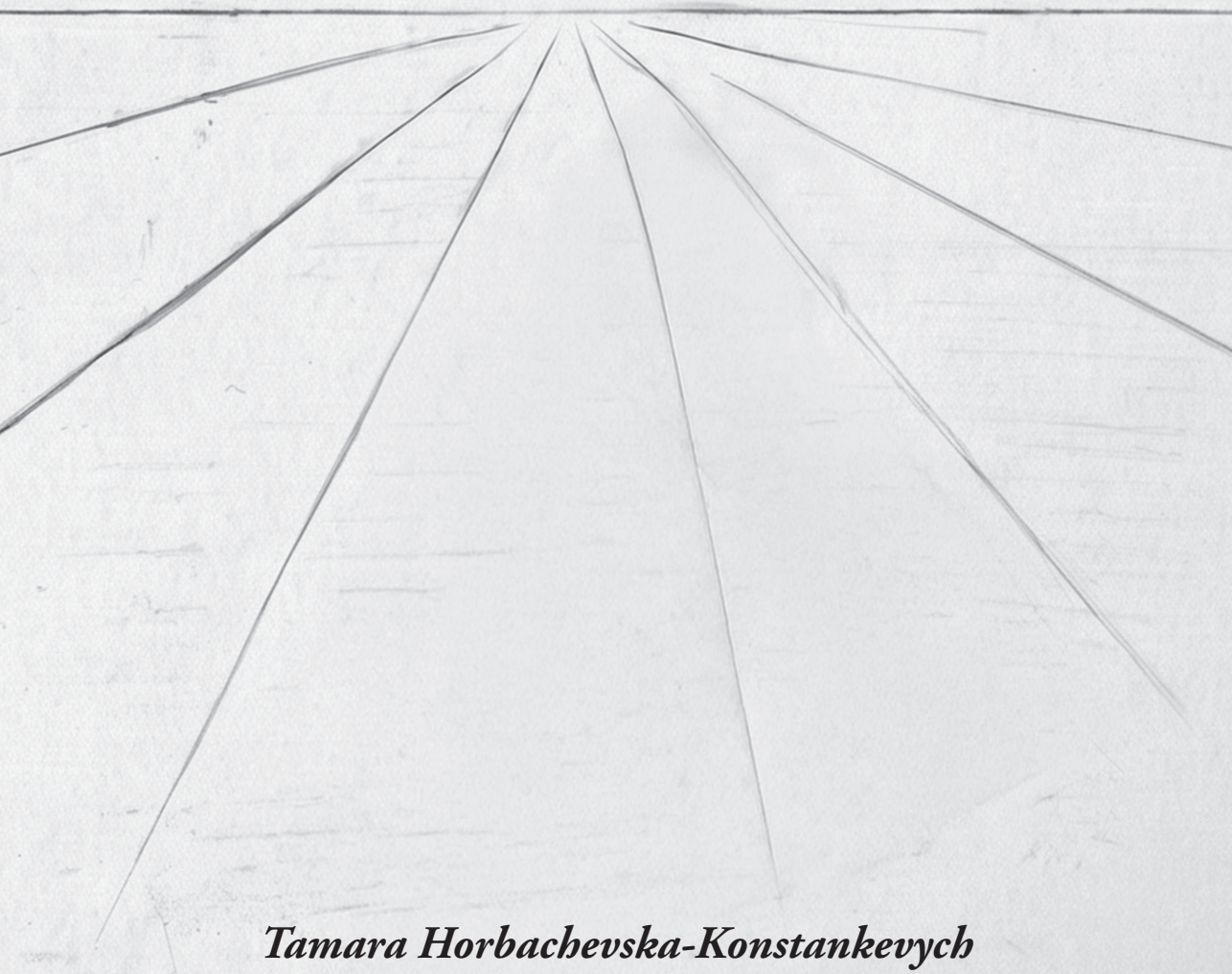
The Role of Private Actors in SDGs Implementation:

Business, Gender Equality and Freedom of Religion or Belief in Ukraine



Tamara Horbachevska-Konstankevych

Propositions

1. Businesses are responsible for protecting human rights.

(this thesis)

2. Human rights law is neither neutral, nor universal.

(this thesis)

3. Anonymity in a peer-review process is at odds with scientific integrity.

4. Legal questions require interdisciplinary thinking.

5. The stronger the attack on human rights, the greater their protection.

6. Only the victims of war can understand its reality.

Propositions belonging to the PhD thesis entitled:

The Role of Private Actors in SDGs Implementation: Business, Gender Equality and Freedom of Religion or Belief in Ukraine

Tamara Horbachevska-Konstankevych

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The Role of Private Actors in SDGs Implementation: Business, Gender Equality and Freedom of Religion or Belief in Ukraine

Tamara Horbachevska-Konstankevych

Thesis committee

Promotor

Prof. Dr Nadia Bernaz
Professor in Law
Wageningen University & Research

Supervisors

Dr Olena Uvarova
Associate professor, Department of Human Rights and Legal Methodology
Yaroslav Mudryi National Law University, Kharkiv, Ukraine

Dr Dmytro Vovk
Associate professor, Department of Human Rights and Legal Methodology
Yaroslav Mudryi National Law University, Kharkiv, Ukraine

Other members

Dr Judith van Leeuwen, Wageningen University & Research
Prof. Dr Mykola Gnatovskyy, European Court of Human Rights, Strasbourg, France
Prof. Dr Joshua Castellino, Brunel University London, United Kingdom
Dr Claire Bright, Nova Law School, Portugal

This research was conducted under the auspices of the Graduate School Wageningen School of Social Sciences.

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Tamara Horbachevska-Konstankevych

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Татові

'Do you think of yourself as poor? I am not poor, I am weak'—

Question to, and response of, residents of squatter settlements
in Salvador da Bahia in Brazil

A Frediani 'Sen's Capability Approach as a framework to the practice of development' (2010)
Development in Practice 20(2) 173–187

FOREWORD

I started writing this PhD thesis in the autumn of 2021. Listening to the growing number of worrying voices about hundreds of thousands of russian[1] troops over the Ukrainian border, we still could not believe a full-scale war was possible in the 21st century. Yet it happened. Since the Revolution of Dignity in 2013 and the first russian invasion of Ukraine in 2014, we have learned what freedom, dignity, and human rights mean in reality. However, no one had expected what was awaiting us in 2022 following the russian full-scale invasion of Ukraine.

Losing friends in the combat zone and heavily bombed Ukrainian cities, advocating for the release of close ones from russian captivity, and living in constant fear for my husband who is continuously fighting in the combat zone significantly affected this PhD and my positionality. Some parts of this manuscript were written 15 kilometers from the frontline in the Zaporizhzhia region, in the South of Ukraine, which contributed to my understanding of what the terms sustainability and human rights existentially designate for people who can lose their lives at every moment.

Consequently, this PhD changed remarkably from the initial concept. War brings unpredictable and often unbearable burdens that society needs to reflect in legislation, policymaking, and practice. Bearing that in mind, a part of this manuscript is dedicated to discovering how law can grasp heightened human rights risks in war and post-war, with a specific focus on non-state actors. Being unforeseen, this new angle of the PhD majorly contributed to the framing of changing business actors' responsibilities in human rights protection and reaching sustainability generally and in Ukraine specifically.

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[1] In Ukraine, using a lowercase 'russia' is a form of protest against the war. The National Commission for State Language Standards of Ukraine has officially allowed using this in unofficial texts as a way to protest the war. See: https://mova.gov.ua/news/napysannia-nazv-rosiiska-federatsiia.

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events inspired many changes in my thinking and understanding of the law, which consequently changed the entire writing process of this PhD thesis. I am also deeply grateful to all respondents – experts and business representatives – for participating in the empirical part of this PhD thesis and providing invaluable insights that helped in shaping the results of the research.

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I want to express my deep gratitude to the Ukrainian Armed Forces for allowing me to live in a free Ukraine.

