) 47(4) *The Sociological Review* 672.
[249] This risk may, to a certain extent, be mitigated by the nomination of *independent* directors on mining companies' boards. Studies have demonstrated that, while concerns with independence remain, more female independent directors on boards have the potential to increase firms' performance and to influence corporate decisions. See, eg, Siri Terjesen, Eduardo Barbosa Couto and Paulo Morais Francisco, 'Does the Presence of Independent and Female Directors Impact Firm Performance? A Multi-Country Study of Board Diversity' (2016) 20 *Journal of Management & Governance* 447.

VI CONCLUSION

In this chapter, I highlighted the many flaws of self-regulated due diligence from both regulatory and feminist perspectives. Despite these flaws, I argued that as part of an interlocking, meta-regulatory system of hard law and soft law, self-regulation creates incentive and opportunities for mining companies to engage with the risks their activities generate for women. The regulatory promises of self-regulated due diligence may be achieved in a manner that contributes to effective prevention of sexual violence if the process is reinforced through assimilation of feminist concerns including the grounding of due diligence in human rights – and women's rights – objectives and the integration of women into the self-regulatory sphere.

However, self-regulation of due diligence cannot adequately prevent mining-related sexual violence on its own. Effective internal due diligence processes can only occur if external stakeholders, including States and civil society, constantly regulate and critique mining companies women's rights performance and hold them accountable for their due diligence processes.[250] This is recognised, to some extent, in guiding principle 18 of the UNGPs:

> In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should: (a) Draw on internal and/or independent external human rights expertise; (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.[251]

Yet, according to Christine Parker and John Howe, this type of stakeholder engagement as part of human rights due diligence suggests 'corporate management discretion and authority to identify and assess human rights impact with the assistance of external expertise and stakeholder consultation, as deemed appropriate by corporate management themselves as a matter of reaching *from the inside out*'.[252] They argue that, in fact, the language of due diligence does not prioritise countervailing critiques *from the outside in*, which may be achieved by allowing interested actors, such as communities of operation, to penetrate the corporate shell.[253] Given the latitude international standards offer to corporations' decision-making, due diligence that is in line with feminist objectives can only be accomplished if mining companies' self-

[250] Parker and Howe (n 136) 297.
[251] *UNGPs* (n 2) Principle 18.
[252] Parker and Howe (n 136), 298, emphasis in original.
[253] Ibid.

regulatory processes are designed with the participation of relevant external stakeholders, as part of a meta-regulation mechanisms. It also requires that these stakeholders, including the State and civil society, influence, control and monitor companies' continuing due diligence practices.

CHAPTER 7: SEXUAL VIOLENCE AND PREVENTATIVE STATE REGULATION

I INTRODUCTION

In meta-regulation, which is the primary theory underlying the arguments in this chapter, the State plays a key part in buttressing corporate self-regulation.[1] This mechanism allows the State to ensure that self-regulation is designed and implemented in compliance with the human rights standards (domestic or international) it is supposed to address, in this case human rights due diligence. The State is perceived as the authority that oversees corporate regulators who are not necessarily willing to regulate effectively. In that context, some writers have referred to the State as 'meta-regulator'.[2] In line with the findings of regulatory scholars, this chapter recognises the important role of the State in strengthening due diligence regulation. This function may be performed through the elaboration of domestic standards, such as laws and policies, that frame the regulatory expectations put on mining companies regarding the prevention of sexual violence in their operations. It is also achieved through the establishment or reinforcement of enforcement mechanisms against non-compliant companies. While this chapter recognises the various forms State regulation may take, it focuses on the law as one of the most prominent mechanisms used at domestic level.

Emphasising the regulatory role of the State in this chapter does not diminish the value of genuine voluntary self-regulation. Instead, 'smart' forms of regulation envisage combinations of regulatory measures according to which, for example, corporate due diligence self-regulation complements most forms of command-and-control regulation.[3] According to Neil Gunningham and Darren Sinclair, combining instruments is particularly relevant where the level of performance that is sought from the company is 'beyond compliance'.[4] While their argument applies primarily to the field of environmental compliance, in relation to mining-

[1] See, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002).
[2] See, eg, Peter N Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8(4) *Governance* 527; Parker (n 1).
[3] Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 133, 140.
[4] Ibid 141.

related sexual violence it is fundamental that mining companies go well beyond the standards established by international instruments on business and human rights. I have highlighted already the risks of cosmetic compliance in human rights due diligence – largely allowed, if not involuntarily encouraged, by international standards – and the limited and biased understanding of mining companies' contribution to sexual violence in both international instruments and in the industry. In that situation, it is essential that in addition to self-regulation, other forms of regulation, notably State law, encourage companies to go beyond minimum standards to *effectively* comply with international human rights law.

A feminist regulatory approach to State law, although embracing the State as a critical regulator, also recognises its limitations. In fact, feminist literature has long criticised the law for disempowering women and silencing their voices. Based on these feminist commentaries, I contend that the law, while essential, must be of a certain nature to prevent mining-related sexual violence effectively. Not only does it need to be designed in a way that supports the recognition of women's experiences in business activities, it must also be developed and implemented in a way that does not make these experiences worse. I argue that to achieve this objective, State due diligence laws must be preventative in nature. They should encourages mining companies to review and reform internal and external practices that create risks of sexual violence in the first place.

To elaborate on my overall argument, I start by discussing the role of the State from the perspective of meta-regulation. The State is described as an essential part of an overlapping system of multiple regulation aimed at making due diligence more effective in preventing sexual violence. I focus on the role of the law, which, by monitoring both the corporate processes and outcomes, may represent an effective tool to achieve positive outcomes for women in mining communities. In Section III, I analyse State regulation and domestic law from a feminist perspective. I argue that, despite important loopholes, the law can be reinforced to ensure that it does not alienate women and survivors of sexual violence. In its role as meta-regulator, the State is expected by regulation theorists to learn and be held responsible for its failure to meta-regulate corporate human rights due diligence. The measures needed to foster States' learning and compliance can be informed by practices found in another layer of regulation: international human rights law. Section IV examines how existing and developing international norms can enhance State regulatory practice in line with feminist objectives.

II REGULATORY THEORIES AND STATE REGULATION

A *The Meta-Regulatory Role of the State: Compliance and Evaluation*

1 *The State as Meta-Regulator*

In the development of the business and human rights international framework, the potential regulatory role of the State has occasionally appeared to be secondary to the regulatory power of social actors and civil society or the self-regulatory authority of corporations in seeking compliance with human rights.[5] Yet, regulatory theorists advise that companies not only need to establish strong internal processes to comply with their human rights responsibilities but must also be held accountable for the quality of these processes.[6] This accountability stems from the desired cooperation between the State – in its domestic and international roles – civil society and corporate regulators, as examined by both regulatory theory and the business and human rights framework. In other words, the corporate responsibility to respect human rights is the result of interactions between States' formal regulation, informal social action and corporate self-regulation.[7] In this section, I build on meta-regulation theories to analyse the important role of the State in regulating the practices of corporate self-regulators and, consequently, in ensuring the meaningful implementation of human rights due diligence. I suggest that the State has a role in scrutinising corporate behaviour and establishing appropriate enforcement mechanisms to bolster corporate compliance with international human rights.

Regulatory literature recognises the value of corporate self-regulation, including its potential to respond to social goals such as the respect of international human rights and to drive the global economy.[8] At the same time, regulatory scholars are not naively optimistic regarding the behaviour of corporations. They have been vocal on the need to maintain an array of external threats of formal and informal sanctions to deter and punish non-compliant companies.[9] In an environment where corporate self-regulation management systems regularly lack the capacity and goodwill to develop effective internal mechanisms to respond to human rights risks and improve their human rights performance, Christine Parker contends that 'the

[5] Justine Nolan, 'Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?' (2018) 15 *Brazilian Journal of International Law* 65, 67.
[6] Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20 *Melbourne Journal of International Law* 221, 243.
[7] Parker (n 1) 245.
[8] Ibid 301.
[9] See, eg, Ayres and Braithwaite (n 1).

role of regulation is to meta-evaluate corporate self-regulation and organizational learning and to hold companies responsible for how they react to and resolve injustices that they cause'.[10] Emphasising external evaluation and enforcement of corporate self-regulation illustrates the necessity of a 'third loop' of regulation. I have argued in Chapter 6 that most process-based regulation systems rely on two phases of self-regulation management (or double-loop learning): the commitment to respond to responsibility issues by developing internal control mechanisms, and regularly evaluating these systems with a view to improving them.[11] Meta-regulation introduces a third layer of learning, one that entails external, non-corporate stakeholders and regulators learning to improve their own regulatory strategies in order to monitor and assess the validity of corporate self-regulation.[12] In other words, this third layer of regulation 'forces companies to evaluate and report on their own self-regulation strategies so that regulatory agencies can determine whether the ultimate substantive objectives of regulation are being met'.[13] These objectives are, in this research, effective prevention of sexual violence.

In this system of interlocking layers of regulation, the State maintains a central role. It has the authority to decide the extent to which government intervention is needed to ensure enforcement of and compliance with the regulation. It also has a critical role in evaluating corporate self-regulation in order to hold industry accountable for how well it integrates the goals of regulation.[14] This may be achieved through 'outcome regulation', which allows the State to hold companies accountable for their *outcomes* (e.g. reported cases of sexual violence), irrespective of the self-regulation process they have instituted.[15] Indirect ways of regulating outcomes may be economic incentives or information disclosure requirements. Evaluation may also be achieved by 'process regulation', through which the State regulates the company's self-regulatory *process*, in this case human rights due diligence.[16] For instance, the State can be directly involved in supervising the practical implementation of due diligence in mining companies.

[10] Parker (n 1) 301.
[11] Sharon Gilad, 'It Runs in the Family: Meta-Regulation and its Siblings' (2010) 4 *Regulation & Governance* 435, 488; Landau (n 6) 240.
[12] Parker (n 1) x.
[13] Ibid 245.
[14] Ibid 275.
[15] Ibid.
[16] Ibid 276.

2 *Human Rights Due Diligence and Outcome Regulation*

Outcome regulation, at first sight, seems of limited relevance in relation to the prevention of sexual violence through human rights due diligence as it ignores internal self-regulation *processes*. As explained by Christine Parker, '[o]utcome regulation alone is not appropriate where there is little business knowledge and skills for self-regulation processes, or little diffusion of self-regulation skills and practices throughout industry'.[17] It is clear that well developed, transparent, due diligence processes are still far from being internalised by corporations in the mining industry. State interference through process regulation is therefore necessary.[18] This conclusion is in line with the requirements of international standards that establish human rights due diligence as a responsibility of means. If companies, under international soft law are expected to take reasonable self-regulatory steps to avoid being involved in human rights violations,[19] external governmental evaluation of these steps is essential.

At the same time, the relevance of outcome regulation is not to be overlooked. I have argued in Chapter 6 that one way to increase the effectiveness of human rights due diligence in preventing sexual violence is to ground corporate due diligence in companies' responsibility to respect human rights. Specifically, a company's due diligence process should be evaluated against the human rights standards and outcomes that aim to protect women from violence. Thus, human rights due diligence, in relation to mining-related sexual violence, is best approached by a regulatory regime that combines process and outcome regulation, each type covering the other's limitations.

Such approach has been criticised for multiplying standards and for leaving little space for the integrity of corporations' own internal self-governance.[20] I recognise, and argue in subsequent sections, that too many State standards are an impediment to establishing the balance between State and corporate regulation that is recognised by regulatory theories. My claim here, however, is that in relation to mining-related sexual violence strict oversight of mining

[17] Ibid 276.
[18] Ibid. Christine Parker, however, also identifies limitations of process regulation. This includes the fact that State regulatory agencies may be ill-equipped to evaluate corporate processes for compliance and may gain the necessary skills and knowledge at the same time as corporations themselves (or after) (276).
[19] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) Principle 17 (Commentary) ('*UNGPs*').
[20] Parker (n 1) 277.

companies' processes and outcomes is important. Indeed, companies' historical propensity to ignore the risks their activities create for women, the enhanced due diligence expectations put on them in the conflict areas in which they may operate and the often opaque relationships they maintain with State and non-State stakeholders require reinforced government (and other regulators') intervention. This does not mean that State regulation must be more abundant, but that it must be stronger. It could take the form, for instance, of mandatory due diligence instruments that address women's experiences of corporate activities – including sexual violence – and offer tax, economic or administrative incentives to companies. In this example, the advantages offered would be evaluated based on the strength of their due diligence processes *and* the actual outcomes for women of these processes. The standards are not necessarily more numerous. Instead, they are more clearly defined and provide more guidance to companies on how to integrate women's rights in their due diligence practices. This option may only be temporary, as mandatory due diligence laws and corporate practice are developing. Meta-regulation, as examined earlier, expects corporations to learn, which may lead mining companies to stronger, more transparent and more effective practices over time.

In conclusion, the State has, on several levels, a crucial role in meta-evaluating self-regulation. This is recognised by regulatory theories, as well as by international business and human rights standards. During the elaboration process of the UNGPs, John Ruggie noted that 'the State's role as an economic actor is a key – but under-utilised – leverage point in promoting corporate human rights awareness and preventing abuses'.[21] The UNGPs recognise that States have binding obligations, elaborated upon existing international law standards, to protect human rights.[22] The obligation to protect requires States to take legislative, administrative and adjudicative measures to prevent third parties on their territory or under their jurisdiction, including business enterprises, from violating human rights and to respond to such violations.[23] Similarly, the UN Working Group on Business and Human Rights called upon States to engage in processes to develop National Action Plans on Business and Human Rights (NAPs) as a means to implement the UNGPs.[24] Defining NAPs as '[…] evolving policy strateg[ies]

[21] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/14/27 (9 April 2010) [32].
[22] *UNGPs* (n 19) General Principles and Principle 1.
[23] Ibid Principle 1.
[24] Human Rights Council, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/23/32 (14 March 2013) [71]; Human Rights Council, *Outcome of the Seventh Session of the Working Group on the Issue of Human Rights and*

developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the [UNGPs]',[25] the Working Group recommended that governments 'identify a 'smart mix' of mandatory and voluntary, international and national measures'[26] in their action plans. So far, only twenty-four States have developed NAPs, although several others are in the process of or have committed to developing one.[27] For example, among the States examined in this thesis (Australia, Canada, and the United Kingdom (UK) as home States, and the Democratic Republic of Congo, Guatemala, Papua New Guinea, Peru and Tanzania as host States), only the UK has produced a NAP.[28] While NAPs illustrate States' commitment towards better meta-evaluation of corporate practice, their effectiveness in relation to sexual violence is conditioned by States' recognition of such abuse as a *systemic* risk of business operations, which does not appear to be generally the case. In its NAP, the UK government commits to '[c]onsider new project activity on raising awareness and tackling the negative impacts of business activity, including on the human rights of groups like […] women' but does not mention any risk of sexual violence.[29] Other States recognise a risk of sexual harassment or violence in the workplace or in conflict-affected areas (in relation to guiding principle 7) but fail to address systemic risks against women in communities of operation.[30] There is no scope in this thesis to explore further all the ways in which States may ensure corporate compliance with due diligence regulation. However, from a legal perspective, formal laws are the tools predominantly used by the State to engage with its norm-setting and enforcement duties.

Transnational Corporations and other Business Enterprises, UN Doc A/HRC/WG.12/7/1 (25 March 2014) [2]-[14].

[25] UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (November 2016) 3.

[26] Ibid ii.

[27] Office of the High Commissioner on Human Rights, *State national action plans on Business and Human Rights* <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

[28] Ibid.

[29] Secretary of State for Foreign and Commonwealth Affairs, *Good Business Implementing the UN Guiding Principles on Business and Human Rights* (UK Government, May 2016) 11.

[30] See, eg, the NAPs of Belgium, Denmark, France, Italy, Japan, Kenya, Luxembourg, Norway, Poland, Slovenia, Spain, Switzerland, and Thailand.

B *Formal Law and Reinforcing Due Diligence Self-Regulation*

1 *The Law and Meta-Evaluating Due Diligence*

Regulatory theories not only require that companies adopt effective internal processes to address social regulatory outcomes but also that companies be held accountable if they fail to develop and implement these processes in an *effective* way (i.e. in a manner that achieves the substantive objectives of the regulation). For regulatory scholars, this accountability implies the existence of external threats that create real regulatory consequences for companies that do not implement substantive human rights due diligence.[31] These consequences take various forms that increase in severity as the forms of government intervention escalate up pyramids of increasingly stringent enforcement measures.[32] As expressed by Ian Ayres and John Braithwaite, 'given that an industry will be tempted to exploit the privilege of self-regulation by socially suboptimal compliance with regulatory goals, the state must also communicate its willingness to escalate its strategy up [a] pyramid of interventionism'.[33]

Formal law is one of the numerous strategies to promote compliance and build commitment for effective self-regulation. Indeed, 334 businesses and industry organisations across sectors surveyed in 2020 indicated that 'regulation or legal requirements are currently, or have been in the past, the least selected incentives for companies to undertaking due diligence, […] *[p]resumably because of the existing lack of regulatory or legal requirements to undertake due diligence*'.[34] At the same time, possibly because of the comfortable privileges voluntary self-regulation offers them, the majority of survey respondents were not in favour of mandatory, legally binding, due diligence.[35] Corporate stakeholders added that 'the current legal landscape […] does not provide companies with legal certainty about their human rights and environmental due diligence obligations, and is not perceived as efficient, coherent and effective'.[36]

In fact, writers have argued that in order to be effective in achieving the substantive objectives of human rights due diligence – and more largely of women's right to a life free from violence

[31] Landau (n 6) 244.
[32] See, eg, Ayres and Braithwaite (n 1). See also Chapter 3 of this thesis for more details on enforcement pyramids.
[33] Ibid 38.
[34] Lise Smit et al, *Study on Due Diligence Requirements Through the Supply Chain* (European Commission, 2020) 16, emphasis added.
[35] Ibid 17.
[36] Ibid 16.