ABBREVIATIONS

BHR Business and Human Rights

CA Capability Approach

CSDDD Corporate Sustainability Due Diligence Directive

FoRB Freedom of Religion or Belief

GE Gender Equality

hHRDD Heightened Human Rights Due Diligence

HRDD Human Rights Due Diligence

LGBT+ Lesbian, Gay, Bisexual, and Transgender/Transsexual People

MDGs Millennium Development Goals

SDGs Sustainable Development Goals

SOEs State-Owned Enterprises

SOGI Sexual Orientation and Gender Identity

UNGPs United Nations Guiding Principles on Business and Human Rights

UNHRC UN Human Rights Council

UNWG UN Working Working Group on the issue of human rights and transnational corporations and other business enterprises

Chapter 1

Introduction

1. Introduction

This PhD research explores the role of private actors in safeguarding the capabilities of both present and future generations. It argues for a shift in corporate responsibility towards respecting, protecting, and fulfilling human rights using the capability approach as a normative framework. This approach offers guidance on how private actors can meaningfully engage in the implementation of the Sustainable Development Goals (SDGs). Furthermore, the interpretation of the SDGs based on the capability approach that I propose in this research has implications for the positive human rights responsibilities of business actors. Under this interpretation, they should not merely avoid harming individuals and communities, but also protect and fulfil human rights when it is necessary to safeguard human capabilities and where they can be reasonably expected to do so.

To contextualize ongoing debates on the role of business in society as an influential actor able to contribute to human rights protection and sustainable development, this research focuses on two human rights: gender equality and freedom of religion or belief. It examines their interconnections within both the business and human rights, and the sustainability agendas.[1] The empirical focus is on Ukraine—my home country—where business actors currently face a complex set of challenges in contributing to achieving the SDGs amidst ongoing war and economic transformation. Ukraine is a unique case: a state enduring the profound disruption of an existential war, while simultaneously undertaking the long-term, strategic process of integration into the European Union. Focusing on businesses operating in Ukraine, this PhD addresses how private actors can ensure respect, protect, and fulfil gender equality and freedom of religion or belief as basic human capabilities. The PhD uncovers a shift in business actors' human rights responsibilities and explores the prospects of developing them further into binding obligations to protect and fulfil human rights under certain circumstances.

The scope of business responsibilities in the human rights field is at the core of all four substantive chapters of this PhD thesis. The first chapter proposes a theoretical framework that justifies the expansion of the concept of corporate human rights responsibility, leading to establishing legal obligations, thus advancing the current legal and policy framework on business and human rights. The second chapter presents an empirical investigation of how companies perceive conflicting social expectations concerning certain human rights, such as gender equality and freedom of religion or belief. It specifically examines expectations related not only to the corporate responsibility to *respect* these rights, but also, in some contexts, to businesses' potential roles in *protecting, fulfilling, and even promoting* them. The

[1] FoRB and GE are situated within specific SDGs, notably SDG 5 (Gender Equality, targets 5.4 and 5.5), SDG 8 (Decent Work and Economic Growth, targets 8.5 and 8.8), SDG 10 (Reduced Inequalities, targets 10.2 and 10.3), and SDG 17 (Partnerships for the Goals, target 17.14).

third chapter analyses multiple responsibility burdens women face in wartime, and how women's deteriorated capabilities should be reflected in business actors' policies and practices to ensure sufficient safeguards for women's rights during war and post-war recovery. Finally, the fourth chapter discusses how positive actions such as gender quotas in corporate boards can contribute to reaching greater substantive gender equality.

Together, those chapters advance knowledge on the scope of business responsibilities in implementing human rights as a part of sustainable development both in Ukraine and globally. Before diving into the theoretical framework, the following *Background* section presents important context as well as key concepts used throughout the thesis.

1.1. Background and Key Concepts

1.1.1. Sustainable Development Goals, Sustainability Justice, and the Role of Private Actors

The Sustainable Development Goals, adopted by all UN Member States in 2015, reflect current societies' expectations regarding the scope of various actors' roles in achieving a safe and just space for present and future generations.[2] Back in 2000, the first attempt to introduce a unified vision of human well-being resulted in the creation of the Millennium Development Goals (MDGs).[3] The MDGs focused on issues of extreme poverty and equality in developing countries.[4] While being focused mostly on reducing poverty in the world,[5] the MDGs did not address the question of human well-being comprehensively.[6] By contrast, the SDGs highlight the importance of human capabilities to be fulfilled to ensure the full potential and opportunities of an individual in life and society.

The SDGs aim to address economic, social, and environmental issues with a view to ensuring intra-generational equity (distribution within different groups of people of the same generation),[7] and inter-generational equity (distribution of goods taking into account the interests of future generations).[8] They combine the common good with individual well-being, framing sustainability as a justice issue.[9] From this perspective, the SDGs represent concrete justice claims—conditions needed to secure fairness across time and address historical inequalities.[10] The Outcome document of the UN Conference on Sustainable Development held in at Rio de Janeiro in 2012, named 'The Future We Want', similarly elaborates about past inequalities and systematic injustices for groups such as women or indigenous groups, who may require positive actions are taken to ensure equality of

---

[2] D Griggs, M Stafford-Smith, O Gaffney, J Rockstrom, M Ohman, P Shyamsundar, W Steffen, G Glaser, N Kanie and I Noble, 'Policy: sustainable development goals for people and plane' (2013) 495(7441) *Nature* 305; S E Cornell, 'We Need to Talk About Gender in the "Safe Operating Space for Humanity"' in B Sjåfjell, C Liao and A Argyrou (eds) *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene* (Edward Elgar, 2022) 18.

[3] UN General Assembly *United Nations Millennium Declaration* (A/RES/55/2, 2000); United Nations *Millennium Development Goals Report* (2015) New York, USA: United Nations.

[4] Ibid.

[5] V Guibou, 'Critical analysis of the millennium development goals (MDGs)' (2017) *SSRN* 1.

[6] M Langford, 'A poverty of rights: six ways to fix the MDGs' (2013) *Health and Human Rights in a Changing World* 179-193.

[7] E Folkesson, 'Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest' (2013) 6 *Erasmus Law Review* 144.

[8] Pope Francis *Encyclical on climate change and inequality: On care for our common home* (Melville House, 2015).

[9] A Mahadi, 'Adopting the Capabilities Approach in Developing a global Framework for measuring Sustainable Development' (2012) *Examensarbete i Hållbar Utveckling* 31.

[10] K Stumpf, S Baumgärtner, C Becker and S Sievers-Glotzbach, 'The justice dimension of sustainability: A systematic and general conceptual framework' (2015) 7(6) *Sustainability* 7438 at 7448 and 7452; O Langhelle, 'Sustainable development and social justice: expanding the Rawlsian framework of global justice' (2000) 9(3) *Environmental Values* 295 at 309 and 316.

opportunities in comparison to other, more privileged groups.[11] Injustice throughout countries leads to the 'incapability' (intellectual, related to mobility, or self-sustainment deprivations) of human beings to prioritize outcomes of their life.[12] The emphasis is on disparities caused by numerous injustices 'in wealth, incomes and opportunities' in the past that were carried over into the present.[13] To this end, enhancing the capabilities of vulnerable groups becomes a crucial part of sustainability justice.[14]

Within the sustainability discourse, it is important to identify the respective roles of duty-bearers in reaching the SDGs and the normative frameworks that can legitimize such duties. The SDGs call for partnerships and for a transfer from mere refraining from infringements to active protection, where the private sector is an important actor in decreasing inequalities.[15] Specifically, the private sector is 'a critical driver of productivity, employment and growth' that must be accountable for delivering proclaimed sustainability commitments in corporate human rights policies instead of goal-washing practices.[16] The SDGs consist of specific targets related to the mutual reinforcement of policies by state and private actors such as 'eliminating discriminatory law, policies and promoting appropriate legislation, policies' (SDG 10: Target 10.3), and enhancing policy coherence for sustainable development (SDG 17: Target 17.14).[17] Furthermore, by emphasizing the need for societal actors to take positive actions to achieve sustainable development, the SDGs introduce a 'do more good' principle.[18] In particular, the SDGs 'strongly encourage this [private] sector to eliminate or stop their negative impacts on the human and their environment, enhancing their positive participation'.[19] In this way, reaching the SDGs 'might rest on a move towards corporate social obligation'[20] to protect human rights as new global sustainability goals demand new rules to make their achievement effective.

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11 *The Future We Want* UN Conference on Sustainable Development (Rio de Janeiro, Brazil, 2012); J Castellino, 'Fostering Inclusion for Ethnic, Religious, and Linguistic Minority Communities' in C Koppel (ed) *Untapped Power: Leveraging Diversity and Inclusion for Conflict and Development* (Oxford University Press, 2022) 236.