– and providing safeguards against cosmetic compliance, the law must have certain characteristics. According to Ingrid Landau, for instance, potential laws that sanction companies failing to engage in human rights due diligence need to be specific about the minimum standards that the due diligence process must meet, and must require companies to report on their implementation of these specific processes and their outcomes.[37] The UN Working Group on Business and Human Rights recommends, in relation to women's rights, that mandatory due diligence laws 'integrate a gender perspective'[38] and be responsive to the different and disproportionate impacts business activities have on women.[39] As for Christine Parker, she goes further by recommending a reform of formal legal tools. She argues that these tools need to be designed to build up commitment and capacity for effective self-regulation, and to recognise the potential for self-regulation so it is accountable under the law.[40]

This connection between legal accountability and commitment to self-regulation is achieved through two processes. The first consists in adjusting corporate legal responsibility or penalty against companies by assessing whether the company has developed effective internal processes, and whether these processes detect and correct the breach. In relation to sexual violence, this would allow for the implementation of the law as a *preventative* instrument, with State regulation ensuring compliance with effective human rights due diligence. The second process resides in making the implementation of effective self-regulation a required response to or penalty for a breach of human rights.[41] According to Christine Parker, this last process is a 'broadened form of corporate probation' because it requires the legislator – the State – to supervise the rehabilitation of the company, i.e. to monitor whether the company will adopt effective due diligence mechanisms in the future.[42] While this specific process may be less effective than the first one in relation to human rights due diligence – because this concept is *preventative* in nature – given the broad diversity of the mining industry, it may have a role to play for smaller companies that have not yet implemented international standards.

[37] Landau (n 6) 244.
[38] Human Rights Council, *Gender Dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the Issue of Human rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/41/43 (23 May 2019) Principle 1 [2] ('*Gender Dimensions of the UNGPs*').
[39] Ibid [2].
[40] Parker (n 1) 256.
[41] Ibid.
[42] Ibid 257.

2 *State Law and Mandatory Due Diligence*

Many States have chosen the first approach and have imposed a legal duty on companies to respect international human rights, as well as penalties for non-compliant companies. The development of domestic laws aimed at 'hardening'[43] human rights due diligence requirements for businesses is relatively recent. Most of these laws focus on reinforcing transparency in supply chains, with a due diligence component,[44] and only a limited number of them specifically require companies to conduct human rights due diligence.[45] The strongest example of an explicit due diligence law is the 2017 French Corporate Duty of Vigilance Law.[46] Although broad in its scope (it applies to all human rights), the law is relatively narrow in its application as it requires only the largest French companies to develop and implement a 'vigilance plan' to identify and prevent serious harms to the environment, human rights and fundamental freedoms in their operations and those of their subsidiaries, suppliers and sub-contractors. Despite extremely limited applicability to the mining sector,[47] the French law is an important advance in supporting the regulatory role of the State in relation to human rights due diligence. It establishes compliance mechanisms that allow corporate monitoring from both public and private stakeholders, as well as a civil liability framework for companies that do violate human rights.

As a result, these mechanisms go beyond a naming and shaming tactic from social and private actors to drive compliance.[48] They establish public legal enforcement mechanisms alongside monitoring and pressure from private actors. In that sense, they allow the State to carry the 'big stick' to which Ian Ayres and John Braithwaite refer when they express '[r]egulatory agencies will be able to speak more softly when they are perceived as carrying big sticks'.[49] In parallel, the French law has been criticised for inadequately establishing the standards of what constitutes 'adequate' due diligence, with the details being left up to companies.[50] In addition, from a feminist regulatory perspective, the law and other due diligence and disclosure

[43] Nolan (n 5) 66.
[44] See, eg, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, § 1502, 124 Stat 1376, 2213 (2010); *Modern Slavery Act 2015* (UK); *Modern Slavery Act 2018* (Cth).
[45] Nolan (n 5) 66.
[46] *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre French* [Law No 2017-399 of 27 March 2017 on Corporate Duty of Vigilance] (France) JO, 28 March 2017.
[47] Since the 1970s, France has largely disappeared from domestic and global mining. Only a handful of mining companies, such as Eramet and Orano (ex-Aveva), are impacted by the law.
[48] Nolan (n 5) 73.
[49] Ayres and Braithwaite (n 1) 6.
[50] See, eg, Joanna Bourke-Martignoni and Elizabeth Umlas, *Gender-Responsive Due Diligence for Business Actors: Human Rights-Based Approaches* (Geneva Academy, 2018).

requirement laws that currently exist show important weaknesses. They do not refer to gender as a component of human rights due diligence, nor do they create specific guidance to help companies to identify and prevent the adverse impacts of their activities on women.[51]

These laws, from a regulatory perspective, are not sufficient by themselves to provide an effective regulation of human rights due diligence. However, they have the potential, in addition to encouraging corporate compliance as elaborated earlier, to contribute to reinforcing international law on business and human rights that, so far, has only been based on soft forms of regulation. International soft law, despite its limitations, may bring change in corporate culture; increased interest from corporations in assimilating due diligence processes internally proves this. In addition, '[a]chieving something, even if not perfect, can be preferable to achieving nothing'.[52] Yet, for soft law – in particular, human rights due diligence – to gain in legitimacy and to be an effective mechanism in preventing sexual violence in mining operations, it needs to be coupled with 'hard' forms of State law that compel companies to exercise human rights due diligence effectively.[53] Indeed, despite the UNGPs gaining some authority from their endorsement by the UN Human Rights Council, the language they use in relation to human rights due diligence is overall non-authoritative, if not ambiguous. This may lead corporate stakeholders to look for potential loopholes and tailor their response to their specific objectives, which makes it is unlikely the UNGPs will produce systemic change.[54] A hardening of soft law through State legislation, in clarifying the elements of human rights due diligence and the expectations put on companies as well as developing a strong framework that forces companies to act in a due diligent manner, increases the normative value of soft international standards. It also allows human rights due diligence to be anchored more strongly in international human rights law rather than being based on fluctuating and geographically determined social expectations.[55]

In summary, despite the dangers and limitations of the law there is significant value in State legal regulation. Mandatory due diligence laws and initiatives, however, are only now emerging and it is still uncertain what their actual impact will be. State regulators have an

[51] These laws, however, were adopted before the publication by the UN Working Group on Business and Human Rights of their Gender Guidance to the UNGPs. It may be argued that domestic legislators have now access to stronger guidance on how to integrate gender into national laws.
[52] Justine Nolan, 'The Corporate Responsibility to Respect: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 138, 141.
[53] Ibid.
[54] Nolan, 'The Corporate Responsibility to Respect: Soft Law or Not Law?' (n 52) 155.
[55] Ibid 156.

important role in strengthening and supporting the evolution of corporate due diligence self-regulation. At the same time, it is fundamental that in developing new legislation – especially laws that have the potential to address business-related risks for women – they recognise the overall feminist critiques of governance and the law. This safeguard is important to ensure that the law, while valuable as a regulatory tool, is not designed and implemented in a way that alienates women and survivors of sexual violence.

III STATE LAW AND MAKING DUE DILIGENCE MORE EFFECTIVE IN ADDRESSING MINING-RELATED SEXUAL VIOLENCE

A *A Feminist Regulatory Perspective on State Meta-Regulation*

While regulatory theories recognise the essential role of the State in evaluating corporate self-regulation, a feminist regulatory perspective on human rights due diligence points to precautions that need to be taken when envisaging the role of the State as meta-regulator. Relying on State laws and mechanisms may achieve some of the objectives associated with eradicating or limiting sexual violence in mining operations. However, feminist scholars have warned against the practice of putting *too much* regulatory burden on the State, as will be examined below. In this section, I highlight the risks of overabundant State regulation. I propose that States may mitigate these risks by adopting an approach aimed primarily at preventing mining companies from engaging in acts of sexual violence, in line with the preventative nature of human rights due diligence.

The first problem with excessive emphasis on the role of the State in the regulatory sphere is that it may excuse companies from engaging in genuinely transformative internal change targeted at better integrating women into their activities. The business and human rights arena recognises the fundamental role of the State in providing guidance, incentives and disincentives (through laws and the threat of sanctions, among others) for business enterprises to discharge their human rights responsibilities under the international standards. In fact, in the framework developed by the UNGPs, although companies have some responsibilities that may be sanctioned by 'potential corporate legal liability',[56] most of the responsibilities of companies need to be supervised or guided by the State.[57] In relation to sexual violence in conflict areas, for example, the primary responsibility is upon the State to 'help ensure that business

[56] *UNGPs* (n 19) Principle 23 (Commentary).
[57] Ibid Principles 1 to 10.

enterprises operating in those contexts are not involved with such abuses'.[58] States may achieve this objective by making sure that their current policies, legislation and enforcement measures are effective in addressing the risk of business involvement in sexual violence.[59] Yet, focusing primarily on the role of the State to address sexual violence seems, to a certain extent, to shift the attention away from the role of companies themselves in driving effective internal change.[60] The current practice of companies across sectors demonstrates this. To date, most research shows that, as no State incentive exists yet in relation to gender-responsive due diligence, companies have not introduced women's concerns in their due diligence in a significant way.[61] Indeed, focusing on *enhancing* the role of the State risks positioning the State as the primary entity in charge of delivering human rights due diligence guidance, laws and incentives, when regulatory theories demonstrate the greater effectiveness of reinforcing the role of companies themselves to prevent sexual violence in their operations. The recommendation is thus to not necessarily put excessive emphasis on State meta-regulation but, instead, to balance State and corporate responsibilities in order to increase companies' processes and practices.

Second, in relation to sexual violence, most feminist scholars agree that State intervention is needed.[62] However, relying too heavily upon State intervention in human rights due diligence regulation and mining-related sexual violence could be counterproductive. It could 'encourage an undue emphasis on criminal justice responses [to sexual violence], with adverse consequences such as arrests of survivors and other unwanted interventions that thwart, rather than advance, fundamental human rights principles of safety, equality, and dignity'.[63] Others have argued that in addition to the undue burden on State judicial authority, law enforcement authorities often dismiss many cases related to sexual violence for lack of sufficient evidence, privilege mediation or 'social solutions' instead of sanctions under civil or criminal law or, when the cases reach State courts, hand down reduced or inappropriate sanctions.[64] It is also

[58] Ibid Principle 7.
[59] Ibid.
[60] Yakın Ertürk, 'The Due Diligence Standard: What Does it Entail for Women's Rights?' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers, 2008) 27, 28.
[61] See, eg, António Guterres, *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Note by the Secretary-General*, UN Doc A/73/163 (16 July 2018).
[62] See, eg, Catharine MacKinnon, 'Reflections on Law in the Everyday Life of Women' in Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (University of Michigan Press, 1993) 109–122; Vanessa E Munro, 'Legal Feminism and Foucault: A Critique of the Expulsion of Law' (2001) 28(4) *Journal of Law and Society* 546.
[63] Julie Goldscheid and Debra J Liebowitz, 'Due Diligence and Gender Violence: Parsing its Power and its Perils' (2015) 48(2) *Cornell International Law Journal* 301, 301.
[64] Ertürk (n 60) 38.

now well known that women are discouraged from reporting sexual violence to State authorities because they feel intimidated. Domestic proceedings concerning mining-related sexual violence have typified these dangers. Court cases brought against Monterrico Metals and Barrick Gold over allegations of sexual violence in, respectively, their Peruvian, Tanzanian and Papua New Guinean operations all ended up being settled out of court.[65] The courts left it to the companies– and alleged perpetrators – themselves to provide remedy to survivors, revealing significant imbalances in power that have been strongly criticised by civil society and have left survivors with inadequate compensation. The issues raised by feminist scholars make one consider what the appropriate amount and nature of State intervention needed to address mining-related violence is, as well as the potential impacts of extensive State intervention. Julie Goldscheid and Debra Liebowitz argue that an appropriate model of State responsiveness 'should explicitly grant the State discretion not to respond, or to delegate its response to other stakeholders such as community members, survivors, NGOs, and advocates'. It should take into account 'the impact of any intervention on those at the margins' while considering the experiences and recommendations of both advocates and survivors.[66]

The concerns raised by an overbearing role for the State are important. Thus far, the State has focused on responding to violations of women's human rights committed by private persons rather than organising systems to prevent these violations. From a feminist regulatory perspective, however, a more effective approach to addressing mining-related sexual violence would require focusing on the regulatory role of the State as a *preventative*, rather than reactive, mechanism. In other words the State, in line with the preventative nature of human rights due diligence, should concentrate on regulating due diligence in a manner that encourages companies to review and reform the internal and external practices that create risks of sexual violence against women. Similarly, the law and other regulatory mechanisms developed by the State should develop enforcement and sanction mechanisms against companies that do not implement human rights due diligence in a manner that effectively prevents risks of sexual violence in mining operations. The emphasis of State action should be on encouraging companies to change their corporate culture and adopt gender-responsive human rights due

[65] Leigh Day, *Monterrico Metals Plc* <https://www.leighday.co.uk/latest-updates/cases-and-testimonials/cases/monterrico-metals-plc/>; Leigh Day, *Barrick Gold* <https://www.leighday.co.uk/latest-updates/cases-and-testimonials/cases/barrick-gold/>; Barrick Gold, *Statement from Barrick Gold Corporation and EarthRights International* (3 April 2015), <https://www.barrick.com/news/news-details/2015/Statement-from-Barrick-Gold-Corporation-and-EarthRights-International/default.aspx>.
[66] Goldscheid and Liebowitz (n 63) 301.

diligence. In practice, this approach could limit the cases in which the State needs to intervene to respond to allegations of sexual violence against mining companies.

B *Feminist Regulation and Addressing the Limitations of the Law*

State regulation is essential to evaluate corporate self-regulation and ensure its compliance with international and domestic due diligence standards. However, using feminist literature to highlight the pitfall of *too much* State regulation, I have shown that to achieve – or at least work towards – balanced regulatory roles between the State and corporations, the State needs to adopt an approach intended chiefly to prevent mining companies from engaging into acts of sexual violence, in line with the preventative nature of human rights due diligence. In this section, I turn back to examining the law, not from a purely regulatory perspective but from a feminist perspective. I have demonstrated earlier that the law is an important tool for regulating due diligence self-regulation, in particular if it covers corporate processes and the outcomes companies achieve for women. Here, I examine feminist critiques of the law to explain that while important, the law must be designed and implemented in a way that supports and empowers women, rather than alienating them.

1 *Feminist Critiques of the Law*

From a feminist perspective on regulation, not only must the law be effective enough to act as an incentive to ensure corporate compliance, it must also be elaborated in a way that guarantees that women's rights – and the right to live a life free from violence, in particular – are recognised and implemented to their full potential. Feminist scholars have long highlighted the limitations of the law, in that it excludes women, uses discriminatory language or is used in a way that disempowers women.[67] Anne Bottomley, for example, questions whether the very nature of the law is gendered:

> By drawing on other disciplines we are now asking if not only the practice of law silences women's aspirations and needs, and conversely privileges those of men, but whether the very construction not only of the legal discourse, but representations of the discourse in the academy (the construction of

[67] See eg, Ellen C Dubois et al, 'Feminist Discourse, Moral Values, and the Law – A Conversation' (1985) 34 *Buffalo Law Review* 11; Bruce A Arrigo, 'Deconstructing Jurisprudence: An Experiential Feminist Critique' (1992) 4(1) *The Journal of Human Justice* 13; Susan Atkins and Brenda Hoggett, *Women and the Law* (Institute of Advanced Legal Studies, 2018).

> our understanding and knowledge of the law), is the product of patriarchal relations at the root of our society.[68]

Similarly, Carol Smart, a prominent feminist legal scholar, is a strong critic of the law.[69] In her 1989 study *Feminism and the Power of Law*, she challenges the power of the law to positively transform the quality of women's lives, notably because of its self-referential nature, which makes it impermeable to feminist discourses. She puts a specific emphasis on laws that address rape. According to her 'the law consistently fails to "understand" accounts of rape which do not fit with the narrowly constructed legal definition (or Truth) of rape'.[70] She argues that this legal definition is based on erroneous understandings of women's consent,[71] disqualification of women's experiences, sexualisation of women's bodies[72] and celebration of phallocentrism.[73] Smart's aim is thus to 'de-centre' the law as the primary means to achieve women's rights and to think, instead, 'of non-legal strategies and to discourage a resort to law as if it holds the key to unlock women's oppression'.[74] In this process, she is not suggesting a complete abolition of the law but, rather, highlighting its limitations in achieving feminist goals.[75] While the law should not be completely disqualified, it should not be perceived as providing the main (or only) solution to the oppression it generates and sustains.[76]

Since 1989, the law has seen significant development, including in relation to violence against women. Carol Smart herself is now less critical of the law and recognises its positive capacity 'to adapt to social change and to offer recognition and affirmation alongside unwanted regulation and control'.[77] Reflecting back on *Feminism and the Power of the Law*, she asserts

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[68] Anne Bottomley, 'Feminism in Law Schools' in Sue McLaughlin (ed), *Women and the Law* (University College London Press, 1987) 12.
[69] Smart is only one of many feminist scholars that have taken such an approach. More recently, governance feminism scholars have suggested the co-option of feminism into law in some areas. See, eg, Janet Halley et al, *Governance Feminism: An Introduction* (University of Minnesota Press, 2018).
[70] Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 26.
[71] On that point see also Vanessa E Munro, 'Concerning Consent: Standards or Permissibility in Sexual Relations' (2005) 25(2) *Oxford Journal of Legal Studies* 335; Sharon Cowan, 'Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape' in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish Publishing, 2007) 51–71; Jonathan Herring and Michelle Madden Dempsey, 'Rethinking the Criminal Law's Response to Sexual Penetration: On Theory and Context' in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 30–44.
[72] On that point see also Catharine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987).
[73] Smart (n 70) 33–39. For Carol Smart, the notion of 'phallocentrism' refers to a 'culture which is structured to meet the needs of cultural imperative', 27.
[74] Ibid 5.
[75] Ibid.
[76] Ibid 49.
[77] Rosemary Auchmuty and Karin Van Marle, 'Special Issue: Carol Smart's Feminism and the Power of Law' (2012) 2 *Feminist Legal Studies* 65, 66.

that 'law (especially at the levels of both formulating legislation and case law) provides a vital site for the contestation of ideas and values. It provides an opportunity to voice feminist values and concerns, and even possible alternatives.'[78] In that vein, legislators have engaged in legal reforms that have positively influenced women's rights in domestic contexts. Yet, the law still fails on many levels to address the fundamental disparities between men and women and to respond to the specific needs and experiences of women. Susan Atkins and Brenda Hoggett have highlighted this point by modifying in 2018 the statement made in the first edition of their book *Women and the Law*:

> [L]aws which seek to force women and men into separate spheres are now increasingly thought to be wrong as are laws which put the stability of the home and family above the ordinary legal rights of the people within it. *But there has been little enthusiasm for laws which seek to adjust the relationship between the separate spheres, to redefine what each entails*.[79]

In relation to laws that address sexual violence against women, lacunas have continued to be noticed in domestic as well as in international law. At domestic levels, important discrepancies exist between different national jurisdictions as well as between international human rights law and local legal protection of women.[80] In international law, while much has now been theorised on conflict-related sexual violence, important gaps persist in the regulation of preventing sexual violence in peacetime.[81] I have shown earlier that no clear definition of sexual violence exists in international law. In addition, sexual violence is not, except in relation to specific types of sexual violence,[82] specifically prohibited in any of the nine core international human rights instruments, despite more recent efforts to address sexual violence in other international initiatives and standards.[83] This is because, according to most feminist theorists of international law, the international human rights system, both in its organisational and normative structures,

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[78] Carol Smart, 'Reflection' (2012) 20(2) *Feminist Legal Studies* 161, 162.
[79] Atkins and Hoggett (n 67) xxii, emphasis added.
[80] On that point, see, eg, Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press, 2006); Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010).
[81] See, eg, Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) *European Journal of International Law* 326; Karen Engle, 'Feminism and its (dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99(4) *American Journal of International Law* 778; Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Belknap, 2006).
[82] See, eg, *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 6.
[83] See eg, *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN Doc A/RES/48/104 (20 December 1993); *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, opened for signature 11 July 2003, OAU Doc CAB/LEG/66.6 (entered into force 25 November 2005); *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, opened for signature 9 June 1994, 33 ILM 1534 (entered into force 5 March 1995) ('*Belém do Pará Convention*').

reproduces the patriarchal structure of States, reflects a male perspective and prioritises men's experiences and interests.[84] Others have also highlighted the fact that the true level of global sexual violence against women remains concealed, impacting its visibility as a human rights concern.[85]

2 *Feminist Critiques of the Law and Business and Human Rights*

The feminist critiques of the law examined above, despite being developed in contexts other than the business and human rights debate, hold important lessons for how State law can be used in a way that positively affects survivors of mining-related sexual violence. They suggest, indeed, that any legal initiative undertaken by the State to regulate due diligence in a way that allows for effective prevention of sexual violence needs to move away from gender neutrality and to undergo important transformation. Meta-regulation has highlighted these conditions by emphasising that the third loop of regulation, in which the State is engaged, entails the State to learn continuously to improve its own regulatory strategies in order to monitor and assess the validity of corporate self-regulation effectively. This means, in practice, that the State needs to bolster its legal understanding of sexual violence in business contexts. Such learning process can support the State in framing and evaluating mining companies' self-regulation in such a fashion that limits legal loopholes, ensures corporate compliance with legal standards prohibiting corporate participation or contribution to sexual violence and gives the law its full preventative potential.

This approach to due diligence laws may support the realisation of feminist goals regarding the prevention of sexual violence in large mining operations. For instance, due diligence laws that are aligned to feminist objectives could compensate for the flaws of international instruments by expressly putting women at the forefront of corporate due diligence processes, both as recipients and agents, and by recognising the systemic nature sexual violence across sectors and industries. For States to treat women's rights as a cross-cutting and enforceable issue makes women's intersectional experiences of mining more visible. It also ensures that mining companies realise the specific risks their activities create for women, and are held to account for their performance in preventing such risks. Another approach for States to attain this objective is the development or reinforcement of domestic laws that protect women from sexual

[84] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613.
[85] Christine Chinkin, 'Violence Against Women: The International Legal Response' (1995) 3(2) *Gender and Development* 23, 23.

violence with a view to making them responsive to sexual violence (among other impacts) *in business settings*.[86] Finally, in order to reduce the further 'privatisation' of sexual violence created by both international and corporate regulatory systems,[87] the law can recognise and create direct corporate liability for the effects of corporate self-regulation in creating conditions for sexual violence to take place and to be perpetuated.

In addition, making the law more effective in guiding corporate self-regulation and, consequently, preventing sexual violence requires that the law be developed alongside other State mechanisms aimed at reinforcing its effectiveness. As seen earlier, smart regulation theorists promote the use of multiple (but complementary) rather than single policy instruments – and a broader range of regulatory actors – to produce better regulation, including conventional forms of direct government regulation.[88] This makes the law multidimensional in the sense that it is aimed at interacting with other regulatory instruments and techniques, as well as other regulatory schemes. Complementary tools may include, for example, economic instruments, information based strategies or, as recommended by the UN Working Group on Business and Human Rights:

> [D]isincentives, including withdrawal of economic diplomacy and financial support, to deter business enterprises domiciled in their territory and/or jurisdiction from causing, contributing to, or being directly linked to sexual harassment and gender-based violence in conflict-affected or other areas.[89]

State regulation generally, and the law specifically, are essential tools to ensure that corporations self-regulate on human rights due diligence in a way that is non-cosmetic and that achieves positive outcomes for women in mining operations. The law has several limitations, yet regulatory and feminist theories are informative about how to mitigate the flaws of the law and ensure that it responds comprehensively to women's experiences as survivors, agents and regulators. International human rights law may also contribute to this objective, particularly when the State is unable or unwilling to regulate effectively. In fact, international standards may be used to shape State legislative practice on business and human rights, and make it more efficient in regulating both corporate self-regulation and its own regulatory mechanisms.

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[86] *Gender Dimensions of the UNGPs* (n 38) 2, Principles 1 and 3.
[87] See Chapter 6 in relation to the public-private dichotomy and pushing sexual violence further into the private realm.
[88] Gunningham and Sinclair (n 3) 133.
[89] *Gender Dimensions of the UNGPs* (n 38) Principle 7 [14].

IV INTERNATIONAL LAW AND MONITORING STATE REGULATION

As States learn and meta-regulate corporate self-regulation, regulatory theories propose another layer of regulation. They suggest that the State's performance itself be monitored and evaluated. According to Christine Parker, the State must 'make itself accountable to its own stakeholders (citizens who need to know whether government policy is accomplishing its objectives)'.[90] Under this structure, external stakeholders have the power to frame and monitor State's regulatory efforts. These may be citizens and civil society actors, as will be analysed in Chapter 8. The international community, through international law, may also intervene to encourage States to provide stronger protection of individual human rights and enhanced accountability for private actors perpetrating human rights abuses. In this section, I analyse two mechanisms that, while not exhaustive in supporting this objective, are relevant in relation to sexual violence. These are the State's human rights due diligence obligations under international human rights law and current negotiations of a binding treaty on business and human rights.

A *The Role of State Human Rights Due Diligence in Business and Human Rights*

In the business and human rights arena, the notion of human rights due diligence differs from the human rights due diligence obligations allocated to States under international human rights law. In relation to the UNGPs, John Ruggie and John Sherman assert that the concept of human rights due diligence used in the business and human rights instrument is

> neither based on nor analogizes from state-based law. It is rooted in a transnational social norm, not an international legal norm. It serves to meet a company's social license to operate, not its legal license; it exists 'over and above' all applicable legal requirements; and it applies irrespective of what states do or do not do.[91]

While the Special Representative and his co-author are clear about the distinction between the two concepts and the inappropriate character of transposing the State-based legal concept onto

[90] Parker (n 1) 275.
[91] 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(3) *European Journal of International Law* 921, 923.

the corporate responsibility to respect human rights,[92] the two understandings of human rights due diligence are intertwined, notably through the first pillar of the UNGPs.

Neither the UNGPs nor preliminary works directly refer to State human rights due diligence. However, the Special Representative recognised early in his mandate that States have a duty under international law to 'refrain from violating' international human rights and to '"ensure" […] the enjoyment or realization of those rights by rights holders'.[93] This last obligation 'requires protection by States against other social actors, including [all types of business enterprises], who impede or negate those rights'.[94] Similarly, guiding principle 1 of the UNGPs refers to a well-established principle of international human rights law, the duty to protect human rights within their jurisdiction by regulating the conduct of non-State – including corporate – stakeholders. The commentary to this principle adds:

> The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.[95]

This may be achieved through a range of measures including policies, legislation or adjudication.[96] Guiding principle 1 and its commentary highlight the positive obligation of the State to protect international human rights against violations by private actors as third parties, and consider that the State may violate its international obligations by failing to take the measures necessary to secure these rights. In doing so, they reproduce the language of State human rights due diligence that is well known to international lawyers in establishing State responsibility. One of the fundamental conditions for establishing a State's international responsibility is that wrongful conduct must be attributable to the State.[97] The concept of human rights due diligence applies in situations where the conduct of private actors is not directly attributable to the State.[98] In these cases, the adverse acts of non-State actors do not

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[92] Ibid 924.
[93] John Ruggie, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/11/13 (22 April 2009) [13] ('*Towards Operationalizing the "Protect, Respect and Remedy" Framework*').
[94] Ibid.
[95] *UNGPs* (n 38) Principle 1 (Commentary).
[96] Ibid.
[97] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) 2(2) *Yearbook of the International Law Commission* 49. In international law, there is an internationally wrongful act of a State when an action or omission is attributable to the State and constitutes a breach of its international obligations (art 2).
[98] Ibid Chapter 2.

normally engage State responsibility unless the State manifestly fails to exercise due diligence in preventing or reacting to such acts.[99] Due diligence and the criteria for its implementation have been addressed in a variety of fora and jurisdictions,[100] and vary from one context to another.[101] However, with regards to international human rights, the 1988 landmark decision of the Inter-American Court of Human Rights in *Velásquez Rodríguez v. Honduras*[102] laid the foundations of human rights due diligence:

> An illegal act which violates human rights and which is initially not directly imputable to a State [...] can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the [Inter-American Convention on Human Rights].[103]

In brief, as a standard of conduct under the general law of State responsibility, human rights due diligence is a way of identifying whether or not an obligation under international human rights law has been breached, [104] through assessing whether a State has failed to protect human rights in a due diligent manner. In the context of international human rights law, as well as in business and human rights, the concept of due diligence is thus significant in determining the extent of States' obligations in relation to the conduct of private corporations that is not attributable to the State.[105]

While indirectly referring to State human rights due diligence, the UNGPs do not suggest that States, because of their due diligence obligations, are under a specific duty under international law to require corporations to undertake human rights due diligence.[106] Guiding principle 2 of the UNGPs simply recommends that States clearly convey the expectation that companies domiciled in their territory or under their jurisdiction respect human rights throughout their operations – including abroad[107] – and guide them in that process, including through advising

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[99] Jan Arno Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due diligence in International Law' (2003) 36 *New York University Journal of International Law and Politics* 265, 268.
[100] See, eg, *Corfu Channel (UK v Albania) (Judgement)* [1949] ICJ Rep 35; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 91; *Trail Smelter (US v Canada) (Award)* (1941) 3 RIAA 1905.
[101] International Law Commission (n 97) art 2 (Commentary).
[102] *Velásquez Rodríguez v Honduras (Judgment)* (Inter-American Court of Human Rights, Series C No 4, 29 July 1988).
[103] Ibid [172].
[104] Joanna Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers, 2008) 47, 49.
[105] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899, 906.
[106] Landau (n 6) 226.
[107] *UNGPs* (n 19) Principle 2 (Commentary).

them to engage in human rights due diligence processes.[108] Since the adoption of the UNGPs, however, State practice – through the increasing adoption of human rights due diligence laws – as well as academic, international organisations and civil society literatures suggest an increasing expectation that States, in fulfilling their due diligence obligations, impose due diligence obligations on companies within their territory or jurisdiction.[109] The UN Working Group on Business and Human Rights recommends in its gender guidance, for instance, that States 'should integrate a gender perspective in *mandatory human rights due diligence laws*, including those concerning modern slavery and transparency in supply chains'.[110]

B *State Human Rights Due Diligence and Preventing Sexual Violence in Mining Operations*

1 *Human Rights Due Diligence and Sexual Violence*

International law provides various examples of how States are expected to protect women from violence by non-State actors. In 1992, the CEDAW Committee issued its General Recommendation No. 19, according to which '[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'.[111] Since then, international human rights institutions have explicitly adopted due diligence standards in relation to violence against women, including sexual violence, to define States' obligations. The Declaration on the Elimination of Violence against Women,[112] along with guidance from human rights treaty bodies[113] and regional instruments including the Inter-American Convention on the Elimination of Violence against Women[114] and the Council of Europe Convention on Preventing and Combating Violence

[108] Ibid, Principle 3 (Commentary).
[109] Landau (n 6) 226.
[110] *Gender Dimensions of the UNGPs* (n 31) Principle 1 [2]. See also Bonita Meyersfeld, 'Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 193, emphasis added.
[111] CEDAW Committee, *General Recommendation No. 19: Violence Against Women*, UN Doc A/47/38 (1992) [9].
[112] *Declaration on the Elimination of Violence against Women* (n 83) art 4.
[113] See, eg, Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [18]; CEDAW Committee, *General Recommendation No. 35, (2017): On Gender-Based Violence Against Women, Updating General Recommendation No. 19*, UN Doc CEDAW/C/GC/35 (14 July 2017) ('*CEDAW General Recommendation 35'*).
[114] *Belém do Pará* Convention (n 83) art 7.

against Women and Domestic Violence,[115] constitutes the normative basis of a due diligence obligation now generally understood as the positive obligation of the State to take action to prevent and protect women from violence, to punish the perpetrators of violent acts and to compensate the survivors.[116]

These obligations compel States to take all the necessary measures to ensure that mining companies do not cause or contribute to sexual violence in their operations. Indeed, one of the main characteristic of State human rights due diligence is its preventative nature. Past 'Special Rapporteur on Violence against Women, its Causes and Consequences', Rashida Manjoo, highlights the preventative nature of human rights due diligence by reaffirming that

> [t]he State has an obligation to investigate all acts of violence against women, including systemic failures to *prevent violence against women*. Where a specific incident of violence takes place in the context of a general pattern of violence against women, there is a wider scope required to comply with the due diligence obligation.[117]

This statement suggests that States, along with corporations under business and human rights instruments, are expected to focus on a preventative approach to sexual violence. On that matter, Manjoo adds that '[e]liminating violence against women requires a multi-stakeholder approach to accountability that includes monitoring State and non-State actors for compliance and including them as direct duty-bearers for prevention, protection and change'.[118] From a feminist regulatory perspective, this means that to address mining-related sexual violence, States need to regulate the due diligence practices of mining companies by making them direct duty-bearers in the prevention of sexual violence. This can be achieved, as seen earlier, through domestic legislation on human rights due diligence which should be primarily preventative. This approach would also respond to the critiques made in relation to the practical application of State due diligence standards, which have been blamed for focusing overly on States' response to violence – as opposed to prevention and compensation – and for largely neglecting the responsibility of non-State actors.[119]

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[115] *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, opened for signature 11 May 2011, CETS No 2010 (entered into force 1 August 2014) art 5 ('*Istanbul Convention*').
[116] Yakin Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN Doc E/CN.4/2006/61 (20 January 2006) 2.
[117] Rashida Manjoo, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo*, UN Doc A/HRC/23/49 (14 May 2013) [73], emphasis added.
[118] Ibid [77].
[119] Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women* (n 116) 2.

2 *The Extraterritorial Prevention of Sexual Violence*

While State human rights due diligence is an essential tool to reinforce States' role in regulating the actions and due diligence practices of mining companies, it also has significant limitations in the transnational contexts in which mining operations often take place. The UNGPs encourage home States to 'take steps to prevent abuse abroad by business enterprises within their jurisdiction'.[120] They add that '[t]here are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad'.[121]

The problem of State extraterritorial obligations emerged as a concern at several stages in the development of the UNGPs.[122] Interestingly, however, the Special Representative concluded that the issue was 'unsettled'[123] and shifted the emphasis of the debate from States' extraterritorial obligations under international law to 'policy reasons' for home States to protect human rights in transnational business activities.[124] In fact, there are still important legal debates as to the scope of home States' legal obligations to exercise due diligence in relation to the extraterritorial human rights of their nationals abroad.[125] International human rights instruments on violence against women are also indecisive on that matter. While the Council of Europe Convention urges States to 'take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors',[126] neither CEDAW General Recommendation No. 19 nor the Inter-American Convention create a clear obligation for States to take due diligent measures to address the perpetration of violence against women by their nationals *abroad*.