12 C Basta, 'From justice in planning toward planning for justice: A capability approach' (2016) 15(2) *Planning Theory* 205.

13 UN General Assembly *Political declaration of the high-level political forum on sustainable development* (Doc No A/74/L.2, October 2019) para 20.

14 Stumpf, Baumgärtner, Becker and Sievers-Glotzbach (n 11) 7440-7441.

15 UN Conference on Sustainable Development (n 13) para 244 and 268.

16 UN Secretary-General *Progress towards the Sustainable Development Goals: towards a rescue plan for people and planet* (Doc No A/78/80-E/2023/64, April 2023) 55.

17 Global Reporting Initiative *Business Reporting on the SDGs: An Analysis of the Goals and Targets* (United Nations Global Compac, 2017).

18 N Landrum, 'Stages of corporate sustainability: Integrating the strong sustainability worldview' (2018) 31.4 *Organization & Environment* 287.

19 A Rashed and A Shah, 'The role of private sector in the implementation of sustainable development goals' (2021) 23 *Environment, Development and Sustainability* 2937.

20 R Scheyvens, G Banks and E Hughes, 'The private sector and the SDGs: The need to move beyond 'business as usual'' (2016) 24(6) *Sustainable Development* 371.

The private[21] sector is influential in all spheres of social regulation. It enjoys almost unfettered access to resources and human capital across the world.[22] The SDGs envisage a significant role for businesses in ensuring their implementation. Furthermore, the SDGs are intertwined with the business and human rights (BHR) agenda in bringing businesses to greater responsibilities in human rights protection.[23] Consequently, the 'do more good' principle present in the SDGs extends the 'do no/less harm' approach enshrined in the BHR agenda.

1.1.2. Business and Human Rights Agenda

BHR as a field of study emerged from a critique of the 'business as usual' – a paradigm focused solely on growth without considering the social and environmental impacts of business activities.[24] The key international instrument in the field is the 2011 UN Guiding Principles on Business and Human Rights (UNGPs, see below). Distinctly shaped by Surya Deva, 'BHR is essentially about reorienting the role and purpose of corporations in society'.[25] BHR questions the scope of corporate responsibilities,[26] and the extent to which business actors can be

[21] The notions 'business actor,' 'businesses,' 'business' are used interchangeably throughout this PhD thesis. The PhD research uses the phrase 'business actor', a term that includes both private companies (sector) and state-owned enterprises (SOEs), because SOEs are also active and influential in Ukraine and play a significant role in achieving the SDG 2030 Agenda. This fluidity in the use of the terms is very common in BHR scholarship where the type of business, the exact legal status of the entities is less consequential than their impact on human rights. This contrasts with corporate law, where precise distinctions are drawn between different types of ownership etc. See: E Bukspan and A Kasher, 'Human Rights in the Private Sphere: Corporations First' (2018) *University of Pennsylvania Journal of International Law* 40 419; S J Kobrin, 'Private political authority and public responsibility: Transnational politics, transnational firms, and human rights' (2009) *Business Ethics Quarterly* 19(3) 349; J Martens, 'The role of public and private actors and means in implementing the SDGs: Reclaiming the public policy space for sustainable development and human rights' in M Kaltenborn, M Krajewski and Heike Kuhn (eds) *Sustainable development goals and human rights* (Springer, 2020) 207; J Mende, 'The public, the private, and the business-societal: A threefold approach to business responsibility for human rights' in M Stohl and A Brysk (eds) *A research agenda for human rights* (Edward Elgar Publishing, 2020) 155.

[22] T Horbachevska, J van Zeben and N Bernaz, 'A capability approach to the sustainable development goals: towards positive corporate human rights obligations' (2024) *Transnational Legal Theory*, 15(3) 465.

[23] J Gabriel and F Wettstein, '"Business and Human Rights" and the United Nations Sustainable Development Goals: Complementary or Conflicting Agendas?' (2021) 1; S Deva, 'Sustainable development: what role for the company law?' (2011) 8 *International and Comparative Corporate Law Journal* 76; K McPhail, 'Corporate responsibility to respect human rights and business schools' responsibility to teach it: Incorporating human rights into the sustainability agenda' (2013) 22.4 *Accounting Education* 391.

[24] A Ramasastry, 'Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability' (2015) *Journal of Human Rights* 14(2) 237.

[25] S Deva, 'From business or human rights to business and human rights: what next?' (2020) in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (The Edward Elgar, 2020) 1-21 at 12.

[26] I Kolstad, 'Human rights and positive corporate duties: the importance of corporate–state interaction' (2012) 21.3 *Business Ethics: A European Review* 276; C Bright and N Bueno *Mandatory human rights due diligence* (Edward Elgar Publishing, 2023). C Bright and K Buhmann, 'Risk-based due diligence, climate change, human rights and the just transition' *Sustainability* 13.18 (2021) 10454.

recognized as duty-bearers with positive responsibilities to protect human rights.[27] It encompasses discussions on the need to revisit the role of corporations in sustainable development and society in general.[28] This revamped role requires taking human rights and rightsholders seriously as 'corporations must have legally binding and enforceable human rights obligations as a precondition for doing business.'[29] The development of new binding legislation and the evolving BHR research agenda highlight that a sufficient level of human rights respect and protection within business activities can be achieved only by going beyond 'do no harm'. In this PhD thesis, I look at how both legal developments in the BHR field and contextual dynamics in Ukraine as a case study provide insights on how the role of businesses can be rearticulated to contribute to the achievement of sustainable development.

For the purpose of this PhD thesis, it is important to specify the terms 'responsibilities' and 'obligations' used in the text regarding the scope of business responsibilities in the human rights area. The UNGPs distinguish between the state *duty to protect* and the corporate *responsibility to respect* human rights. Such distinction is not coincidental and has important consequences for state and non-state actors' human rights responsibilities. First, under the UNGPs, the state duty to protect human rights is grounded in law, while the corporate responsibility to respect human rights is a societal expectation. Second, States should protect human rights against corporate abuse, while businesses should merely respect human rights. The responsibility of businesses to respect human rights is articulated as the necessity to refrain from infringing of human rights, or as 'do no harm'. However, one of the main arguments of this PhD thesis is that to reach sustainability, the responsibility of businesses to passively refrain from breaching human rights is *not enough*. Accordingly, situating my work within the sustainability discourse, I use the term 'responsibility' to refer to an extended scope of social expectations from businesses not only to respect, but also to protect and fulfil human rights. In addition, the word 'obligation' is used to capture the potential of the normative framework proposed in this PhD. In chapter 2, I propose to interpret the SDGs through the lens of the capability approach, which leads to solidifying the corporate responsibility to respect human rights as a legally binding obligation. Considered jointly, the SDGs and BHR frameworks interpreted through the capability approach led to the finding that, in addition to the responsibility to refrain from negative impact, business actors have to anticipate their positive impact on human capabilities. Therefore, achieving sustainability justice means businesses should *protect* and *fulfil – in other words*

[27] A Clapham, 'Rights and responsibilities: a legal perspective' (2006) 7 *PSIS special Study* 61; L Jakulevičienė and D Gailiūtė-Janušonė, 'The scope of legal expectations from business in human rights: carrot or stick?' *Entrepreneurship and Sustainability Issues* 8.2 (2020) 932.
[28] Deva (n 25) 5.
[29] Ibid, 11; S Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights-A Quiet (R) Evolution?' (2015) 32 *Social Philosophy & Politology* 247.

'actively' act. They should aim not only to *avoid negative* impacts but also to *bring more* opportunities for people they can reasonably protect.

While corporate involvement is essential to implement and achieve the SDGs, the SDGs do not articulate an explicit normative foundation for a positive corporate responsibility to protect human rights. In this PhD thesis I argue that using the capability approach as the explicit normative basis for the SDGs enables a broader interpretation and design of BHR instruments. I propose to align corporate human rights responsibilities with the core aim of sustaining human capabilities. In the end, this interpretation supports establishing a business obligation to protect human rights.

To substantiate this argument, I propose a critical analysis of existing BHR frameworks such as the UNGPs and of their limitations in addressing both 'ordinary' and 'heightened' human rights risks with a specific focus on corporate responsibility to respect, protect, and fulfill gender equality and freedom of religion or belief in Ukraine.

1.1.3. Gender Equality and Freedom of Religion or Belief as SDGs and Human Capabilities

Within this research, I focus on two fundamental human rights - gender equality (GE) and freedom of religion or belief (FoRB). GE guarantees equal enjoyment of rights, opportunities, resources, and responsibilities by all people, regardless of their gender. FoRB assures an individual's freedom to hold, change, or practice any religion or belief. FoRB and GE are also covered by SDG 5 Gender Equality; SDG 8 Decent work and economic growth; and SDG 10 Reduced inequalities.[30] While GE and FoRB are recognised as fundamental human rights requiring full protection,[31] the interplay of these two rights in the context of business activities is under-investigated.[32] Furthermore, although there are studies about gender equality in business activities, a limited number of investigations focus on the intersection of

[30] United Nations *Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development* (A/RES/71/313, 2017).

[31] M Handl, S L Seck and P Simons, 'Gender and intersectionality in business and human rights scholarship' *Business and Human Rights Journal* 7.2 (2022) 201; E Velasco-Balmaseda, L Izaskun and E Nagore, 'Corporate social responsibility as a framework for gender equality: mapping of gender equality standards for sustainable development' *Corporate social responsibility and environmental management* 31.3 (2024) 1905; G Clark and R E Snyder, 'Promoting Religious Freedom: A Corporate Social Responsibility' *Educação & LinguagEm* 17 (2014) 36.

[32] N Götzmann, J Bourke Martignoni, B Meyersfeld and H Kaur, 'From Formalism to Feminism: Gender, Business and Human Rights' *Business and Human Rights Journal* 7(1) (2022)1; P Otero-Hermida and H Gonzalez-Urango, 'Business engagement in gender equality policy: roles, contributions, and expectations.' *Journal of Public Policy* (2025) 1; M Bell, 'Bridging a Divide: A Faith-Based Perspective on Anti-Discrimination Law' (2020) *Oxford Journal of Law and Religion* 9.1.

gender and war within businesses activities, and few studies elaborate on how to enhance women's capabilities within business activities.[33]

The challenges in ensuring corporate respect for GE and FoRB are multifaceted.[34] The rise of undemocratic regimes, wars, regional conflicts, and environmental deterioration negatively affect GE and FoRB protection. In such challenging contexts, personal identities, including their gender, sexual orientation, and religion, are more than just individual characteristics. Consequently, the implementation of these two rights may face a wide range of challenges – from indirect discrimination to the direct prohibition of its manifestations in public and private spaces. The way the business handles various human identities may reflect the legal, cultural, and ideological realities of the society in which it operates. To situate these global challenges within this PhD, I focus on how businesses address issues such as the oppression of religious and/or sexual minorities; discrimination of these groups; the need to resolve conflicts between different human rights such as FoRB and freedom from discrimination based on sexual orientation and gender identity (SOGI)) at the corporate and community level under the pressure of conflicting social expectations; lack of FoRB, religious literacy, and gender in business policies and practices; deteriorated women's capabilities due to social crisis like war; the need to look for strategies to enhance women's agency within business activities. These aspects are covered into four substantive chapters of this PhD, and contribute to a wider debate on how business actors should reflect human rights and capabilities in their activities.

In the course of PhD, a full-scale russian war against Ukraine has started and still is significantly affecting the life of every Ukrainian citizen – abroad and residing in Ukraine. In this context, FoRB matters have been the subject of renewed public debates in Ukraine concerning ecclesiastical disputes and legal conflicts between different Ukrainian religious organizations (some of which have alleged connections with the aggressor state), their legal organization, and the impossibility of serving in the army due to religious convictions.[35] These pressing and relevant topics are at the core of Ukrainian law-making processes, jurisprudence, and scholarship.

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[33] N Kabeer, 'Gender, livelihood capabilities and women's economic empowerment: reviewing evidence over the life course' *Gender and Adolescence: Global Evidence (GAGE)* (2018).

[34] P Andrea, 'The EU Needs an RFRA: The Leftovers of Religious Freedom in the Case Law of the Court of Justice' *Canopy Forum*. https://canopyforum.org/2021/08/03/the-eu-needs-an-rfra-the-leftovers-of-religious-freedom-in-the-case-law-of-the-court-of-justice/ (accessed 14 July 2025); D Vovk 'Ukraine: How should government deal with conscientious objectors in wartime?' (2025), https://www.forum18.org/archive.php?article_id=2974 (accessed 15 July 2025); T Horbachevska, 'The Need for the Minimum Standard Requirement in the Protection of Freedom of Religion and Belief at the Workplace: The Case of Wabe and Mh Mueller Handels Gmbh v. Mj' *Law Ukr.: Legal J.* (2022) 162.

[35] D Vovk, 'Ukraine: How should government deal with conscientious objectors in wartime?' (2025), https://www.forum18.org/archive.php?article_id=2974 (accessed 5 September 2025); D Vovk, 'The Russia–Ukraine war, the Orthodox Church, and religious freedom' (2024) *Religion, State & Society* 52.4 431; E Clark and D Vovk (eds) *Religion during the Russian-Ukrainian conflict* (Routledge, 2020).

However, these topics, despite their importance, are not directly related to this PhD, which from the start has been about the role of the private sector. Consequently, initially planned as a project exploring the intersection of GE and FoRB within business activities in Ukraine, this project has shifted more towards gender-related issues.

Such a complex legal and social landscape places persons with a certain gender, sexual or religious identity at risk of violations of their rights to GE and FoRB. Therefore, contrary to the SDG imperative of leaving 'no one behind,'[36] FoRB and GE are at risk of 'being left behind' in corporate policies and practices and a more robust investigation on possible ways to enhance FoRB and GE's protection is required.[37] To do this, the law and policymakers need to revisit the role of business actors in reaching sustainable development. Consequently, businesses need to provide strategies to better protect and fulfill gender equality and freedom of religion or belief. Furthermore, as argued above, the sustainable development goal of leaving no one behind requires business actors, along with other actors, not only to control negative impacts but to ensure the enhancement of present and future human well-being. To do so, they must take into account capabilities and create more opportunities for affected communities and individuals. Such responsibility entails not only respecting certain human rights, but also taking positive actions to enhance human capabilities as a precondition for achieving sustainable development. In this PhD, I situate the responsibility of business actors to act positively to achieve sustainable development within the Ukrainian legal, political, ideological, and economic contexts.

1.1.4. The Case of Ukraine

Ukraine, as a country situated at the crossroads of Eastern Europe and the post-Soviet space, presents a compelling case of a state striving for European integration while grappling with the legacy of post-Soviet legal and institutional frameworks.[38] The Soviet legislation landscape was grounded in regulations, in which the collective interest prevailed over the individual/private; where the principle of the supremacy of the state prevailed over the rule of law; where human rights were perceived as an idea subordinate to state policy; and where human dignity and personal autonomy were not recognised as human rights and constitutional values requiring protection from the state or private actors.[39] This ideological legal

[36] UN Conference on Sustainable Development (n 13) para para 4, 31, 45 and 58.
[37] K Buhmann, *Human Rights: A Key Idea for Business and Society* (Routledge, 2021).
[38] It should be noted that the definition of the post-Soviet region is very conditional. We use this term to refer to countries that were part of the USSR, except for countries that have become EU members (Latvia, Lithuania, Estonia).
[39] D Vovk, 'Soviet Law and Political Religion' *Law as Religion, Religion as Law* (2022) 225; B Grodsky, 'Human rights activists and transitional justice in the post-communist world: explaining silence among the outspoken' *Southeast European and Black Sea Studies* 14(1) (2014) 1; D Vovk, 'The Universal

environment applied to an economic system in which the idea of private property was denied and private entrepreneurship prohibited.[40] Therefore, while 'the business and human rights field has developed rapidly in the last two decades' in other countries,[41] addressing the significant impact of business actors on human rights is still seen as a new trend in policymaking and practices within the contemporary Ukrainian legal landscape.