For some, these uncertainties around the status of State due diligence make the concept ill suited to addressing human rights issues in the context of business and human rights regulation. Bonita Meyersfeld, for example, takes the specific example of women's right to equality in the workplace to illustrate this point. She argues that governance gaps between developed and

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[120] UNGPs (n 19) Principle 2 (Commentary).
[121] Ibid.
[122] See, eg, John Ruggie, *Extra-territorial Legislation as a Tool to Improve the Accountability of Transnational Corporations for Human Rights Violations* (Summary Report, November 2006); John Ruggie, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council': Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (Addendum), UN Doc A/HRC/4/35/Add.2 (15 February 2007).
[123] *Towards Operationalizing the 'Protect, Respect and Remedy' Framework* (n 93) [15].
[124] *UNGPs* (n 19) Principle 2 (Commentary).
[125] Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge, 2014) 5.
[126] *Istanbul Convention* (n 115) art 5.

developing countries often lead to inconsistencies in legislation addressing gender issues in a corporation's home State and its host State. These gaps allow corporations to violate the rights of women in certain countries in a way that would be unlawful in their home environment.[127] Indeed, laws relating to sexual violence are extremely varied and, if not non-existent, often fail to prevent and respond to sexual violence effectively.

At the same time, the limitations of State due diligence are not irreversible. Meyersfeld herself contends that the principle of extraterritorial application of a State's international human rights obligations, while under-explored, may be a way to close the governance gaps identified.[128] This principle is not new and, in fact, international human rights law places significant obligations on States in relation to some of the extraterritorial human rights abuses committed by their corporate nationals.[129] The general law of State responsibility, for example, provides for the possibility of attributing to a State acts committed by its corporate nationals, thus engaging its international responsibility.[130] Similarly, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights define extraterritorial human rights obligations as 'obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory'.[131] In relation to corporations, this means that

> States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means […] where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the state concerned.[132]

State practice also demonstrates a general acceptance of the principle of extraterritoriality in their domestic laws. The Australian Commonwealth *Criminal Code Act 1995*, for instance, provides that is a crime under Australian law for Australian citizens, residents and bodies

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[127] Meyersfeld (n 110) 208.
[128] Ibid 209.
[129] Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) *The Modern Law Review* 598, 600. See also Daniel Augenstein & David Kinley, 'Beyond the 100 Acre Wood: In Which International Human Rights Law Finds New Ways to Tame Global Corporate Power' (2015) 19(6) *The International Journal of Human Rights* 828.
[130] International Law Commission (n 97) arts 5, 8 and 16. These articles refer to situations where corporations are exercising elements of State authority or are acting under the instruction, direction or control of a State. They also include the situation where a State makes itself complicit in the commission of an internationally wrongful act by aiding or assisting corporate activity.
[131] International Commission of Jurists, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084, Principle 8.
[132] Ibid Principle 25.

corporate incorporated in Australia to engage in, encourage or benefit from sexual activity with children overseas.[133]

The principle of extraterritoriality is thus an efficient complement to the principle of State due diligence in addressing extraterritorial human rights abuses in corporate contexts. Indeed, the links between these two concepts are strong. Daniel Augenstein and David Kinley, drawing on the case law of the European Court of Human Rights and UN Treaty Body Comments and Concluding Observations,[134] argue that

> [a] state's *de jure* authority to exercise extra-territorial jurisdiction under public international law not only delimits the state's lawful competence to regulate and control business entities as perpetrators of extra-territorial human rights violations, but also constitutes a *de facto* relationship of power of the state over the individual that brings the individual under the state's human rights jurisdiction and triggers corresponding extraterritorial obligations.[135]

In other words, it is the failure by the State to act with due diligence to prevent human rights violations by corporate actors overseas that brings the affected individuals under the power of the State and generates corresponding obligations to protect their human rights. International instruments on violence against women and treaty bodies' documents have traditionally been timid in approaching the issue of States' extraterritorial obligations for corporate abuses against women. Yet, these findings are important for achieving the feminist objective of effectively protecting women throughout layers of regulation. Indeed, the CEDAW Committee has recently confirmed the validity of these arguments in relation to violence against women by expressly linking States' due diligence and extraterritorial obligations. It affirms in its 2017 General Recommendation No. 35 that

> [the] obligation, frequently referred to as an obligation of due diligence, underpins the [CEDAW] Convention as a whole and accordingly States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation

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[133] *Criminal Code Act 1995* (Cth) div 272. For further discussion on extraterritorial State law, see, eg, Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' (2004) 28(2) *Melbourne University Law Review* 290; Michael Rawling, 'Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment' (2015) 26(4) *The Economic and Labour Relations Review* 660.

[134] See, eg, *Isaak v Turkey* [2008] Eur Court HR 553; *Rantsev v Cyprus and Russia* [2010] Eur Court HR 25965/04; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4 (11 August 2000); Committee on the Elimination of Racial Discrimination, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, UN Doc CERD/C/GBR/CO/18–20 (14 September 2011).

[135] Daniel Augenstein and David Kinley, 'When Human Rights "Responsibilities" Become "Duties": The Extra-Territorial Obligations of States that Bind Corporations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 271, 285.

> for acts or omissions by non-State actors which result in gender-based violence against women. This includes actions by corporations operating extraterritorially. In particular, States Parties are required to take necessary steps to prevent human rights violations abroad by corporations over which they may exercise influence, whether by regulatory means or by the use of incentives, including economic incentives.[136]

In addition to addressing feminist concerns, recognising extraterritorial due diligence obligations for States also provides avenues to respond to issues raised by regulatory scholars. Regulatory theories in transnational contexts have been perceived, to a certain extent, as problematic. This is the case, for example, when companies, if facing a move up the regulatory pyramid, transfer their operations to more welcoming jurisdictions.[137] These considerations relate to a common critique of responsive regulation: – its poor implementation potential in the global South.[138] One of the main arguments that illustrates this point is responsive regulation's over-reliance on the State to monitor the implementation of regulation and to use its domestic law to sanction any breach, when many States in the global South might not have the capacity or the interest to do so.[139]

Braithwaite replies to these critiques by underlining the primary role of self-regulation and the ability of 'weak' States to rely on other more powerful actors along the escalation process (for instance, other States, NGOs, international organisations) to compensate for their weak regulatory capacity and to allow them to concentrate their resources at the peak of the enforcement pyramid.[140] In that vein, reinforcing the human rights extraterritorial obligations of home States in relation to corporate abuse may support the role of home States as stronger regulators of corporate regulation and practice. By forcing home States to adopt and implement more efficient (and possibly more coercive) legislation and other regulatory mechanisms, international law positions itself in the 'transnational regulatory standard-setting' process

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[136] *CEDAW General Recommendation* 35 (n 113) [24].
[137] Kenneth W Abbott and Duncan Snidal, 'Taking Responsive Regulation Transnational: Strategies for International Organizations' (2013) 7(1) *Regulation & Governance* 95, 97.
[138] See, eg, Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing, 2004) 145; Fiona Haines, 'Regulatory Reform in Light of Regulatory Character: Assessing Industrial Safety Change in the Aftermath of the Kader Toy Factory Fire in Bangkok, Thailand' (2003) 12(4) *Social & Legal Studies* 461; Navroz K Dubash and Bronwen Morgan, *The Rise of the Regulatory State in the South: Infrastructure and Development in Emerging Economies* (Oxford University Press, 2013).
[139] This is particularly true in relation to mining where host States, in addition to lacking resources to develop and implement legal mechanisms effectively, may heavily rely on the mining industry, thus creating imbalances of power between the State and multinational mining companies.
[140] John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) *World Development* 884, 886.

advocated by regulatory theorists.[141] It represents a tool to reinforce the enforcement peak of the regulatory pyramid and thus allows less scope for companies to escape or dilute their due diligence responsibilities. It may also alleviate the pressure that is currently placed on host States, generally from the global South, to enforce human rights regulation – at least in cases of violation by subsidiaries and security providers based on their territory – in a context where high levels of corruption in the mining industry make it difficult for responsive regulation to work.

C *Feminist Regulatory Perspective on a Treaty on Business and Human Rights*

1 *A Feminist Approach to a Binding Instrument*

Existing international human rights law constitutes an important regulatory framework to fill some of the governance gaps created by weak or inconsistent State practice. Among other mechanisms, the State has due diligence obligations that can be used to make it accountable for its failures to support mining companies in preventing sexual violence in their operations, and to monitor corporate due diligence self-regulation and practice. Another level of international regulation can be found in emerging initiatives aimed at enhancing the potential of international law to address business-related human rights abuses, or at least to reframe States obligations within the business and human rights context. Among these initiatives, a proposed treaty on business and human rights is currently being negotiated.

This treaty process began in 2014 with the adoption of a resolution in which the UN Human Rights Council created an Open-ended Intergovernmental Working Group (OEIWG) 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[142] The OEIWG produced a 'Zero draft treaty' in 2018, a revised draft in 2019 and a second revised draft in 2020.[143] The draft treaty has evolved significantly between 2018 and 2020 but has maintained its general objective of clarifying and ensuring 'effective implementation of the obligation of

[141] Abbott and Snidal (n 137) 97.
[142] Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/RES/26/9 (14 July 2014) [1].
[143] OEIGWG, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (Second Revised Draft, 6 August 2020) ('*Treaty on Business and Human Rights Second Revised Draft*').

States to respect, protect and promote human rights in the context of business activities, as well as the responsibilities of business enterprises in this regard'.[144]

The idea of a treaty has generated important debates about the regulation of corporate activities by international law rather than or in addition to States, as well as about voluntary versus mandatory approaches to business responsibilities.[145] Without expanding on the content of this debate, from a feminist lens the proposed treaty is generating new opportunities to integrate women's human rights further into the business and human rights agenda. In fact, feminist scholars generally agree that a binding instrument is one of the many possible mechanisms to render women's experiences of business operations more visible and to address the failures of the State to respond to business-related violations of women's rights.[146] They also recommend the prioritisation of a gender perspective in the instrument.

This does not mean that the treaty should be written by and for women alone. Instead, the recommendation is that it assumes that women, who are not a homogeneous group, experience business activities in various ways that are different from the experiences of men.[147] For example, The Feminists for a Binding Treaty[148] – a collective involved in debates surrounding the elaboration of the treaty – criticised the zero draft treaty for failing to 'acknowledge the structural and systematic barriers for women to realize their human rights in the face of corporate human rights abuses'.[149] This involves recognition of sexual violence as a systemic risk across industries. Likewise, Bonita Meyersfeld advocates that the treaty address the root causes of inequality that might encourage discrimination against women in business settings, such as poverty.[150] Another important element is the need for the binding instrument to refer

[144] Ibid art 1.
[145] Beth Goldblatt and Shirin Rai, 'Remedying Depletion through Social Reproduction: A Critical Engagement with the United Nations' Business and Human Rights Framework' (2020) 10(10) *European Journal of Politics and Gender* 1, 7. See also Dorothée Baumann-Pauly and Justine Nolan, *Business and Human Rights: From Principles to Practice* (Routledge, 2012).
[146] See, eg, Bourke-Martignoni and Umlas (n 50).
[147] Bonita Meyersfeld, 'A Binding Instrument on Business and Human Rights: Some Thoughts for an Effective Next Step in International Law, Business and Human Rights' (2016) 1(1) *Homa Publica: International Journal on Human Rights and Business* 18, 32.
[148] The Feminists for a Binding Treaty, *Integrating a Gender Perspective into the Legally Binding Instrument on Transnational Corporations and Other Business Enterprises: Comments on the Zero Draft Proposed by the OEIGWG Chair* (Submission, 5 October 2018). The submission states that 'The Feminists For a Binding Treaty is a collective of over 15 organisations working together to integrate a gender perspective into the legally binding instrument on the activities of transnational corporations and other business enterprises and to ensure that a gender approach and women's voices, rights, experiences and visions are visible and prioritized throughout the negotiation process' (1).
[149] Ibid 2. See also Sanyu Awori et al, 'A Feminist Approach to the Binding Instrument on Transnational Corporations and other Business Enterprises' (2018) 0(0) *Business and Human Rights Journal* 1.
[150] Meyersfeld, 'A Binding Instrument on Business and Human Rights' (n 147) 29–32.

explicitly to mandatory human rights-based gender impacts assessments.[151] This requirement would pressure States and mining companies to integrate women's concerns into corporate due diligence processes and practices.

The 2020 version of the draft treaty tries to address some of these requests. It contains a provision compelling States to ensure that a gender perspective, 'in consultation with potentially impacted women and women´s organizations, [is integrated] in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experience by women and girls'.[152] While a step in the right direction, extensive work still needs to be conducted for the treaty to align with feminist objectives. Indeed, not only is the gender guidance it provides limited, but the draft instrument also reuses the vulnerability discourse that I have identified in Chapter 4 as perpetuating imbalances of powers between mining companies and survivors and discarding the role of women as agents and regulators.[153]

It is difficult at this stage to know what the final instrument, if adopted, will entail and whether feminist concerns will be taken seriously. What can be said, however, is that the OEIWG may take advantage of the current momentum in the international community to address the gendered dimension of business activities in relation to human rights. The UN Committee on Economic, Social and Cultural Rights, for instance, recognised in its 2017 General Comment No. 24 the intersectional and multiple discrimination faced by women, as well as the disproportionate adverse effects of business activities on women 'particularly in relation to the development, utilization or exploitation of lands and natural resources'.[154] The Committee added that 'investment-linked evictions and displacements often result in physical and sexual violence against […] women and girls'.[155] In 2017, The CEDAW Committee underlined the responsibility of States for failing to prevent, investigate, prosecute and punish acts of corporations – including those operating extraterritorially – that result in gender-based violence against women.[156] These endorsements by UN treaty bodies constitute fertile ground for the

[151] Awori et al (n 149) 5.
[152] *Treaty on Business and Human Rights Second Revised Draft* (n 143) art 3.
[153] Ibid Preamble.
[154] Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24 (10 August 2017) [8].
[155] Ibid [9].
[156] *CEDAW General Recommendation 35* (n 113) [24]. See also Committee on the Rights of the Child, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, UN Doc CRC/C/GC/16 (17 April 2013) [32] and [51].

OEIWG to elaborate a binding instrument that makes women's experiences of business more visible.

2 *Binding Instrument, Effectiveness and Sexual Violence*

A binding instrument on business and human rights may contribute to greater State accountability for the development and implementation of human rights due diligence regulation. Because such an instrument would address, among other things, States' obligation to require from companies human rights due diligence and effective remedies for victims of corporate abuse, it may also enhance perspectives of corporate accountability. However, doubts subsist as to the extent of its reach and its capacity to prevent mining-related sexual violence. Indeed, some States that are homes to the largest mining companies have already expressed reluctance to be bound by a treaty, and their ratification of a binding instrument is doubtful.[157] More significantly for this research, better integration of gender considerations in a treaty – especially if they are only articulating obligations of which States are already aware– is not sufficient to modify the existing political and economic incentives States have in relation to mining.

From a regulatory perspective, it is debatable whether a treaty on business and human rights can address the governance gaps created from insufficient accountability motivations for States to continuously learn and improve their regulatory practice. Hilary Charlesworth and and Emma Larking, for example, have identified significant compliance issues with obligations arising under human rights treaties and in the context of the Human Rights Council's Universal Periodic Reviews.[158] They refer to these issues as 'ritualism' to describe a way of adapting to a normative order.[159] In the field of human rights, 'rights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses'.[160] For a State, ritualistic practices may involve ratifying a human rights treaty without implementing its provisions at national level, or failing to develop domestic rules to prevent or provide remedies for human rights

[157] The States that voted against the Human Rights Council resolution for a binding treaty are Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, the United Kingdom and the United States of America. Other countries such as Australia and Canada are showing reluctance to engage in the treaty process.
[158] Hilary Charlesworth, 'Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict' (2010) 29 *Australian Year Book of International Law* 1; Hilary Charlesworth and Emma Larking, 'Introduction: The Regulatory Power of the Universal Periodic Review' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rights and Ritualism* (Cambridge University Press, 2014) 1.
[159] Charlesworth and Larking (n 158) 10.
[160] Charlesworth (n 158) 12.

violations.[161] In that sense, ritualism impedes the effectiveness of human rights treaties.[162] Other writers have also addressed the issue of the effectiveness of human rights treaties.[163] Jolyon Ford and Claire Methven O'Brien, in particular, have reviewed the negotiations surrounding a treaty on business and human rights through the lens of regulatory ritualism. They argue that proposals for a binding instrument should be assessed primarily in terms of their likely efficacy in enhancing the protection of human rights in business activities.[164] The main objective of the negotiators should thus be to ensure that a new business and human rights instrument does not promote regulatory ritualism.[165] This may be achieved, according to the authors, through the design of a framework convention regime referring to the UNGPs and containing broad commitments by States to adopt national measures to implement relevant international human rights standards, and to promote their effective implementation.[166]

There is no room in this section to discuss the advantages and flaws of specific forms of treaties, and how these forms may influence an instrument's effectiveness. Arguments in favour of a framework convention are justifiable as they acknowledge the sovereignty of States in identifying the best way to implement international standards domestically. They also take into account the fact that general rules are more likely to be applied at national level than detailed due diligence requirements.[167] Yet, framework conventions are not exempt from risks of

[161] Hilary Charlesworth, 'A Regulatory Perspective on the International Human Rights System' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 357, 365.
[162] As opposed to rituals, which may contribute to establish and entrench international consensus, to build webs of relationships and to make sense of social and political dynamics; Charlesworth and Larkin (n 158). The authors define rituals as 'ceremonies or formalities that, through repetition, entrench the understandings and the power relationships that they embody. Rituals are a means of enacting a social consensus – or at least of demonstrating the efficacy of the mode of power they internalise' (8–9).
[163] See, eg, Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behaviour?' (1999) 36 *Journal of Peace Research* 95; Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935; Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 *Journal of Conflict Resolution* 925; Wade M Cole, 'Human Rights as Myth and Ceremony? Reevaluating the Effectiveness of Human Rights Treaties, 1981–2007' (2012) 117 *American Journal of Sociology* 1131.
[164] Jolyon Ford and Claire Methven O'Brien, 'Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty' (2017) 40(3) *UNSW Law Journal* 1223, 1225.
[165] Ibid.
[166] Ibid 1238. The authors argue that in contrast to other treaty models (such as declaratory instruments, broad-spectrum treaties and narrow-spectrum treaties) such a regime, 'if it insisted on participatory, transparent and equitable procedures at national as well as international levels, and were based on the already widely accepted UNGPs, might provide more spaces, and more accessible deliberative nodes for state and non-state constituencies, for influencing transformation in the posture of a state towards its duties to regulate, in ways that substantively improve enjoyment of human rights' (1246). This is also the approach adopted by Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1(1) *Business and Human Rights Journal* 41. He explains that 'a framework convention is one which defines general obligations of result, while leaving a broad margin of appreciation to states regarding the means of implementation as well as the speed at which to adopt the measures required' (56).
[167] Ford and O'Brien (n 164) 1238.

ritualism. This is particularly true in cases where ritualism takes the form of invocation of cultural norms to undermine international standards,[168] as is regularly the case with sexual violence. In fact, States generally have poor track records when it comes to implementing women rights treaties, irrespective of their form.[169] These are reasons why my arguments in favour of a binding instrument do not focus on the form of the treaty itself but, instead, on its potential to increase the accountability of States for ensuring that due diligence State and corporate regulation is implemented in a way that effectively serves women's right to a life free from violence.

First, although risks of ritualism exist irrespective of the form of the instrument,[170] these risks can be mitigated by the instauration of strong accountability mechanisms to oversee the performance of States and companies in implementing human rights due diligence in a way that effectively prevents sexual violence. Such mechanisms may be structured, for example, as an international secretariat that would monitor national level processes and outcomes in relation to due diligence and the rights of women, or a peer-review process across States.[171] They could be specifically designed to evaluate the implementation of gender-responsive due diligence. Strong monitoring should accompany strong obligations for States. In addition to creating obligations around the feminist concerns highlighted above, a potential treaty may ensure that States are held accountable not only for their failure to regulate effectively but also, potentially partly, for the failures of companies to prevent sexual violence through corporate due diligence. This approach may seem radical and may have the effect of limiting the willingness of States to adhere to the treaty. However, it is not unheard of in international law. The general law of State responsibility, as seen previously, allows, in specific circumstances, for the attribution to a State of acts committed by its corporate nationals, thus engaging its international responsibility.[172] Such a system, although possibly accompanied by legal and practical obstacles, may create incentives for States to regulate corporate due diligence self-regulation in alignment with objectives of effective prevention of sexual violence, as other treaty incentives have had mixed results regarding the implementation of women's rights.

[168] Charlesworth, 'A Regulatory Perspective on the International Human Rights System' (n 161) 365.
[169] Debra L DeLaet, 'Lost in Legation: The Gap between Rhetoric and Reality in International Human Rights Law Governing Women's Rights' (2018) 8(3) *Global Discourse* 387.
[170] See, eg, Ford and O'Brien (n 164) De Schutter (n 166).
[171] De Schutter (n 166) 57.
[172] International Law Commission (n 97) arts 5, 8 and 16. Complicity of the State could even be established by its investment in private projects; see, eg, McCorquodale and Simons (n 129).

Second, a treaty on business and human rights has value in that it opens State and corporate regulatory practice to scrutiny from other actors. Unlike some international lawyers who have adopted generally fatalistic views as to the effectiveness of human rights treaties,[173] regulatory theorists have been more optimistic. They do not focus specifically on the text or the implementation of treaties but, instead, perceive them as opportunities for non-State actors to regulate State and corporations' behaviours.[174] In that sense, peer and civil society regulation is used as a way to fight ritualism, with non-State stakeholders using a binding instrument as a tool to advance women's rights in mining. Under the surveillance of civil society, which may issue demands for effective implementation, States and corporations may feel increased pressure to live up to their international obligations regarding sexual violence.

V CONCLUSION

Despite avenues to increase the potential of corporate self-regulation to prevent mining-related sexual violence, governance gaps remain due to the potential inability or unwillingness of mining companies to regulate their activities effectively. In fact, the Special Representative recognised, two years into his mandate, that '[t]he Achilles heel of self-regulatory arrangements to date is their underdeveloped accountability mechanisms'.[175] The State, through legal and other regulatory mechanisms, has an important role to play in monitoring and enforcing corporate self-regulation's compliance with domestic and international standards. At the same time, feminism highlights the risks associated with State regulation, including the alienation of women's rights and the resultant disempowerment of women and survivors. To address these risks, a feminist approach to State due diligence regulation requires the law to be preventative in nature, in keeping with the preventative nature of human rights due diligence. It must also be designed so as to lead mining companies to put women's human rights at the forefront of any operational decisions. In parallel, additional governance gaps may also be created from insufficient accountability incentives for the State itself to continuously learn and improve its regulatory practice to make it more efficient in addressing mining-related sexual violence. The existing and possible failures from the State in effectively regulating and

[173] See especially Oona A Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 *Journal of Conflict Resolution* 588.
[174] Charlesworth, 'A Regulatory Perspective on the International Human Rights System' (n 161) 368.
[175] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) *American Journal of International Law* 819, 836.

adjudicating the role of multinational mining companies may be linked to the political and economic impetus they face in a globalised world. According to John Ruggie:

> Currently, at the domestic level some governments may be unable to take effective action on their own, whether or not the requisite will is present. And in the international arena states may compete for access to markets and investments, as a result of which collective action problems may restrict or impede their serving as the international community's 'public authority'.[176]

The international human rights regime supports further accountability for the State. States' human rights due diligence obligations and a potential treaty on business and human rights are such standards and may compel States to address sexual violence in mining operations adequately. However, for international and domestic rules – including business and human rights instruments – to better articulate the normative duties of States and corporations is not sufficient to modify the incentive structures these actors face or to improve their internal accountability systems.[177] External and independent regulators, with specific influence over States and mining companies, are essential to ensure monitoring and accountability for State and corporate due diligence regulatory mechanisms. Regulatory theories recognise these stakeholders as including, among others, civil society. The regulatory role of civil society has been somewhat relegated to 'second-class' regulation by international instruments on business and human rights instruments with, in relation to human rights due diligence, non-authoritative references to '[…] consulting […] human rights defenders and others from civil society'[178] or 'partnerships with international and civil society organisations'.[179] This contrasts with State and business regulation, which, in the UNGPs, benefit from entire 'pillars'.[180] In contrast, the role of civil society is critical in opening the regulatory sphere to women, both as regulators and as influencers of regulation. This is developed further in the following chapter.

[176] Ibid 838.
[177] Tara J Melish and Errol Meidinger, 'Protect, Respect, Remedy and *Participate*: 'New Governance' Lessons for the Ruggie Framework' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, 2012) 303, 329.
[178] *UNGPs* (n 19) Principle 18 (Commentary).
[179] *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2016) 15.
[180] This has led some to argue that the UNGPs should have integrated a fourth pillar for civil society. See, eg, Melish and Meidinger (n 177).

CHAPTER 8: CIVIL SOCIETY MONITORING AND MULTISTAKEHOLDER REGULATION OF HUMAN RIGHTS DUE DILIGENCE

I INTRODUCTION

Civil society constitutes the last layer of regulation in the interlocking system of regulation that, as argued in this thesis, is essential to envisage effective prevention of mining-related sexual violence through human rights due diligence. Embracing the role of civil society as an important element of this system, consists in answering one of the questions asked by Hilary Charlesworth and Christine Chinkin about the gendered dimensions of regulation: 'who regulates the regulators?'[1] Indeed, in regulatory scholarship, civil society has a direct role in overseeing both corporate and State regulation, and in fostering its compliance with international standards, domestic norms and social expectations.[2] This implies binary responsibilities for civil society. First, it functions as a monitoring force with respect to the actions of State and corporate stakeholders. It also has the task of contributing to the elaboration and implementation of corporate self-regulatory standards and national laws and policies.[3] To a certain extent, the business and human rights sphere recognises the regulatory role of civil society by defining the content and extent of companies' responsibility to respect through social expectations. [4] According to the Special Representative, any breach of this responsibility is chiefly subject to 'the courts of opinion' and, occasionally, to charges in State courts.[5] The UNGPs also recognise some international human rights instruments as 'the benchmarks against which other social actors assess the human rights impacts of business enterprises'.[6]

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[1] Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 268.
[2] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) Chapter 3.
[3] Colin Scott, 'The Regulatory State and Beyond' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 278.
[4] John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UN Doc A/HRC/8/5 (7 April 2008) [54].
[5] John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UN GAOR, 8th sess, Agenda Item 3, UN Doc A/HRC/8/5 (7 April 2008).
[6] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and*

In this chapter, I use the words 'civil society' broadly to refer to 'all those institutions that are intermediate between the individual and the State'.[7] The most obvious civil society actors are local and international NGOs, and I contend that such groups – notably women's organisations – are indeed critical in monitoring both corporate and State regulation. The definition used is this chapter, however, includes movements led by women and survivors of sexual violence, mining communities, consumer associations and academic initiatives, as well as corporate entities such as industry associations, insurers and investors, among others. In this chapter, I emphasise the relevance of relying on civil society to design and implement due diligence policies and practices that participate in preventing sexual violence in large mining operations. Despite the diversity of civil society stakeholders, I focus on NGOs, women and survivors, mining communities and women's organisations. Indeed, in response to the challenges women face in mining context, a range of women's organisations has emerged in mining communities across the global South.[8] While literature has overlooked the role of women's organisations, these have been active in both opposing mining operations and shedding light in women's experiences of mining.[9] As a result, they 'are crucial for policymakers and mining companies alike to recognise, seek out and support, in order to better understand and tackle the gendered context and impacts of mining activities'.[10]

I recognise the limitations of civil society in performing its functions but contend that these do not undermine its legitimacy in influencing and monitoring corporate and State regulation. Instead, I use feminist theories to demonstrate that civil society is instrumental in increasing the visibility of women in the regulatory sphere and in supporting an intersectional understanding of sexual violence in mining. I suggest that empowering civil society – notably,

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Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc A/HRC/17/31 (21 March 2011) Principle 12 (Commentary) ('*UNGPs*').

[7] John Braithwaite and Heather Strang, 'Introduction' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 1, 1.

[8] Katy Jenkins, 'Women, Mining and Development: An Emerging Research Agenda' (2014) 1(2) *The Extractive Industries and Society* 329, 336.

[9] See Kuntala Lahiri-Dutt, 'The Feminisation of Mining' (2015) 9(9) *Geography Compass* 523; Katy Jenkins and Glevys Rondón, '"Eventually the Mine will Come": Women Anti-Mining Activists' Everyday Resilience in Opposing Resource Extraction in the Andes' (2015) 23(3) *Gender & Development* 415. Examples of prominent women in mining's organisations are the International Women and Mining Network (RIMM), The Tanzanian Women Miners Association (TAWOMA) and the Porgera Women's Association in Papua New Guinea. In Latin America, in particular, networks and organisations have organised resistance to mining. They include the Red Latinoamericano de Mujeres Defensoras de Derechos Sociales and Ambientales; Genero y Minería, and the Unión Latinoamericana de Mujeres.

[10] Jenkins (n 8) 336. I acknowledge, however, that the regulatory role of women human rights defenders may significantly be impeded by their particular vulnerability to gender-specific violence and risks. See, eg, Inmaculada Barcia, *Urgent Responses for Women Human Rights Defenders at Risk: Mapping and Preliminary Assessment* (AWID, 2011).

women and women's groups – constitutes a valid strategy for reinforcing an interlocking and multilayered system of regulation aimed at preventing sexual violence in mining.

To construct my argument, I first explain how regulatory theories have framed the role of civil society in the regulation of corporate conduct and recognised the dual role of this regulatory group. I also underline some of its flaws linked, specifically, to questions about extent of corporate concern for reputational damage. In Section III, I demonstrate that these limitations carry little weight compared to the advantages of empowering civil society to reinforce regulatory systems in line with feminist goals. Using feminist and regulatory scholarship, I thus show that civil society is essential in opening the regulatory sphere to women, both as regulators and as influencers of corporate due diligence self-regulation. I continue by explaining, in Section IV, that civil society also has its place in States' legislative processes. It may support the development of comprehensive legislative frameworks on mandatory due diligence, as well as women's work and lives in and around mines.

II REGULATORY THEORIES AND THE ROLE OF CIVIL SOCIETY

A *Civil Society, Monitoring and Accountability*

Regulatory models are founded on the idea of regulatory tripartism. This model developed by Ian Ayres and John Braithwaite for responsive regulation involves 'drawing the commitments and resources of interest groups into regulatory roles'.[11] A tripartite regulatory system thus recognises that the regulation of business activities is not a bilateral game involving only corporations and States. Instead, it identifies the additional capacity of civil society groups for contributing to policymaking, and for monitoring the actions of business actors (who are driven by self-interest) and States (which may be ineffective or co-opted by corporations).[12] In this regulatory world, alongside States –which can influence, evaluate, monitor and ensure the compliance of corporate self-regulation – civil society intervenes by exerting regulatory pressure on both corporations and States.

The role of civil society is dual. Not only does it monitor the practices of corporations and States, it is also expected by regulatory scholars to become involved in the design and negotiation of corporate policies and domestic regulation.[13] In fact, the policy-making role of

[11] Scott (n 3) 278; Ayres and Braithwaite (n 2) Chapter 3.
[12] Scott (n 3) 278.
[13] Ibid 278–279.

civil society has implicitly been recognised throughout regulatory spheres, in particular regarding the regulation of human rights in specific industries. In the mining sector, several industry initiatives aimed at limiting the environmental and human rights impacts of mining companies constitute joint agreements between civil society organisations, mining corporations and, occasionally, States. The Voluntary Principles on Security and Human Rights, for example, is an initiative comprising 10 governments, 14 key international NGOs and 32 extractive companies. In their aim of guiding companies on providing security for their operations while respecting human rights, the members of the initiative 'collaborate to share information […] and develop tools that will help define best practice for securing operations in a way that respects human rights'.[14] Similarly, the Initiative for Responsible Mining Assurance (IRMA) gathers together companies and influential NGOs involved in the design and implementation of IRMA's Standard for Responsible Mining.[15] In that sense, NGOs and civil society have a significant and unique regulatory power. They often have access to privileged, community-based, information that mining companies and States may have limited opportunities to obtain. Using this information, they have greater capacity to push governmental and corporate stakeholders to address public-oriented goals, such as women's rights.[16] In relation to sexual violence, there are limited examples of civil society intervening in the negotiation of mining companies' internal policies. Barrick Gold reported that the remedy framework it implemented in Porgera was designed and implemented 'in consultation with experts from [Papua New Guinea], including women's organizations in Porgera, and leading international experts'.[17] In general, however, it seems that in relation to this specific abuse, mining companies have been reluctant to engage in significant collaboration with civil society to reform their internal policies and procedures.

While civil society can contribute to detecting regulatory gaps and, consequently, to making governance efforts more effective, its participation in the regulatory sphere is not without challenges. First, the success of civil society in influencing corporate self-regulation varies

[14] Voluntary Principles on Security and Human Rights, *The Voluntary Principles Initiative* <https://www.voluntaryprinciples.org/the-initiative/>.
[15] Initiative for Responsible Mining Assurance, *Standard* <https://responsiblemining.net/what-we-do/standard/>.
[16] Natasha Tusikov, 'Transnational Non-State Regulatory Regimes' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 339, 348.
[17] Barrick Gold, *The Porgera Joint Venture Remedy Framework* (Barrick Gold, 2014). Barrick Gold stated that it consulted with Human Rights Watch, UN Women, the former UN Special Representative for Business and Human Rights, the Harvard International Human Rights Clinic, the Porgera District Women's Association (PDWA) and the PDWA's Women's Welfare Office, Paiam Hospital, the Porgera Medical Centre, local police, and the PJV's Community Affairs personnel (3).

according to companies' interests and willingness to be bound by higher standards.[18] One of the main challenges facing civil society is thus to convince corporate and State stakeholders of the validity of its claims and the relevance of focusing regulatory attention on specific human rights issues such as sexual violence. Second, regulatory theorists recognise that a risk exists of civil society misbehaving, being captured by companies, or 'pursu[ing] symbolic rewards from enforcement activities that do not promote compliance (or cooperation)'.[19] Corporate practice demonstrates the reality of such risk, with the influence of public interest groups on regulatory processes being diminished by industry lobbying efforts.[20] In this context, for regulatory tripartism to function at its full potential, considerations of mutual transparency, accountability and information sharing between all regulators involved are essential.

Finally, as the business and human rights debate seeks to implement regulatory theories, it fails to recognise the emphasis this scholarship puts on civil society as a regulator. The UNGPs, for instance, recommend that companies, when identifying and assessing actual or potential adverse human rights impacts, consult with 'credible, independent, expert resources, including human rights defenders and others from civil society'.[21] Likewise, the OECD Guidance on Minerals suggests that companies consult with civil society organisations throughout their due diligence processes, as well as in respect to improving their provision and use of public and private security.[22] As opposed to the State and business enterprises that benefit, in the UNGPs, from entire 'pillars' guiding their implementation of the principles, these references to civil society appear secondary.

The consequence of marginalising the role of civil society is that business and human rights standards deprive non-State and non-corporate groups of international legitimacy in monitoring and orchestrating the design and implementation of human rights due diligence in an effective way. As such, business and human rights fails to provide civil society with strategic leverage for persuasion and coercion. It is also unsuccessful in 'validating civil society requests to access

[18] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000). The authors identify five strategies for civil society to ratchet up regulatory standards where businesses oppose higher standards. These are 1) exploiting strategic trade thinking to divide and conquer business; 2) harnessing the management philosophy of continuous improvement; 3) linking Porter's competitive advantage of nations analysis to best available technology and best available practice standards; 4) targeting enforcement on 'gatekeepers' within a web of controls (actors with limited self-interest in rule-breaking, but on whom rule-breakers depend); and 5) taking framework agreements seriously (612).
[19] Scott (n 3) 278. See also Ayres and Braithwaite (n 2) 74–77.
[20] Robert V Percival and Huiyu Zhao, 'The role of civil society in environmental governance in the United States and China' (2014) 24(1) *Duke Environmental Law & Policy Forum* 142, 157.
[21] UNGPs (n 6) Principle 18 (Commentary).
[22] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2016) ('*OECD Guidance on Minerals*') 18, 22, 80, 102, 108.

information from business entities about their policies, guidelines, impact assessments and performance tracking systems, while promoting greater business reliance on external, independent and community based monitoring and assessment systems'.[23] In line with regulatory and feminist theories, widening the business and human rights debate to include the primordial regulatory role of civil society is thus essential for opening the regulatory sphere to women, both as regulators and as influencers of regulation.