Currently characterised as a transitional economy, Ukraine is often described as a 'wild'[42] and 'crony capitalism'[43] state with a high level of bureaucracy, maximum profit orientation, and weak attention to human rights.[44] Voluntary corporate self-regulation in the field of human rights remains limited.[45] The high level of state engagement in business activities is proven by the considerable role of state-owned enterprises (SOEs) in the private market.[46] Post-Soviet legal traditions continue to some extent to shape current regulations concerning corporate responsibility for human rights in Ukraine. For instance, introduced in 1971, the Labour Code remains in force in Ukraine and, despite a number of amendments, adopts a paternalistic view on human rights both in regard to state and private employers.[47] Ukrainian policymakers have only recently started engaging with global business and human rights as well as sustainability discourses.[48]

Furthermore, current legislation regarding business and human rights, as well as sustainability, is failing to bring business towards a sufficient level of engagement with human rights. The first comprehensive document on sustainable development

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Declaration of Human Rights, Soviet Political Religion, and Soviet Law' *The Review of Faith & International Affairs* 21.4 (2023) 79.

40 OSCE Project Co-ordinator in Ukraine, 'Business and Human Rights in The Central tnd Eastern Europe:
Kharkiv Forum's Summary' (2020), https://www.osce.org/files/f/documents/5/2/482918.pdf (accessed 23 July 2025).

41 D Baumann-Pauly and J Nolan *Business and Human Rights from Principles to Practice* (Routledge, 2016) 19; L J Obara L J, '"What does this mean?": How UK companies make sense of human rights' *Business and Human Rights Journal* 2(2) 249; N Bernaz *Business and human rights: history, law and policy-bridging the accountability gap* (Routledge, 2016).

42 B Faracik, J Letnar Cernic and O Uvarova *Scoping study on the Status of the Implementation of the UNGPs on Business and Human Rights in Eastern Europe and Central Asia.* (UNGP, 2022).

43 M Upchurch, R Croucher, H Danilovich and C Morrison, ('The transformation of work and industrial relations in the post-Soviet bloc: 25 years on from 1989' (2015) *Work, employment and society* 29(3); S Shevtsova and K Sergienko, 'Economic consequences of crony capitalism system' (2015) *Visnyk Prydniprovskoi derzhavnoi akademii budivnytstva ta arkhitektury*, 7-8(209) 105 [In Ukrainian].

44 Faracik, Letnar Cernic and Uvarova (n 59).

45 The UNDP in Ukraine *Accelerating Sustainable and Equitable Development through Implementation of the UN Guiding Principles on Business and Human Rights* (UNDP, 2022).

46 A Grosman, 'Governing the hybridity of state-owned enterprises' in J Vakkuri, J Johanson, R Pinheiro and T Erkkilä (eds) *Public Policies for Hybrid Governance* (Edward Elgar Publishing, 2025).

47 T Horbachevska-Konstankevych and O Uvarova, 'Women on Corporate Boards: American, European and Ukrainian Experience to Use Gender Quotas' In O Uvarova, C Olarte-Bácares, and D A Pamplona (eds) *Business and Human Rights from the Lens of Women: Voices from the Global South* (Springer, 2025) 133-157,

48 The UNDP in Ukraine (n 45).

in Ukraine was the National Baseline Report 'Sustainable Development Goals: Ukraine,' issued by the Ministry of Economic Development and Trade in 2017.[49] The report characterised key challenges for reaching the SDGs, among which the consequences of armed conflict in the East of Ukraine.[50] In the context of SDG 17, Ukraine had an insufficient number of public-private partnerships to pursue sustainable development.[51] Since then, Ukraine recognised the need to implement the SDGs in 2019,[52] adopted a plan for promoting socially responsible business in 2020,[53] and a Business and Human Rights Chapter in the National Human Rights Strategy in 2021.[54] However, in practice these policy documents have not been fully implemented and only a few measures address corporate impacts on human rights and sustainable development. For example, the 2021 National Action Plan on the implementation of the National Human Rights Strategy contained only one action, namely, 'the discovery of the best practices of implementation' of the international BHR documents.[55]

Furthermore, the BHR scene in Ukraine has changed dramatically following the beginning of the shocking russian military aggression in 2014, which expanded into a full-scale war in 2022. The severe social, economic, and life-threatening crises the war has triggered have left little room for human rights.[56] The russian large-scale invasion of Ukraine has also created new challenges to the protection of human rights.[57] The state's lack of ability to protect human rights makes people especially vulnerable in times of emergencies such as a war or a pandemic.[58] War also exacerbates existing systematic gender inequalities, thus making the level of women's responsibility burdens unbearable.[59] Adding to the perceived existing

[49] Ministry of Economic Development and Trade of Ukraine *National Baseline Report 'Sustainable Development Goals: Ukraine'* (Ministry of Economic Development and Trade of Ukraine, 2017).
[50] Ibid, 6.
[51] Ibid, 119.
[52] Decree of the President of Ukraine *On the Sustainable Development Goals of Ukraine for the period up to 2030* (722/2019, 2019).
[53] Cabinet of Ministers of Ukraine *Action plan for the implementation of the Concept of implementation of state policy in the field of promoting socially responsible business in Ukraine for the period up to 2030* (853-r, 2020).
[54] Cabinet of Ministers of Ukraine *Action plan for the implementation of the National Strategy for Human Rights for 2021-2023* (756-r, 2021).
[55] Ibid, para. 59; I Konopka, 'Ukrainian business and human rights strategy: A breakthrough delayed' (2024) *Business and Human Rights Journal 9*(1) 169.
[56] *Ukraine and The Netherlands v. Russia* ECtHR (2025) 43800/14, 8019/16, 28525/20 et al.
[57] M Gnatovskyy, 'The Judicial Front of the Armed Conflict between Ukraine and the Russian Federation' *Law Ukr.: Legal J.* (2020) 74.
[58] O Uvarova, 'Ukrainian companies and human rights during the war' (2022), https://www.business-humanrights.org/en/blog/ukrainian-companies-and-human-rights-during-the-war/ (accessed 26 September 2025); Ukrainian Women's Congress. *A quick assessment of the situation of women during the war that Russia has waged against Ukraine* (UWC, 2022).
[59] UN Women *Beijing Declaration and Platform for Action Beijing+5 Political Declaration and Outcome* (UN Women, 2014).

power relations in society, war worsens levels of violence and discrimination.[60] For instance, while reconstruction initiatives in Ukraine recognize businesses' vital role in recovery and emphasize the importance of respect for gender equality in the context of war,[61] they rarely address these two dimensions in a comprehensive manner. The limitations of gender programs within business activities are discussed in chapter 4 of this PhD.

Despite existing challenges, I argue that business actors can considerably contribute to sustainable development in Ukraine and beyond. To illustrate the potential of business actors to contribute to sustainable development, I use the capability approach as a theoretical framework for the interpretation of the SDGs to enhance business actors' human rights responsibilities.

1.2. Theoretical Framework, Methodology, and Thesis Outline

1.2.1. The Capability Approach

The capability approach was designed by two prominent philosophers, Amartya Sen and Marta Nussbaum, bringing the idea that not economic growth but the capability of a person to fulfil their basic freedoms and opportunities[62] is the main indicator of quality of life, human development, justice,[63] and sustainability.[64] The capability approach builds 'a partial theory of justice' focusing on intragenerational justice.[65] According to this approach, sustainable development is implemented as long as people are guaranteed the capacity to fully shape their current and future lives.[66] Proposing an alternative to development based on income or the basic needs approach, the capability approach introduces agency, power relations, and participation as key objectives of sustaining human capabilities.[67]

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[60] M Céspedes-Báez, E Prieto-Ríos and J Pontón-Serra, 'Informal mining in Colombia: gender-based challenges for the implementation of the Business and Human rights Agenda' (2022) *Business and Human Rights Journal 7*(1) 69.

[61] UN Global Compact Ukraine *Ukraine Business Compact* (UN Global Compact Ukraine, 2023); Ministry of Economy of Ukraine *Ukraine Plan* (Ministry of Economy of Ukraine, 2024) 37.

[62] A Sen, 'The economics of happiness and capability' in *Bruni L et al* (Oxford University Press, 2008) 16; M Nussbaum, 'Creating capabilities: The human development approach and its implementation'(2009) 24(3) *Hypatia* 211.

[63] J Conill, 'The philosophical foundations of the capabilities approach' in C Luetge (ed) *Handbook of the philosophical foundations of business ethics* (Springer, 2013) 661-674.

[64] G Enderle, 'The capability approach as guidance for corporate ethics' in C Luetge (ed) *Handbook of the philosophical foundations of business ethics* (Springer, 2013) 675.

[65] F Rauschmayer, T Masson, O Leßmann and R Gutwald 'Sustaining Human Well-Being Across Time and Space—Sustainable Development, Justice and the Capability Approach' in A Crabtree (ed) *Sustainability, Capabilities and Human Security* (Palgrave Macmillan, 2020) 75.

[66] P Burger and M Christen, 'Towards a capability approach of sustainability' (2011) 19(8) *Journal of cleaner production* 791.

[67] A Frediani, 'Sen's Capability Approach as a framework to the practice of development' (2010) 20:2 *Development in Practice* 185.

This approach explicates how structural constraints within certain societies limit human capabilities to choose the life they value through two core concepts – conversion factors and adaptive preferences. Conversion factors are a set of characteristics of a particular society such as cultural, environmental, religious, or economic factors that affect a person's capability to make choices regarding their life.[68] Conversion factors form adaptive preferences, which are adjustments to human desires and life choices according to the conditions of the society 'where the person declares herself satisfied with an obviously unsatisfactory situation'.[69] Consequently, due to a specific set of conversion factors and adaptive preferences, 'an agency gap' occurs for people from different backgrounds being placed in similar situations, when the person's incapability to fulfill some rights is 'embedded in different national policy frameworks, mediated through firms/workplaces, and translated into individual lives and households'.[70] Particular adaptive preferences and agency gaps eventually shape business policies and practices regarding human rights and sustainability in a given society, for instance, in Ukraine.

The capability approach is reflected in certain SDGs. For example, targets 5.5 (ensure women's full and effective participation and equal opportunities for leadership at all levels), 10.2 (empower and promote the social, economic, and political inclusion of all), and 16.3 (ensure equal access to justice for all) embody human capabilities as well as SDG 1 (eliminating poverty); SDG 3 (good health and well-being); SDG 4 (quality education); and SDG 6 (clean water and sanitation).[71] Equally accessible education for everyone as well as 'universal health coverage and access to quality health care' are other examples of the human capabilities implications of the SDGs.[72] All capabilities of a person are interconnected and if one is insufficient this creates a negative impact on the application of the others.[73] For example, reaching SDG 8 on providing decent working conditions for all is not possible without healthy and safe working environments.[74] Taken together, the above-mentioned examples demonstrate the strong connection between the SDGs, human capabilities, and human rights. This enriching synergy proposes to measure human well-being not only through formal commitments but based on the real ability of a person to practice their rights. Ensuring this ability entails not only a

[68] I Robeyns, 'The capability approach' In G Berik, E Kongar (eds) *The Routledge handbook of feminist economics* (Routledge, 2021) 77.
[69] S Deneulin, M Nebel and N Sagovsky *Transforming unjust structures*. Dordrecht: Springer, 2006) 134.
[70] B Hobson, 'The agency gap in work–life balance: Applying Sen's capabilities framework within European contexts' (2011) *Social Politics* 18(2) 147.
[71] Independent Group of Scientists *Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development* (United Nations, 2019) 43, 49 and 128.
[72] UN *Transforming our world: the 2030 Agenda for Sustainable Development* (Doc no A/RES/70/1, 2015) para 7 and 25-27.
[73] N Ndubuka and E Rey-Marmonier 'Capability approach for realising the Sustainable Development Goals through Responsible Management Education: The case of UK business school academics' (2019) *The International Journal of Management Education* 17(3).
[74] A Cosbey, 'A Capabilities Approach to Trade and Sustainable Development: Using Sen's Conception of Development to Re-examine the Debates' (2004) *SSRN*.

negative duty to refrain from breaching human rights but also a positive duty to guarantee such rights in the business sector.

Martha Nussbaum argues that corporate bodies are important in providing support for 'the capabilities of each person'.[75] However, such capabilities may deteriorate due to structural social, economic, and cultural constraints (conversion factors), that affect individual preferences in life choices (adaptive preferences) when the person perceives to be satisfied with their well-being under unsatisfactory conditions.[76] For instance, during the war, business actors may perceive additional burdens as normal, therefore forming conversion factors for women for whom the necessity to work under dangerous or extremely challenging circumstances becomes seen as an ordinary situation. As a result, individuals start to adapt to such conditions and perceive multiple burdens as a normal part of their lives during the war, which makes these burdens silent. Furthermore, corporate human rights policy commitments may declare human rights protection but omit their application in practice.[77] It is therefore important for businesses to create an appropriate environment taking into account the scope of capabilities of the employees, local residents, customers, and partners in their activities and supply chains.[78] This also implies that businesses should apply a capability mapping: assess what resources are available for ensuring individual capabilities, how realising human capabilities impacts the economic, social and environmental pillars of sustainable development, how these pillars change under such impact, and how these changed systems affect the capabilities of future generations.[79]

It is worth noting that while the capability approach provides a rich normative basis for the interpretation of business and human rights as well as sustainability instruments, it is crucial to distinguish whether a given researcher uses the capability approach as a general approach or as a theory of justice, thus a capability theory.[80] As Ingrid Robeyns highlights, capability theories are used, inter alia, for 'theorising about human rights.'[81] Robeyns argues that the capability approach helps to see capabilities as objects of human rights and to find out the structures that affect human rights implementation beyond legal systems and notions.[82] Within this PhD,

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75 M Nussbaum *Women and Human Development: The Capabilities Approach (The Seeley Lectures)* (Cambridge University Press, 2000).
76 Deneulin, Nebel and Sagovsky (69) 134.
77 C Renouard, 'Corporate social responsibility, utilitarianism, and the capabilities approach' (2011) *Journal of business ethics* 98(1) 85.
78 L Miles, 'The Capabilities Approach and Worker Wellbeing' (2014) *The Journal of Development Studies* 50:8.
79 O Lessmann and F Rauschmayer, 'Re-conceptualizing sustainable development on the basis of the capability approach: A model and its difficulties' (2013) 4(1) *Journal of Human Development and Capabilities* 99.
80 I Robeyns, *Wellbeing, freedom and social justice: The capability approach re-examined* (Open Book Publishers 2017) 29.
81 Ibid.
82 Ibid, 165.

I interpret human capabilities as objects of both human rights and the SDGs. While this PhD thesis indeed uses the capability approach to theorise human rights and the SDGs within business activities, I apply both theoretical foundations of Amaratya's Sen and Martha's Nussbaum works. In chapter 2 of this thesis, I refer to Amartya's Sen vision of the capability approach as an open theoretical framework to argue for reconsidering the role of businesses in society.[83] In chapter 4 of this thesis I apply Ingrid's Robeyns list of capabilities 'at the ideal level' that developed from the reassessments of Martha's Nussbaum list of 10 Basic human capabilities, perceiving the capability approach as a particular theory of justice.[84] The simultaneous application of various theoretical visions within the capability approach itself allows to advance an argument for the need of stronger human rights responsibilities of businesses, as well as to contribute to the discussion on the role of business in achieving the SDGs in Ukraine and beyond.

1.2.2. Objectives and research questions

The objective of this PhD thesis is to articulate the role of the business sector in implementing the SDGs (especially SDG 5 Gender Equality; SDG 8 Decent work and economic growth; SDG 10 Reduced inequalities; SDG 17 Global Partnership for Sustainable Development), taking the examples of GE and FoRB, both salient business and human rights issues. I approach this objective through the theoretical lens of a capability approach to the SDGs, and an empirical focus on the business and human rights landscape in Ukraine. To meet this objective, this PhD focuses on context-specific and human rights-based strategies for SDGs implementation involving the business sector; the conceptual relationship between the SDGs, the capability approach, and the international legal frameworks setting the corporate responsibility to implement GE and FoRB; and on promoting GE and FoRB both as human rights and as part of the SDGs within business actors' activities.

The main research question of this PhD thesis is the following:

Bearing in mind existing (legal) frameworks on human rights and the sustainable development goals, what should businesses in Ukraine do to ensure respect for gender equality and freedom of religion or belief?

To respond to the main research question, I raise the following sub-questions:

Sub Research Question 1: What is the relationship between the SDGs agenda and the capability approach in strengthening human rights protection responsibilities for businesses?