B *Corporate Performance, Shame and Reputation*

Regulatory scholarship assumes that the power of civil society both to monitor corporate regulatory practices and to integrate companies' regulatory processes is particularly strong when it can capitalise on corporations' fear of scandal and damage to their reputation.[24] Indeed, regulatory theories rely on the notion of shame, alongside deterrence, as a driver for compliance.[25] As a result, thinking about the regulatory effectiveness of civil society in relation to the prevention of mining-related sexual violence requires analysing whether mining companies experience enough fear of reputational damage and public shame to self-regulate actively on risks of sexual violence in their operations. It also leads one to consider whether mining companies are convinced that the reputational damage of non-compliance outweighs the managerial and economic costs of compliance.

Data regarding the weight companies give to their reputation is diverse. Some differences may be influenced by the research methods used, the industries examined or the specific subject of the studies. This situation only allows me, in this thesis, to draw broad conclusions as to the potential for civil society to effectively influence corporate self-regulation. For some, reputational concerns have a *relatively* low impact on a corporation's decision to self-regulate on human rights. In relation to modern slavery, a study conducted with Australian companies demonstrated that what most influenced companies to implement due diligence was legal requirements (legal penalties for non-reporting). Other factors, such as customer expectations, reputational impact and adverse publicity, and civil society expectations were less significant

[23] Tara J Melish and Errol Meidinger, 'Protect, Respect, Remedy and *Participate*: "New Governance" Lessons for the Ruggie Framework' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, 2012) 303, 331. This has led the authors to advocate a 'fourth pillar' to recognise and affirm the central role played by civil society actors and affected stakeholders in human rights governance and accountability processes (327).
[24] Tusikov (n 16) 348.
[25] See, eg, Nathan Harris, 'Shame in Regulatory Settings' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 59.

drivers than legal expectations, although not dramatically so.[26] In another study, Lise Smith and her colleagues determined that when asked about their primary incentive for undertaking human rights due diligence, business respondents[27] identified their top three incentives as reputational risks; investors requiring a high standard; and consumers requiring a high standard.[28] In practice, however, and irrespective of the actual level of reputational incentives for mining companies, decades of public allegations against multinational mining companies have sparked no debate in the sector about the risks of sexual violence mining activities create for women. Civil society campaigns and numerous reports about Barrick Gold's remedial frameworks in Papua New Guinea and in Tanzania have seemingly not encouraged any other company to self-regulate to prevent risks of sexual violence in its operations. As a result, an assumption may be made that despite mining companies potentially being aware that their transnational activities exacerbate gender inequalities and risks of sexual violence in different ways,[29] the significant internal reforms involved in understanding the impacts of their activities on women and effectively preventing sexual violence might discourage them from taking the necessary steps.[30]

This question also links to the idea of social expectations of mining companies and on what their international responsibilities are based. The UNGPs integrate the concept of 'social licence to operate',[31] which has evolved importantly in the field of extractive industries, as an argument for responsible business conduct by connecting State soft and hard law, business self-regulation and social expectations.[32] The issue is that such social expectations may not meet feminist objectives. Social expectations about sexual violence vary immensely from one geographical and cultural context, one normative environment or one industry to another. In some mines, sexual violence against women is socially normalised or, worse, encouraged as a

[26] Justine Nolan, Jolyon Ford and M Azizul Islam, *Regulating Transparency and Disclosures on Modern Slavery in Global Supply Chains: A 'Conversation Starter' or a 'Tick-Box Exercise'?* (CPA Australia, 2019) 14.
[27] The study involved 334 business survey respondents from all sectors and representing enterprises of all sizes.
[28] Lise Smit et al, *Study on Due Diligence Requirements Through the Supply Chain* (European Commission, 2020). In this study, regulation and legal requirements were the least-selected incentive for companies to undertake due diligence, presumably, the authors argue, because of the existing lack of regulatory or legal requirements to undertake due diligence (16).
[29] Human Rights Council, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/72/162 (18 July 2017) [28]–[30].
[30] See, eg, Kuntala Lahiri-Dutt, 'Mainstreaming Gender in the Mines: Results from an Indonesian Colliery' (2006) 16(02) *Development in Practice* 215, 220.
[31] Robert G Boutilier and Ian Thomson, 'Modelling and Measuring the Social License to Operate: Fruits of a Dialogue between Theory and Practice' (Conference Paper, International Mine Management Conference, nd). The authors define it as a community's perception of the acceptability of a company and its local operations, 2.
[32] Karin Buhmann, 'Public Regulators and CSR: The "Social Licence to Operate" in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136(4) *Journal of Business Ethics* 699, 699–702.

demonstration of masculinity.[33] In such an uncertain context, it is possible that mining corporations and other stakeholders do not feel any pressure to self-regulate to prevent sexual violence.

There are many obstacles for civil society in putting into effect the full regulatory potential that regulatory theories attributes to this actor, especially in respect to human rights due diligence and sexual violence. However, these limitations do not undermine the legitimacy and power of civil society in influencing and monitoring corporate and State regulation. Although further research is needed as to the role of civil society in due diligence processes, businesses are aware of and potentially responsive to the reputational damage that may derive from civil society action. Similarly, States implicitly recognise the transformational capacity of civil society in relation to corporate conduct.[34] Given this situation, focusing on empowering civil society, notably women and women's groups, constitutes a valid strategy in the reinforcement of a tripartite system of regulation in accordance with feminist objectives of preventing sexual violence in mining.

III CORPORATE SELF-REGULATION AND WOMEN AS REGULATORS

Regulatory theories and the business and human rights debate recognise the fundamental role of civil society as a third layer of regulation. John Ruggie emphasised that the corporate responsibility to respect human rights not only is based on social expectations of corporate conduct,[35] but also 'enjoys near universal recognition as a social norm'.[36] The need to integrate non-corporate input into corporate self-regulation is also considered an element of human rights due diligence, with the recommendation that businesses engage in consultation with internal and external stakeholders, including affected right-holders, along various steps of their due diligence processes.[37] In that context, corporate interest in self-regulating to address risks of sexual violence can only be achieved if due diligence is designed and implemented in such

[33] See, eg, Siri Aas Rustad, Gudrun Østby and Ragnhild Nordås, 'Artisanal Mining, Conflict, and Sexual Violence in Eastern DRC' (2016) 3(2) *Extractive Industries and Society* 475, 477.
[34] Smit et al (n 28). States have generally left it to civil society to monitor corporate compliance with human rights due diligence international requirements (209).
[35] John Ruggie, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/11/13 (22 April 2009) [46], [48], [54].
[36] John G Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights* (Harvard Kennedy School Working Paper No. RWP17-030, 2017) 13.
[37] *UNGPs* (n 6) Principles 18, 20, 21 (Commentary).

a way that mining companies' management is open to scrutiny and critique from external stakeholders of the impacts of mining activities on women. Due diligence self-regulation must thus be transparent and accountable to the broader community.[38] This includes women and women's groups that may support mining companies in identifying risks of sexual violence, and may influence self-regulation positively.

A *Women and Due Diligence Self-Regulation*

1 *Identifying Sexual Violence and Opening Self-Regulation to Scrutiny*

One of the primary conditions for due diligence self-regulation to be effective in preventing mining-related sexual violence, for is mining companies to identify the systemic nature of sexual violence in their operations. This includes companies addressing their own contribution to increased risks of sexual violence in mining communities. As elaborated earlier, this prerequisite comes with an array of obstacles that, thus far, have impeded mining companies' performance in preventing sexual violence. Indeed, under international standards, due diligence regulation relies significantly on corporate self-regulation, focused primarily, as is natural for profit-seeking companies, on business interests. Due diligence is also understood as a responsibility of means, which has, in practice, shifted the responsibility of mining corporations for potentially being perpetrators of sexual violence to a responsibility based on their failure to take reasonable preventative action to identify and address risks of external, private acts of sexual violence. I argue in this section that some of these obstacles can be overcome by integrating into due diligence mechanisms for participation by women and other relevant stakeholders in designing and implementing due diligence processes.[39] Similarly, external verification and independent monitoring would enable or constrain companies – depending on their level of willingness – to conduct more effective and less biased risk analyses, while recognising the extent of their contribution to risks of sexual violence in communities of operation.

Indeed, according to Ruggie, '[c]ompanies do not necessarily recognize those rights on which they may have the greatest impact'.[40] Similar conclusions have been reached by the

[38] Christine Parker and John Howe, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, 2012) 273, 299.
[39] Ibid.
[40] John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General (SRSG) on the*

International Council on Mining and Metals, which developed a guide for mining companies to integrate human rights due diligence into corporate risk management processes. In identifying examples of human rights issues that should be considered by mining companies to ensure that their impact assessment fully incorporate human rights, the guide asks in relation to sexual violence only the question, 'is domestic abuse or sexual assault prevalent?'[41] This interrogation portrays sexual violence as a phenomenon that is exterior to the companies themselves. As an element of response to these gaps, external monitoring ensures mining companies conduct meaningful and transparent risk analyses that effectively identify risks of sexual violence, even when such identification may present challenges for the company.[42] In other words, scrutiny and participation, notably from women in affected communities who are in a privileged position to identify actual risks created by mining activities, allow for stronger risk identification processes and enhanced understanding of the involvement of mining companies in sexual violence.

Simultaneously, such external participation in risk assessment, while possibly facilitating transparency of due diligence processes, presupposes goodwill from companies. Leaving room for women's advocacy and building transparency requirements into impact assessments requirements, despite being necessary, is contingent upon mining companies' willingness to interact constantly with women, survivors and other relevant stakeholders, and to let them witness their internal processes. This is a challenge that may be tackled, as demonstrated earlier, by stronger international and domestic instruments requiring sexual violence to be integrally built in risk assessments as a systemic risk of mining operations. Non-corporate standards may also request that due diligence 'include systematic policies and procedures for allowing interested stakeholders to contest decisions that affect them on the basis of either State-based legal rights, or international law, or other standards the self-regulator has voluntarily adopted'.[43] This issue also underlines the complementary and necessary regulatory role of NGOs, communities and potentially governments in testing the effectiveness of corporate self-regulation, specifically in relation to sexual violence, and holding mining companies accountable for their performance. Regarding mineral supply chains, the OECD and

Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc A/HRC/4/035 (9 February 2007) [74].

[41] International Council on Mining and Minerals, *Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes* (ICMM, 2012) 20.

[42] James Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (2013) 31(2) *Impact Assessment and Project Appraisal* 107, 109.

[43] Parker and Howe (n 38) 299.

the multi-stakeholder initiative Women's Rights in Mining have recently recognised the complementary role of governments, the private sector and civil society in developing 'gender-responsive strategies to identify, assess, report, address and monitor gender-related human rights abuses in or near mining communities and throughout mineral supply chains and ensure that every project is started with a gender lens in design and monitoring'.[44]

2 *The Role of Women in Influencing Due Diligence Self-Regulation*

Opening due diligence processes to external scrutiny is essential for identifying risks of sexual violence and, consequently, triggering internal corporate mechanisms aimed at preventing sexual violence in mining operations. A feminist approach to self-regulation, however, cannot be limited to allowing external stakeholders, including impacted women and women's organisations, to contribute to specific or limited elements of due diligence processes, such as risk identification. Instead, it requires that mining companies embrace the transformative and productive roles of women as agents of mining. These agency roles take place in the workplace, with women embracing roles as corporate regulators. They also take place in communities of operation, with women endorsing their regulatory role by directly collaborating with companies to influence corporate self-regulation, make women's rights more visible and mainstream gender into human rights due diligence. This involves letting women, as agents, infiltrate the entirety of due diligence mechanisms across services, from policy setting, to reporting and monitoring corporate compliance with the right of women to live a life free from violence. On that point, the UN Working Group on Business and Human Rights recommends that 'business enterprises ensure meaningful participation of potentially affected women, women's organizations, women human rights defenders and gender experts *in all stages of human rights due diligence*'.[45] Allowing women to influence self-regulation also involves working with women outside mining companies and women outside large-scale mining activities, given the strong interactions between industrial and artisanal mining.[46]

[44] Women's Rights and Mining and OECD, *Stakeholder Statement on Implementing Gender-Responsive Due Diligence and Ensuring the Human Rights of Women in Mineral Supply Chains* (WRM-OECD, 2019) 1.
[45] Human Rights Council, *Gender Dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the Issue of Human rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/41/43 (23 May 2019) [45(d)], emphasis added ('*Gender Dimensions of the UNGPs*').
[46] See, eg, Sara Geenen, 'A Dangerous Bet: The Challenges of Formalizing Artisanal Mining in the Democratic Republic of Congo' (2012) 37(3) *Resources Policy* 322.

Mining companies have long had a practice of community consultation as a condition for them to obtain their social licence to operate.[47] Community consultation has influenced corporate self-regulation with increasing regulatory authority being assumed by civil society.[48] Corporate codes of conduct and policies have allowed civil society to monitor and assess companies' performance while also bringing a plurality of perspectives – in particular, those of the affected right-holders – to business self-regulation.[49] Despite recognition of the regulatory role of non-corporate actors, there is little evidence in the literature of systematic and comprehensive relations between mining companies and female stakeholders, including women living in mining communities or women's NGOs representing them.[50] This is despite local and international civil society having undertaken, for many years, to mainstream gender in mining debates, to amplify local community perspectives and to develop tools to empower women miners and women living in mining communities.[51] It is also despite research – albeit relatively limited – demonstrating positive impacts generated by the involvement of women in communities in corporate self-regulatory processes and the development of human rights, sustainability or CSR internal policies and codes of conduct.[52]

In parallel, feminist literature has emphasised the importance of hearing women's voices in all spheres, including in relation to the interactions between the corporate sphere and their communities of operation, although most of the feminist literature on women's social movements focuses on the relationship of women with States rather than with the private sector.[53] Hilary Charlesworth and Christine Chinkin, notably, have generally emphasised 'the

[47] Smit et al (n 28). The authors explain that in practice, however, stakeholder engagement is extremely limited with respect to the human rights impacts of suppliers (10).
[48] On how NGOs from the global North and the global South act, respectively, as influencers of corporate self-regulation and as verifiers, see Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy* (UN Research Institute for Social Development, 2001) 10–18. See also Peter Utting, *Rethinking Business Regulation: From Self-Regulation to Social Control* (UN Research Institute for Social Development, 2005).
[49] Justine Nolan, 'The Corporate Responsibility to Respect: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 138, 152.
[50] For general literature on engagement between corporations and civil society on gender issues, including in the business and human rights debate, see, eg, Kate Grosser, 'CSR and Gender Equality: Women as Stakeholders and the EU Sustainability Strategy' (2009) 18 *Business Ethics: A European Review* 290; Maureen A Kilgour, 'The UN Global Compact and Substantive Equality for Women: Revealing a 'Well Hidden' Mandate' (2007) 28(4) *Third World Quarterly* 751.
[51] Kuntala Lahiri-Dutt, 'The Feminisation of Mining' (2015) 9(9) *Geography Compass* 523, 530.
[52] See, eg, Angela Hale and Maggie Opondo, 'Humanising the Cut Flower Chain: Confronting the Realities of Flower Production for Workers in Kenya' (2005) 37(2) *Antipode* 301; Ruth Pearson, 'Beyond Women Workers: Gendering CSR' (2007) 28(4) *Third World Quarterly* 731.
[53] Kate Grosser, 'Corporate Social Responsibility and Multi-Stakeholder Governance: Pluralism, Feminist Perspectives and Women's NGOs' (2016) 137 *Journal of Business Ethics* 65, 68.

importance of women taking an active role in international civil society',[54] while Kate Grosser demonstrates how women's voices can contribute to pluralism, inclusion and legitimacy in corporate CSR processes.[55] According to Kuntala Lahiri-Dutt, the feminisation of mining currently happening translates into an increased space for women in mining-related policy-making and civil society action around mining, and their enhanced visibility on mining.[56] From a feminist regulatory perspective, hearing women's voices equals allowing them into the regulatory sphere.

Yet, the limited evidence of interactions between women and corporations in self-regulatory processes is illustrative of some reluctance – or lack of interest – on the part of mining companies in engaging with groups that address women's rights or, in other words, in allowing community women to enter the regulatory world. At the same time, Kate Grosser argues in the larger context of CSR that engaging with businesses is a relatively new strategy for women and women's organisations. This may be because for decades women's movements have been focused on reframing women's rights in international law.[57] The recent focus on gender in the business and human rights debate may create more incentives for both mining companies and women to collaborate on self-regulation that is more in line with feminist objectives. Incorporating external women into the self-regulatory sphere is crucial. It may encourage regulatory compliance in relation to gender issues, and specifically sexual violence – with women and other NGOs endorsing not only a standard-setting but also a monitoring regulatory role. It may also build mining companies' abilities to better integrate gender, in a systemic and long-term manner, in their human rights due diligence.