I use this sub-question to explain the potential of the capability approach interpreted as an explicit normative foundation of the SDGs on which to develop positive corporate human rights responsibilities, particularly, to protect human rights.

[83] Ibid, 30.
[84] Ibid.

Additionally, answering this question helps to understand how the capability approach can normatively enhance the shift from negative to positive corporate human rights responsibilities, that can potentially extend to the legal obligation of companies not merely to avoid harm but to protect and fulfil human rights thus enhancing human capabilities.

Sub Research Question 2: How do businesses in Ukraine understand the need to guarantee gender equality and freedom of religion or belief within their activities?

To answer this question, I investigate how business actors understand and address clashes between freedom from discrimination based on sexual orientation and gender identity (SOGI), and freedom of religion or belief (FoRB) through both desk-based research of corporate commitments to respect these rights and in-depth interviews with representatives from business actors. Specifically, I look at the strategies that business actors operating in Ukraine use when addressing the clashes between two rights: neutrality, ignoring, and active engagement. The assumption underlying this question is that using an active engagement strategy can contribute to the creation of a more consistent policy of de-marginalization and recognition of freedom from discrimination based on SOGI, where FoRB is seen as a non-clashing, complementary, and mutually reinforcing right.

Sub Research Question 3: In the context of war, how can businesses in Ukraine implement gender equality as a human capability?

To address this question, I analyze the shortcomings of both international and Ukrainian national BHR frameworks to address heightened human rights risks during war and post-war recovery in Ukraine. The assumption here is that the limitations of existing frameworks regarding the gender dimension of ordinary and heightened human rights due diligence (HRDD and hHRDD respectively) lead to the need for their reform and the introduction of a more robust methodology capable of addressing gender equality within business activities during war and post-war recovery. To illustrate this need, I apply the capability approach to the Gender Benchmark Methodology to enhance the consideration of women's capabilities in the corporate sphere during war.

Sub Research Question 4: What could businesses in Ukraine do differently, both in terms of policies and practices, to more effectively ensure human capabilities such as gender equality?

This question aims to explain how the corporate positive actions, not only to respect but also to protect and fulfill gender equality, can apply in practice. To do that, I compare US, EU, and Ukrainian legal systems regarding introducing affirmative action measures such as gender quotas on corporate boards. Specifically, I argue that using such measures could significantly contribute to business actors' contributing to substantive gender equality. This argument is demonstrated by proposing to look at the affirmative actions like gender quotas through the concept of personal autonomy, namely, the principle of 'gendered autonomy,' which allows to form

'capability-oriented' corporate systems that expand human agency both within and beyond work.

1.2.3. Methodology

Within this PhD research, I use a multiple method approach that combines doctrinal, critical discourse, comparative analysis, and empirical methods to investigate how business actors implement the SDGs and human rights in Ukraine. This approach allows me to capture the complex landscape of corporate engagement with human rights protection both at national and international levels.[85] Starting from the introduction of the capability approach as a theoretical framework for this PhD research, I apply the socio-legal methodology to reflect 'how law actually functions in society'.[86] The law is always situated within a certain context that provides specific conditions of 'how legal rules, doctrines, legal decisions, institutionalised cultural and legal practices work together to create the reality of law in action'.[87] To contribute to a discussion on the role of business actors in human rights protection and reaching sustainable development, I analyse how various business and human rights frameworks are implemented in Ukraine, what are the main challenges, and possible solutions to enhance these frameworks. I believe that such contextual investigation is critical for the development of new theoretical approaches towards enhancing business human rights responsibilities as law always impacts social reality and vice versa.[88]

I employ doctrinal analysis, taken together with conducting literature review, to build a theoretical framework for this PhD that is based on the capability approach.[89] This method is applied through the entire PhD thesis to analyse key documents in the business and human rights sphere and sustainable development agenda regarding the extent to which business actors should engage in human rights protection, as well as how these documents may apply within the Ukrainian legal context. To refine my doctrinal research, I also conduct a comparative analysis.[90] Within

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[85] R Kumar *Research methodology: A step-by-step guide for beginners* (FSage Publishing, 2018) 56-57.
[86] D O'donovan, 'Socio-Legal methodology: Conceptual underpinnings, justifications and practical pitfalls' (2016) *Legal Research Methods: Principles and Practicalities 1* 31.
[87] Ibid, citting R Banakar, 'Studying cases empirically: A sociological method for studying discrimination cases in Sweden' in R Banakar and M Travers (eds) *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005).
[88] L Webley, 'The why and how to of conducting a socio-legal empirical research project' in N Creutzfeldt, M Mason, K McConnachie (eds) *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 2019) 59.
[89] The doctrinal analysis is a core method within legal scholarship as it explores 'the concept of "doctrine"' as a source of law through the thorough analysis and interpretation of authorities texts such as conventions statutes, regulations, case-law, etc. S Egan, 'The doctrinal approach in international human rights law scholarship' in L McConnell and R Smith (eds) *Research methods in human rights* (Routledge, 2018) 24-41.
[90] P De Cruz *Comparative law in a changing world* (Taylor & Francis, 2024); P I Bhat, 'Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles' (2020) *Idea and Methods of Legal Research* , https://doi.org/10.1093/oso/9780199493098.003.0005 (accessed 12 May 2025).

Chapter 5 of this PhD I compare US, EU, and Ukrainian experiences in implementing gender quotas in corporate boards to illustrate different approaches in addressing issues of women's agency and autonomy.

I use critical discourse analysis that allows to investigate the context beyond legal wording to assess how particular notions are communicated within various societal groups.[91] Specifically, critical discourse analysis reveals the limitations of existing business and human rights instruments when elaborating on the gender dimension of business human rights policies and practices. For instance, part of this PhD analyses how existing business and human rights frameworks undermine the gender dimension in corporate activities, perceiving women during wartime exclusively as victims, mothers, and individuals in need of protection and lacking agency (see chapter 4 of this PhD).

Finally, it is not possible to elaborate on how businesses in Ukraine understand the need to guarantee gender equality and freedom of religion or belief within their activities without an empirical investigation. I conducted in-depth interviews with relevant experts, corporate officials, and business actors' employees, using snowball, judgmental, and expert sampling. I also analyzed how policymakers in Ukraine understand core concepts of business and human rights within their human rights commitments publicly available on their websites. The empirical findings are covered in Chapter 3 of this thesis.

1.2.4. Thesis outline

Chapter 2 of this thesis*, 'A Capability Approach to the Sustainable Development Goals: Towards Positive Corporate Human Rights Obligations,'* introduces the capability approach as the theoretical framework, its implications for the corporate responsibility to respect, protect and fulfil human rights, and its relation to human rights and SDGs frameworks. It further explains why the capability approach may justify placing greater human rights responsibilities on business actors, which may extend towards positive human rights obligations.

The chapter starts with an overview of literature covering scholarly debate on the corporate responsibility to 'respect' and 'protect' human rights as well as positions the SDGs into the BHR discourse. The chapter further provides a detailed investigation of the key elements of the capability approach, the notions of justice, sustainability justice, and human capabilities that, when read together, lead to positive corporate responsibilities (as opposed to negative corporate human rights responsibilities), that can further extend towards positive human rights obligations. The chapter finally covers how the new, proposed normative interpretation of the

[91] M Foucault, 'Politics and the study of discourse' in G Burchell, C Gordon, and P Miller, (eds.) *The Foucault effect: Studies in governmentality* (Harvester Wheatsheaf, 1991) 53.

SDGs through the capability approach can affect practical processes such as corporate human rights due diligence.

Chapter 3, *'Freedom of Religion and Non-discrimination based on Gender Identity and Sexual Orientation in Ukraine: Corporate Policy Commitments in Situations of Conflicting Social Expectations,'* compares how policymakers at the corporate level and stakeholders in Ukraine understand the business responsibility to respect, protect and fulfil gender equality and freedom of religion or belief, how they should be implemented and their interrelation. To do this, the chapter combines an analysis of businesses' corporate policy commitments (e.g., human rights policies of companies, non-human rights policies, reports, etc.) and in-depth interviews with business representatives to investigate how businesses operating in Ukraine resolve potential clashes between freedom of religion or belief (FoRB) and freedom from discrimination based on sexual orientation and gender identity (SOGI).