Women's infiltration of the self-regulatory sphere, both as influencers and to monitor business practices, faces barriers revolving mainly around persisting misogyny in corporate cultures, lack of funding, lack of information about human rights due diligence and corporate processes, and lack of capacity.[58] While these concerns need to be addressed to ensure mining companies address risks of sexual violence appropriately, effective self-regulation, from a regulatory point of view, must not only take into consideration women's input but also put them 'in a position

[54] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 169.
[55] Grosser, 'Feminist Perspectives and Women's NGOs' (n 53).
[56] Lahiri-Dutt (n 51) 523.
[57] Grosser, 'Feminist Perspectives and Women's NGOs' (n 53) 76.
[58] Patrizia Nanz and Jens Steffek, 'Global Governance, Participation and the Public Sphere' (2004) 39(2) *Government and Opposition* 314.

where they can influence corporate management'.[59] This requires actual commitment – financial, practical or through information sharing and capacity building, for example – from companies to integrate women's voices into their due diligence practices. Rights to consultation for effective self-regulation are a cornerstone for regulation theorists and are perceived as a means of ensuring that companies' internal policies and mechanisms are effective.[60] In the context of mining-related sexual violence and human rights due diligence, consulting with female stakeholders would allow mining companies to align their due diligence priorities to the priorities of affected women. It would also allow mining companies to learn from women regulators and improve their human rights due diligence through giving more room for women, as regulators, to monitor mining companies' performance and suggest improvements.

Finally, a feminist input on regulatory practices requires that companies make sure to hear the voices of *all* women affected by their activities and give them both the latitude and discretion to endorse a regulatory role. For example, the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector – the only international guideline to advise transnational mining companies on applying a gender perspective throughout their stakeholder engagement – encourages enterprises to 'identify female leaders who are able to engage effectively' but emphasises that high-profile women might not speak for all women.[61] This last point is important. Yet it omits the fact that in cases of sexual violence, many survivors might be unlikely or unwilling to report the assault, and may thus not be represented by women leaders at all. Similarly, women leaders might want to push forward their own agendas.[62] This needs to be taken into consideration by mining companies, which should, as developed earlier, recognise the diverse and intersectional experiences of women across mining communities.

[59] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) x.
[60] See, eg, Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2018) 29(2) *Law & Social Inquiry* 307.
[61] OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (2017) 102 ('*OECD Guidance for Stakeholder Engagement*').
[62] Fitsum Weldegiorgis, Lynda Lawson and Hannelore Verbrugge, *Women in Artisanal and Small-Scale Mining: Challenges and Opportunities for Greater Participation* (Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, 2018).

B *Collaborating with Women's Organisations*

1 *The Business Case for Stronger Partnerships*

Given the low numbers of women reporting sexual violence and the many social obstacles survivors face,[63] women's organisations play a crucial role in communicating the requests of survivors and consequently ensuring that survivors are active in influencing corporate due diligence self-regulation. In fact, the role of women's organisations has long been recognised in international human rights law as essential to achieve gender equality. The Beijing Declaration and Platform for Action, for example, establishes that 'the participation and contribution of all actors of civil society, particularly women's groups and networks and other non-governmental organizations and community-based organizations […] are important to the [achievement of equality, development and peace]',[64] and that

> [t]he growing strength of the non-governmental sector, particularly women's organizations and feminist groups, has become a driving force for change. Non-governmental organizations have played an important advocacy role in advancing legislation or mechanisms to ensure the promotion of women.[65]

In relation to business and human rights, the UN Working Group on Business and Human Rights, in its 2019 Gender Guidance to the UNGPs, specifically recommends that:

> To eliminate all forms of discrimination against women and achieve substantive gender equality, States and business enterprises should work together with women's organizations and all other relevant actors to ensure systematic changes to discriminatory power structures, social norms and hostile environments that are barriers to women's equal enjoyment of human rights in all spheres.[66]

These suggestions extend to other regulators, including international financial institutions, industry associations and multistakeholder bodies involved in establishing grievance mechanisms.[67] They also extend to the mining industry, with the OECD Guidance on Stakeholder Engagement prescribing that in designing stakeholder engagement activities and

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[63] These range from exclusion from the family or the community, to increased poverty. See, eg, Christopher Chimaobi Ibekwe et al, 'Perceptions of the Social Consequences of Rape in Ezinihitte-Mbaise, Imo State, Nigeria' (2018) 2(8) *American Journal of Humanities and Social Sciences Research (AJHSSR)* 1; Debra Patterson, Megan Greeson and Rebecca Campbell, 'Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems' (2009) 34(2) *Health & Social Work* 127.
[64] *Beijing Declaration and Platform for Action*, UN Doc A/CONF.177/20 and A/CONF.177/20/Add.1 (15 September 1995) [20].
[65] Ibid [26].
[66] *Gender Dimensions of the UNGPs* (n 45) [44].
[67] Ibid Principles 28 [56] and 31 [62].

processes for engagement with women, extractive companies meet separately with established women's groups.[68]

Indeed, collaborating with women's organisations may be a strategic action for mining companies willing to improve their due diligence performance. Regulatory theories, as well as business and human rights instruments, create an expectation that companies continuously learn and better their internal processes and cultures. As the views of civil society tend to contrast significantly with those of industry organisations and multinational companies,[69] women's organisations have the capacity to bring intersectional perspectives and knowledge that mining companies may have difficulties accessing on their own. A business case for better engagement with women's groups also includes enhanced community support for the mining operations, better effectiveness of the community consultations organised by the company and stronger responses to investors' concerns.[70]

Organisations may also allow mining companies to identify better the risks their activities create for women, in a context where social impact assessments conducted by mining companies tend to consider the differentiated impacts of mining on women only cosmetically.[71] Women's groups in mining communities across the global South, although not very visible in literature, continuously provide in-depth critical analysis of the intersections between women and mining and are critical for companies to better understand and address the impacts of mining on women. This conclusion is particularly true in relation to sexual violence as civil society organisations, including women's organisations, have been instrumental in shedding light on the existence of this risk in large-scale mining and in empowering survivors. The role of women's organisations in preventing and addressing sexual violence more generally has been recognised by the CEDAW Committee, which acknowledged that

> civil society, especially women's non-governmental organisations, have prioritised the elimination of gender- based violence against women; their activities have had a profound social and political impact, contributing to the recognition of gender-based violence against women as a human rights violation and to the adoption of laws and policies to address it.[72]

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[68] *OECD Guidance for Stakeholder Engagement* (n 61) 102.
[69] Smit et al (n 28) 47.
[70] International Finance Corporation, *Unlocking Opportunities for Women and Business: A Toolkit of Actions and Strategies for Oil, Gas, and Mining Companies, Tool Suite 3: Women and Community Engagement* (IFC, 2018) 10–14.
[71] Leah S Horowitz, ''It Shocks Me, the Place of Women': Intersectionality and Mining Companies' Retrogradation of Indigenous Women in New Caledonia' (2017) *Gender, Place & Culture* 1.
[72] CEDAW Committee, *General Recommendation No. 35, (2017): On Gender-Based Violence Against Women, Updating General Recommendation No. 19*, UN Doc CEDAW/C/GC/35 (14 July 2017) [4] ('*CEDAW General Recommendation 35*').

In relation to large-scale mining, women's organisations have been heavily involved in making visible the experiences of survivors of sexual violence at the hand of multinational companies' security forces. In relation to the involvement of Hudbay Minerals in the rape of eleven Mayan Q'eqchi women, for example, fourteen Guatemalan women's rights and human rights organisations have actively supported the survivors and advocated for accountability of the company.[73]

Partnering with women's groups may also constitute a reputational advantage for mining companies. Indeed mining corporations, without such consultations, may be perceived globally as willingly ignoring the risks and abuses they create for women in their operations. This may lead to significant criticism from other regulators, financial disadvantage for corporate managers, and lawsuits, among other consequences. In fact, women in mining have been increasingly self-organising to illuminate women's concerns in mining. Women miners' organisations have contributed – notably, through advocacy, monitoring, lobbying, mobilisation of communities and training – to mainstreaming gender in almost every aspect of the work conducted by donors and development agencies.[74] Similarly, civil society has led the way in bringing multinational mining companies before domestic courts for failing to protect women from sexual violence in their operations.[75]

2 *Enhancing the Potential of Collaboration*

While there are compelling advantages for companies and survivors in involving women's organisations in the due diligence regulatory process, regulation theorists have highlighted potential problems with enlisting civil society organisations as regulators. Neil Gunningham identifies the risk of co-optation that accompanies delegating regulatory power to private actors.[76] Similar concerns can be raised about international NGOs representing women, which, although making survivors' voices heard, are also mainly incorporated in Western countries, have their own agendas and translate the voices of survivors into the 'western rationalist language of the law'.[77] Likewise, large women's organisations commonly fail to 'align the

[73] Nobel Women's Initiative, *Hudbay Minerals Faces Trial for Human Rights Abuses in Guatemala* <https://nobelwomensinitiative.org/hudbay-minerals-faces-canadian-trial-for-human-rights-abuses-in-guatemala/>.
[74] Lahiri-Dutt (n 51) 530.
[75] *Caal v Hudbay Minerals Inc (Amended Statement of Claim)* [2012] ONSC; *Guerrero v Monterrico Metals Plc* [2009] EWHC 2475 (QB).
[76] Neil Gunningham, 'Environment Law, Regulation and Governance: Shifting Architectures' (2009) (21)2 *Journal of Environmental Law* 179.
[77] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613, 619.

different interests of women working in mines, women affected by mining and women mobilising cooperatives'.[78] From the side of mining companies themselves, there also exists a risk of 'possible co-optation of feminist agendas for instrumental business interests',[79] which directly refers to concerns of cosmetic compliance and self-interested self-regulation.

Other issues appear in local organisations, in situations where male elites use women's collective actions to foster their own dialogue when their prior negotiations have failed.[80] In these cases, women's activism is construed as being in support of, or secondary to, men's activism.[81] While there is limited literature available on this issue, and thus uncertainty as to the scope of this phenomenon, it appears that men's influence in women's resistance and organisation practices has contributed to marginalising women's voices.[82] This has led to a practice whereby mining companies, while appearing to consult with women and women's organisations, in fact sideline women's concerns. Leah Horowitz has called this process 'retrogradation', or 'interpreting women's social position as inexorably subordinate to justify sidelining women's concerns and excluding women from negotiations'.[83]

These conclusions are important. They suggest that in order for mining companies to engage with women's organisations in accordance with a feminist understanding of due diligence regulation, they need to develop an intersectional understanding of the place of women within company-community interactions. This means for mining companies to recognise not only their role in ongoing oppression of women, but also the imbalances of power that emerge from disparities between their financial resources and those of women's organisations, as well as between those of local and global organisations. These disparities, indeed, may increase the inability of women's representatives to voice their concerns because of the power differentials in negotiations.

In conclusion, despite specific hazards that may emerge in relationships between companies and women, the entry of women and women's organisations into the regulatory sphere is essential. It ensures that mining companies self-regulate on due diligence in a way that fully grasps risks of sexual violence and responds effectively to the concerns of women and survivors. Despite often having sophisticated community consultation policies, however, the

[78] Lahiri-Dutt (n 51) 530.
[79] Grosser, 'Feminist Perspectives and Women's NGOs' (n 53) 78.
[80] See, eg, Horowitz (n 71); Laine Munir, 'Gender Roles in Nigeria's Non-Violent Oil Resistance Movement' (2020) *Canadian Journal of African Studies / Revue canadienne des études africaines* 1.
[81] Jenkins and Rondón (n 9) 8.
[82] Ibid 14.
[83] Horowitz (n 71) 11.

practice of mining companies has thus far been lacking in comprehensive and relevant engagement with women. At the same time, as parts of a multi-layered system of regulation, additional civil society, international and State regulation can mitigate these limitations by exerting constant pressure on mining companies to comply with enhanced due diligence standards.

IV STATE COOPERATION AND CORPORATE DUE DILIGENCE

Civil society is important in monitoring and influencing State regulatory practice. However, I put less emphasis in this section on the varied interactions between public interest groups and States than I did on the impact of women regulators on corporate self-regulation. There are two reasons for this. First, regulation theorists recognise that the primary stakeholders in effective regulation of corporate conduct are companies themselves. In that sense, effective due diligence regulation happens chiefly internally to companies. States and civil society stakeholders act to make internal due diligence processes more responsive to gender concerns by continually reviewing business' human rights performance and by regulating to hold them accountable for the actual form and impacts of these due diligence processes.[84] Second, in this section I focus on the role of civil society in making legislation, which is a form of monitoring of State regulation by civil society but does not encompass the full extent of that power. This position is in line with the focus that was put in Chapter 7 on the potential of the law in influencing corporate self-regulation and in ensuring stronger compliance with international and domestic standards as well as social expectations on preventing risks of mining-related sexual violence. It is also coherent with what has been identified as one of the outstanding issues in relation to the impacts of mining on women: the lack of comprehensive legislative frameworks on women's work and lives in and around mines.[85]

The importance of the State collaborating with civil society, specifically women and women's groups, in legislative processes has recently been reaffirmed both in the context of women's rights and in the business and human rights debate. The CEDAW Committee, in relation to violence against women, recommends that States

> [d]evelop and evaluate all legislation, policies and programmes in consultation with civil society organisations, in particular women's organisations, including those that represent women who experience intersecting forms of discrimination. States parties should encourage cooperation among

[84] Parker and Howe (n 38) 297.
[85] Lahiri-Dutt (n 51) 524.

> all levels and branches of the justice system and the organisations that work to protect and support women victims/survivors of gender-based violence, taking into account their views and expertise.[86]

Similarly, according to the UN Working Group on Business and Human Rights, 'States should ensure the participation of women and women's organizations in taking legal and policy measures to implement […] the Guiding Principles',[87] including in 'developing and updating laws and policies'.[88]

These propositions are significant in a context wherein most States have a deficit of laws that effectively protect women from violence, but also in an environment in which States are increasingly looking into developing mandatory due diligence domestic laws and policies. Indeed, they directly recognise the transformative power of civil society, and notably women and women's organisations, in shaping national regulatory initiatives. This regulatory influence in States' legislative processes may take several forms. Public interest groups may influence legislation, initiate legislative processes or participate in the implementation of legislation.[89] In relation to human rights due diligence, in particular, civil society has demonstrated the value it places on State regulation to incentivise corporations to develop and implement strong due diligence processes.[90] In that sense, it has led numerous campaigns calling for mandatory human rights due diligence laws across domestic jurisdictions.[91]

From a regulatory perspective, empowering civil society to contribute to policy- and law-making around the prevention of sexual violence through human rights due diligence is thus essential. Because the State, as meta-regulator, has a direct function in facilitating self-regulatory efforts, prescribing specific goals to mining companies or mandating the use of monitoring and enforcement mechanism,[92] women and women's organisations should play a regulatory role to ensure that the regulatory power of the State is exercised in accordance with feminist goals. At the implementation level, they may be instrumental in shaping discourses and distributing resources in order to incite mining companies to self-regulate to implement legislative standards. In other words, they may provide additional guidance to mining

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[86] *CEDAW General Recommendation 35* (n 72) [48].
[87] *Gender Dimensions of the UNGPs* (n 45) Principle 1 [2].
[88] Ibid Principle 3 [6].
[89] Percival and Zhao (n 20) 156 and 162.
[90] Smit et al (n 28) 89 and 135.
[91] Ibid 171. See, eg, Business and Human Rights Resource Centre, *Switzerland: Responsible Business Initiative Rejected at Ballot Box despite Gaining 50.7% of Popular Vote* < https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/>; Tiphaine Beau de Loménie, *Due Vigilance Reference Guidance* (Sherpa, 2019).
[92] Tusikov (n 16) 342.

companies on implementing the law in such a way that corporations are equipped to identify risks of sexual violence in their operations and create effective preventative structures and processes. In fact, civil society may be, on occasions, better placed than States to ensure the implementation of the law, in particular where the State lacks capacity and the means to respond to corporate criminality and abuses. In these situations, regulatory theorists recommend that States 'enrol' civil society to step in to compensate the limitations of the State in innovative ways.[93]

Empowering women and women's organisations to enter the State regulatory sphere is also relevant from a feminist perspective. Feminist writers have demonstrated that the law responds, to a certain extent, to changes in people's attitudes, themselves influenced by feminist critiques and movements.[94] According to Andrea Cornwall and Anne Marie Goetz, '[f]eminist organizations have a key role to play in broadening opportunities for the articulation of gender-transformative agendas in both traditional and "new" democratic spaces'.[95] In this context, women and women's organisations, as mentioned above, are in a privileged position when it comes to influencing State legislation towards gender-responsive due diligence.

In parallel, while it is fundamental to recognise the regulatory role of women, women's groups cannot be privileged over the State as a means of achieving feminist policy outcomes.[96] Indeed, in its most intrusive form the influence of public interest groups can be used as an excuse by the State to disregard its crucial role in implementing – and forcing mining companies to implement – women's right to live free from violence. So far, indeed, the monitoring of corporate human rights due diligence has been primarily operated by the private actions of individuals and civil society rather than by States.[97] A feminist understanding of State regulation suggests that the 'public', 'male-oriented' governmental sphere opens to women's concerns in mining operations. In other words, while women may contribute to shaping and implementing the law in line with feminist objectives, the primary responsibility for doing so lies with the State. Similarly, whereas some States may delegate some of their responsibilities

[93] Gabrielle Simm, 'Regulating Sex in Peace Operations' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 415, 423.
[94] See, eg, Rosemary Auchmuty and Karin van Marle, 'Special Issue: Carol Smart's Feminism and the Power of Law' (2012) 20(2) *Feminist Legal Studies* 65; Christina Ewig, 'The Strengths and Limits of the NGO Women's Movement Model: Shaping Nicaragua's Democratic Institutions' (1999) 34(3) *Latin American Research Review* 75.
[95] Andrea Cornwall and Anne Marie Goetz, 'Democratizing Democracy: Feminist Perspectives' (2005) 12(5) *Democratization* 783, 797.
[96] See, eg, Marian Sawer, 'Constructing Democracy' (2010) 5(3) *International Feminist Journal of Politics* 361.
[97] Smit et al (n 28) 209.

to women's organisations, in a regulatory environment the expectation is that all layers of regulation work concurrently. This means, for example, that in the face of obstacles generated by lack of funding, or administrative burdens, civil society organisations are supported by the State to increase their political agency and contribute to the State's gender-transformative agenda.

V CONCLUSION

In this last substantive chapter, I focused on civil society, marginalised in international business and human rights instruments but crucial in reinforcing the regulation of human rights due diligence pursuant to feminist aims. In fact, theorist of responsive and meta-regulation acknowledge that civil society offers significant tools and strategies to monitor both the due diligence practices of mining companies and the policy and lawmaking activities of States. In relation to corporate due diligence, civil society has the capacity to increase the visibility of women's experiences of sexual violence in large mining operations, and has used this ability on several occasion. One hundred and nineteen survivors in Porgera, for example, have organised and addressed the UN Forum on Business and Human Rights to shed light on the involvement of Barrick Gold in sexual violence against them, placing pressure on the mining giant to increase its responsiveness to risks for women in its projects.[98] Civil society, particularly women's organisations, also has a significant role – both as regulator and influencer of corporate self-regulation – in ensuring that mining companies' due diligence policies and practices are developed and implemented to their full preventative potential. While, arguably, public interest groups may have more impact by working directly with mining companies, they also have a role in shaping States' legislation to create stronger incentives for mining companies to address risks of sexual violence in their operations.

By analysing the regulatory function of civil society, I have detailed how it is part of a system of regulation wherein several stakeholders exercise countervailing and complementary powers. Although the focus of both regulatory theories and the business and human rights debate is on corporate due diligence self-regulation, the practices of corporations may be framed and enforced by States and civil society. Similarly, international law and civil society may intervene to respond to States' political and economic incentives that may impede their willingness to

[98] *Porgera Women Send Message to UN Forum on Business and Human Rights* (Directed by MiningWatch Canada, 2016).

regulate corporate conduct effectively. Finally, civil society, including feminist organisations, has been vocal about strengthening internal standards on business and human rights, leading to increased interest from all stakeholders involved in addressing the specific impacts of business activities on women.[99]

[99] See, eg, The Feminists for a Binding Treaty*, Integrating a Gender Perspective into the Legally Binding Instrument on Transnational Corporations and Other Business Enterprises: Comments on the Zero Draft Proposed by the OEIGWG Chair* (Submission, 5 October 2018).

CHAPTER 9: CONCLUSION

I INTRODUCTION

Personal questions about the relationships between large-scale mining, women's rights and regulatory solutions to address mining-related abuses against women emerged years before I started writing this thesis. In 2013, as a Project Manager for the organisation Partnership Africa Canada (now Impact),[1] I worked closely with civil society organisations involved in mineral resources governance in the Great Lakes region of Africa. Through our conversations and mine site visits, I could perceive that mining operations, large and artisanal, had differential impacts on women, although I was unable to put 'academic' words on what I was witnessing. It was also at that time that I came across the international instruments that constitute the now well-known debate on business and human rights. In reality, this thesis is as much for me as it is to contribute to international legal scholarship and to improve the lives of women living and working in and around mine sites, although I am well aware that my contribution to this last issue has limitations.

I thus began this thesis by answering my own interrogations. How are women in mining communities particularly affected by large-scale mining operations? Is sexual violence, an issue of long-term interest to me, an outcome of industrial mining? To what extent? Are multinational mining companies themselves involved in perpetrating sexual violence against women? In doing so, I realised that others before me had asked similar questions,[2] although, to my surprise, sexual violence seemed to be less of a concern to many scholars than other impacts of mining on women such as endangered livelihoods, displacement and health risks. Similarly, significantly less literature was available on the effects of large-scale mining on women than on those of artisanal and small-scale mining.

The objective of this thesis has been to identify what can be learned, in relation to business and human rights, from the experiences of women in five prominent cases where multinational mining companies have been accused of involvement in sexual violence in communities of operations. Guided by the concept of corporate human rights due diligence, this thesis proposes

[1] Impact, *Impact* <https://impacttransform.org/en/>.
[2] See, eg, Penelope Simons, 'Unsustainable International Law: Transnational Resource Extraction and Violence against Women' (2017) 26 *Transnational Law & Contemporary Problems* 415.

a new approach to due diligence. This approach sheds light on regulatory mechanisms that may reinforce the potential for due diligence to prevent risks of mining-related sexual violence in keeping with feminist objectives. These objectives include making women's intersectional experiences of mining and of sexual violence more visible, and better addressing women's concerns.

In the following sections, I outline the main arguments and findings of my thesis. I then reflect on its theoretical and practical implications. I locate my findings in broader debates on large-scale mining and on business and human rights. I also consider how this thesis may contribute to future legal scholarship and discuss possible avenues for further research on the interactions between women, mining and business and human rights.

II OUTCOMES OF THE THESIS

Based on five examples implicating the multinational mining companies Anvil Mining, Monterrico Metals, Hudbay Minerals and (in two cases) Barrick Gold, I demonstrated that sexual violence is a systematic outcome of large mining projects. Among other factors, this situation is caused by the involvement of mining companies themselves in sexual violence. Using the definition elaborated in guiding principle 13 of the UNGPs, I identified several patterns of corporate involvement in sexual violence. Most commonly, sexual violence has been used against local women by public or private security forces employed or contracted by mining companies. In other cases, like those of Anvil Mining and Monterrico Metals, the companies were accused of complicity in sexual violence through their instrumental association with State armed forces. Significant knowledge gaps persist regarding the patterns and extent of mining-related sexual violence, which calls for further research and data collection on mining-related cases of sexual violence. However, increased risks of sexual violence systematically accompany large mining projects.

Having established the context of my research, I then turned to the core of my argument and answered my first research question: is human rights due diligence an effective tool to prevent and respond to risks of mining-related sexual violence? Replying to this interrogation led me to conduct two types of analysis. In a process which I believe is an original contribution to the development of business and human rights as an interdisciplinary academic field, I approached corporate human rights due diligence from a theoretical point of view. I found that human rights due diligence may be more effective in protecting women's rights from corporate abuse if

designed and evaluated through a method of analysis that draws on both regulatory and feminist theories. This approach constitutes the 'feminist regulatory framework' that is used as a tool throughout my thesis. I considered ways to reinforce regulatory due diligence mechanisms through a feminist lens, and to achieve feminist objectives regarding mining-related sexual violence via better regulation. Using this feminist regulatory framework helped me to evaluate gaps between human rights objectives laid out in international instruments and ineffective regulatory outcomes for women.

Then, in chapters 4 and 5, I reviewed the international standards on business and human rights that lay the foundations of corporate human rights due diligence, and reached two conclusions. First, international instruments support patterns of discrimination against women. They marginalise women's experiences of mining – and largely business – activities, and make sexual violence an exceptional risk of mining operations, despite research demonstrating its systemic character.

Second, building on these findings, I considered the notion of human rights due diligence and each of its constitutive elements to identify whether this specific process could effectively prevent sexual violence in large mining projects. I found that, despite international standards designing human rights due diligence as a response to *all* business-related human rights abuses, it fails to deliver on its promises to protect women from violence. In fact, each of the steps included in a due diligence process contain significant loopholes that can allow mining companies to design and implement due diligence in a way that excludes or inappropriately addresses sexual violence. I deduced that to be effective in preventing sexual violence, mining companies' due diligence processes need to go further than the measures prescribed by international instruments. Feminist expectations suggest they should instead take the form of comprehensive, ongoing, systematic and gender-responsive strategies aimed at preventing current and future risks for women.

As human rights due diligence, in its present form, is not effective in preventing sexual violence in large-scale mining, I turned to examine what regulatory schemes may support stronger due diligence mechanisms. I determined in chapters 6, 7 and 8 that gender-responsive due diligence processes may be achieved by reinforcing three distinct but complementary systems of regulation to align them with feminist goals. This scheme encompasses non-State regulators and strategies that are generally considered outside the scope of international law. However, it does not dismiss necessary efforts to reinforce State regulation, including through international

initiatives aimed at creating further State obligations in relation to the activities of corporations. The draft treaty on business and human rights that is currently being negotiated is an example of such initiatives. What this scheme does, is recognise the need to bolster corporate and civil society systems of regulations, *concurrently* with State law. This approach offers responses to recurring limitations of State legislation on sexual violence, and acknowledges the significance of feminist non-State regulation in preventing sexual violence more effectively.

The first regulatory mechanism, corporate self-regulation, is recognised in business and human rights as a cornerstone of due diligence. Yet, as a voluntary process, it contributes in multiple way to perpetuating sexual violence in mining communities. Perceiving self-regulation as part of a meta-regulatory system provides responses to these impediments. Allowing the State, as meta-regulator, to frame and evaluate self-regulation constitutes an opportunity to limit corporate tendencies to self-interest and cosmetic compliance with domestic and international standards. From a feminist perspective, the limitations of corporate self-regulation can also be mitigated by encouraging mining companies to align their due diligence practices with international human rights law and by increasing the role of women as corporate regulators.

The meta-regulatory role of the State is discussed in Chapter 7. By designing laws that specifically recognise the impacts of mining operations on women and that focus on the prevention of sexual violence, the State has a crucial role in monitoring corporate practice and ensuring its compliance with enhanced, gender-responsive international and domestic due diligence law. At the same time, both States and mining companies have political and economic incentives that may impede their willingness to regulate effectively. To address these concerns, I relied on the regulatory functions of civil society, including women's groups and organisations, to make risks of sexual violence in mining projects visible, to monitor State and corporate regulatory practices, and to intervene in self-regulation and law-making. As a third layer of regulation, civil society has an important role in pressuring and influencing other regulators to develop strategies to respond to women's concerns better, and to prevent sexual violence in mining operations.

III IMPLICATIONS OF THE RESEARCH

While there are a number of valuable lessons identified in this thesis, there are also limitations to this project that need to be taken into account. Indeed, this research is very narrow in scope. It focuses on human rights due diligence, large-scale mining and sexual violence to the exclusion of many other concerns rooted in the business and human rights, mining and women's rights spheres. From the perspective of an international lawyer, however, this research raises questions about the nature of international law not as a State-centred system but, instead, as an environment in which multiple State and non-State regulators interact constantly and exercise countervailing powers.

The business and human rights debate has opened the field for such reflections, albeit in a very cautious way. Under the UNGPs, for example, the duties of States are a mere reflection of existing norms of international human rights law, while corporations are only attributed 'responsibilities' to respect human rights. In the same vein, the Special Representative has expressed the view that business and human rights regulatory initiatives did not represent an occasion to provide multinational corporations with international legal personality.[3] In practice, however, along States, corporations and civil society have been and still are highly influential in shaping understanding of the way several types of regulators both conflict and work together to frame business conduct in relation to human rights. States have developed international standards and have begun legislating on mandatory due diligence; civil society has been very active in monitoring corporate compliance with international standards and shaming failing companies; mining companies have involved NGOs and other public interest groups into their due diligence and human rights self-regulatory processes.

In this context, both regulatory theories and the international community have recognised the essential role of the State as a guardian of human rights interests. Yet, when examined in the context of sexual violence, in mining but also generally, States have largely failed in their duty to protect women. As demonstrated earlier, international human rights instruments are still unclear as to what sexual violence is prohibited. States' legislative practice regarding sexual violence is uneven and generally ineffective in preventing sexual violence committed by or with the contribution of their individual and corporate nationals. Mining companies have been

[3] John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/4/035 (9 February 2007) [44].

involved in acts of sexual violence and States have done little or nothing to stop the wrongdoing. Thinking about international law as a mechanism involving several complementary layers of regulation may provide some answers to the deficiencies of the State in the context of large-scale mining. It allows us to consider whether stronger recognition of the influence of non-State regulators, and better efforts in building their regulatory capacity according to feminist precepts, may contribute to better human rights outcomes for women. In that sense, several scholars propose that regulatory strategies aimed at improving business performance with respect to specific human rights be systematically decided through multistakeholder initiatives.[4]

Another contribution of this thesis is to highlight how feminist concerns, including concerns regarding sexual violence, relate to the business and human rights sphere and the mining industry. Feminist international legal scholarship has been instrumental in making women's rights and women's issues more visible globally. Yet, feminist lawyers seem to have been tiptoeing in the business and human rights arena. More specifically, they have been present from the inception of the debate,[5] but their voices have not been heard enough until recently. This may be because, as I argued in Chapter 3, the theoretical foundations of business and human rights – the regulatory scholarship – have not addressed gender issues sufficiently in the context of international law. It may also be because international human rights mechanisms intrinsically reinforce the unequal position of women under international law.[6]

The fact remains that international instruments on business and human rights have devoted insufficient attention to women' experiences of business activities. Since the beginning of the debate in the 1970s, and eight years after the adoption of the UNGPs, the first significant attempt to integrate women's concern in business and human rights has been the work of the UN Working Group on Business and Human Rights, which produced in 2019 a much-needed report on the gender dimensions of the UNGPs.[7] Although it contains flaws that I have exposed in this thesis, this report is important because, as an influential international document, it forces

[4] See, eg, Scott Jerbi, 'Assessing the Roles of Multi-stakeholder Initiatives in Advancing the Business and Human Rights Agenda' (2012) 94(887) *International Review of the Red Cross* 1027; Dorothée Baumann-Pauly et al, 'Industry-specific Multi-stakeholder Initiatives that Govern Corporate Human Rights Standards: Legitimacy Assessments of the Fair Labor Association and the Global Network Initiative' (2017) 143(4) *Journal of Business Ethics* 771.
[5] See, eg, The Feminists For a Binding Treaty collective.
[6] On this point, see Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011).
[7] Human Rights Council, G*ender Dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the Issue of Human rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/41/43 (23 May 2019).

businesses to recognise that their activities create specific risks for women. It has also shaped the drafting of the proposed treaty on business and human rights that, after two previous inconclusive attempts, now includes specific requirements for businesses to 'integrat[e] a gender perspective […] in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experienced by women and girls'.[8]

It may be years before the draft treaty is finalised. There is also uncertainty as to whether home States where multinational mining companies are incorporated, given their general aversion to the drafting process,[9] will become parties to a binding instrument. Yet, by highlighting a gender perspective on human rights due diligence, the members of the UN Working Group and the treaty negotiators seem to have opened the debate over greater corporate responsibility towards women's rights. Concurrently, as high-level documents, the Working Group's report and a potential treaty provide limited guidance to States and companies about what a gender perspective on due diligence entails. By using the specific example of sexual violence, this thesis addresses some of these gaps by detailing where current corporate practice is failing; how this practice can be improved; and what regulatory partnerships may be created, developed or nurtured. It also contemplates avenues on how to integrate survivors, women and feminist men into the regulatory sphere as both regulators and influencers of regulation. This thesis thus provides considerations and recommendations that may hold relevance for future initiatives. Such initiatives may, for example, build on existing research, advocacy and the work of the Working Group to develop enhanced international documents defining States and corporations' responsibilities regarding women's rights in business. These documents could, for instance, elaborate on how corporations can collect targeted information to address systemic but invisible risks against women, including sexual violence. As I recommend in this thesis, they could also emphasise the necessity of States developing *preventative* legislation on sexual violence, according to the preventative nature of human rights due diligence.

Likewise, this thesis contributes to expanding knowledge about the role and experiences of women in mining. In fact, although many scholars, including legal academics, have studied gender issues, including sexual violence, in both large-scale and artisanal mining, a very

[8] OEIGWG, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (Second Revised Draft, 6 August 2020) art 6(3).
[9] See Chapter 7.

limited number have located their findings within business and human rights.[10] More significantly, from the perspective of an ex-NGO worker interested in the practical implications of academic research, imagining the findings of this thesis making their way, maybe in more digestible form, to the desks of corporate regulators, does not seem entirely inconceivable. In recent years, large mining companies have demonstrated growing interest in gender issues and have been actively seeking information and recommendations on ways to address the impacts of their activities on women.[11]

IV AVENUES FOR FUTURE RESEARCH

Some of the findings of this thesis may be extended to other contexts, other industries and other violations of women's human rights. In the natural resources sector, for instance, oil and forestry companies have been accused of involvement in sexual violence in their communities of operation.[12] These allegations raise questions that have parallels with the issues examined in this research. The form and extent of this transposition is material for further research by lawyers, but also by scholars in other academic fields, who may identify the strengths and flaws in my arguments.

The business and human rights sphere is rapidly evolving and considerable work remains to be done in relation to the place of women in this debate, and to their experiences of corporate activities. This includes further investigation of the content and practical implementation of human rights due diligence, a concept that has gained popularity but that still creates confusion and occasions questions on the part of State, corporate and civil society regulators. Research that is more empirical than mine – that includes, for example, interviews with women in communities of operation – would also constitute a significant contribution to both academic and corporate knowledge.

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[10] See, eg, Penelope Simons and Melisa Handl, 'Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction' (2019) 31(1) *Canadian Journal of Women and the Law* 113.

[11] For example in 2018, the World Bank Group held its first conference on 'Gender in Oil, Gas and Mining', which gathered several representatives from multinational mining companies. The World Bank, *Events: Gender and Oil, Gas and Mining: New Frontiers of Progress, Challenges and Solutions* <https://www.worldbank.org/en/events/2018/03/07/gender-and-oil-gas-and-mining-new-frontiers-of-progress-challenges-and-solutions#2>.

[12] See, eg, *John Doe I et al v Unocal Corp et al*, 395 F 3d 932 (9th Cir, 2002); European Center for Constitutional and Human Rights, *No Investigation against Danzer Manager over Human Rights Abuses against Community in DRC* < https://www.ecchr.eu/en/case/no-investigations-against-danzer-manager-over-human-rights-abuses-against-community-in-drc/>.

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