The chapter provides an analysis of the corporate human rights commitments of the 100 Ukrainian business entities with the largest revenue in 2022 to explore whether and how national and international businesses in Ukraine address the need to respect FoRB and SOGI at the corporate and community levels. To enrich the findings, I conducted 12 in-depth interviews with business representatives and asked 13 open questions regarding established views, beliefs, or cultural characteristics that influence the focus of corporate policies on certain rights and protected characteristics from discrimination. Interviews were conducted online between May and July 2023. I used manual coding to analyse the interview results. The data gathered from both the interviews and desk-based research reveal three strategies national and international businesses operating in Ukraine use to provide respect for FoRB and SOGI: neutrality, ignorance, and active engagement.

Chapter 4, *'Reimagining Heightened Human Rights Due Diligence: A Capability Approach Informed by Women's Experiences in Wartime Ukraine,'* illustrates how the capability approach can enhance existing BHR frameworks by enabling them to more effectively address heightened gender-specific human rights risks during severe crises such as war. It examines existing legal frameworks (obligatory and soft law regulation) to address the gender dimension of heightened human rights due diligence during the war and post-war recovery in Ukraine.

The chapter provides a critical discourse analysis of existing business and human rights frameworks such as the UNGPs, the OECD Guidelines, the Gender Dimensions of the UNGPs, and the Corporate Sustainability Due Diligence Directive (CSDDD). The analysis highlights their limitations in addressing gender-related issues that exist during the russian aggression against Ukraine. The chapter further proposes to apply a concept of women's capabilities as part of the capability approach to improve the mentioned frameworks in considering both gender and conflict when creating business policies for war and post-war recovery. The chapter ends with a proposal to interpret the World Benchmarking Alliance Gender

Benchmark Methodology using the list of women's capabilities proposed by Ingrid Robeyns. I demonstrate how this new interpretation may improve the heightened human rights due diligence process.

Chapter 5, '*Women in Corporate Boards: American, European and Ukrainian Experience to Use Gender Quotas*' addresses the strategies of business actors in Ukraine to ensure the corporate responsibility to respect gender equality more effectively. The chapter elaborates on gender quotas as an example of positive actions to protect human rights whereby companies do not merely refrain from human rights abuses but actively protect and fulfil human rights The main argument is based on the 'gendered autonomy' concept for decision-making within corporate boards that allows to form 'capability-oriented' corporate systems that expand human agency and capabilities both within and beyond work.

The chapter provides both comparative and doctrinal analyses to demonstrate how positive measures such as imposing gender quotas in corporate boards are introduced within three legal systems – US, European, and Ukrainian. The chapter proceeds with a theoretical analysis of the 'gendered autonomy' concept to determine the influence of gender quotas on the personal autonomy of women.

Chapter 6 answers each sub-question and the main research question of what businesses in Ukraine should do to ensure respect for gender equality and freedom of religion or belief, bearing in mind existing (legal) frameworks on human rights and sustainable development goals. Chapter 6 also discusses the study's implications and future research.

Chapter 2

A Capability Approach to the Sustainable Development Goals: Towards Positive Corporate Human Rights Obligations

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2. A Capability Approach to the Sustainable Development Goals: Towards Positive Corporate Human Rights Obligations

Abstract

In this article, we argue that the Sustainable Development Goals (SDGs) should be viewed through the lens of the capability approach. The capability approach lens normatively instils the SDGs with positive human rights protection obligations for business actors, obliging business actors to not merely refrain from breaching human rights but to actively provide affected individuals and communities with capabilities that ensure the protection and fulfilment of their human rights. The capability approach perspective also allows us to bring together two parallel regulatory frameworks, that of the SDGs and the UN Guiding Principles on Business and Human Rights (UNGPs), which considerably enhances the transformative potential of existing and developing corporate human rights due diligence legislation.

Keywords: Sustainable Development Goals; Capability approach; UN Guiding Principles on Business and Human Rights; Business and human rights; Positive corporate human rights obligations.

2.1. Introduction

Business actors have created, and continue to contribute to, large-scale human rights violations all over the world. Undocumented workers in Malaysia's private market,[1] business support to war crimes in Palestine[2] and in Ukraine,[3] significant environmental deterioration due to fossil fuel pollution,[4] represent a small sample of the negative human rights implications of corporate activity.[5] These activities impact current, as well as future, generations and often extend across national boundaries.[6] Given business actors' key roles in societal, legal, and economic relationships, the frameworks that govern their responsibilities, particularly with respect to human rights, require close scrutiny.

This article brings together two regulatory frameworks that are central to the question of corporate responsibility. The first is the UN Guiding Principles on Business and Human Rights (UNGPs), based on the 'Protect, respect, remedy' Framework.[7] The UNGPs distinguish between the state's legal duty to protect human rights (Pillar I), and the corporate responsibility to respect human rights, which is framed as a societal expectation rather than a legal duty (Pillar II). Both states and corporate actors should ensure proper access to remedies for potential human rights violations (Pillar III).[8] Though influential, the UNGPs have not, and currently cannot, offer(ed) comprehensive protection against business actors' human rights abuses.[9]

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1 International Organization for Migration (IOM) *Assessment of Causes and Contributing Factors to Migrant Workers Becoming Undocumented in Malaysia* (2023), Geneva.

2 Business & Human Rights Resource *Centre France: Palestinian family provides evidence to investigating judge in case against Exxelia over alleged complicity in war crimes* (2023), www.business-humanrights.org/en/latest-news/france-palestinian-family-gives-evidence-to-court-in-case-against-exxelia-over-alleged-complicity-in-war-crimes-in-gaza/ (accessed 4 September 2023).

3 Business & Human Rights Resource Centre *Belgium: New Lachaussée suspected of supplying ammunition to Russia despite imposed sanctions* (2023), www.business-humanrights.org/en/latest-news/belgium-new-lachauss%C3%A9e-suspected-of-supplying-ammunition-to-russia-despite-imposed-sanctions-incl-co-response/; Business & Human Rights Resource Centre *US-based Haas Automation allegedly still indirectly supplies Russian arms industry with technology* (2023), www.business-humanrights.org/en/latest-news/us-based-haas-automation-allegedly-still-indirectly-supplies-russian-arms-industry-with-technology-incl-co-comments/. All websites accessed 12 September 2023.

4 The Carbon Majors Database *CDP Carbon Majors Report 2017 100 fossil fuel producers and nearly 1 trillion tonnes of greenhouse gas emissions* (2017).

5 UN Special Rapporteur on the right to development, S Deva *Role of business in realizing the right to development* (Doc No A/78/160, 2023) para 74.

6 C Renouard and C Ezvan, 'Corporate social responsibility towards human development: A capabilities framework' (2018) 27.2 *Business Ethics: A European Review* 144 at 146-47.

7 UN Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (Doc No A/HRC/17/31, 2011) (The UNGPs).

8 UN Working Group on the issue of human rights and transnational corporations and other business enterprises *Corporate human rights due diligence: emerging practices, challenges and ways forward* (Doc No A/73/163, 2018) para 16.

9 See Renouard and Ezvan (n 6) 151.

The second regulatory framework is formed by the Sustainable Development Goals (SDGs).[10] The SDGs are aimed at more broadly improving human well-being in the face of sustainable development challenges. Through 17 goals, split into 169 targets, the SDGs aim to present a 'shared blueprint for peace and prosperity for people and the planet, now and into the future.'[11] They explain how actions of state and non-state actors can help address societal, economic, and environmental issues for inter- and intragenerational human well-being. Businesses are expected to play a significant role in the implementation and achievement of the SDGs. As such, the SDGs agenda and the Business and Human Rights (BHR)[12] agenda (should) go hand in hand.[13]

There are many clear areas of overlap and synergy between the SDG and BHR agendas. Both are international policy instruments,[14] which explicitly envisage a role for state *and* business actors. The 2030 SDG Agenda promotes 'respect, protect and promote human rights and fundamental freedoms for all',[15] which recalls language used in the UN 'Protect, Respect and Remedy' Framework for Business and Human Rights and in the UNGPs that operationalize the Framework.[16] The UNGPs are also referred to as a foundation for business transformation towards corporate responsibility under SDG 17 on partnerships for the SDGs.[17]

Nevertheless, existing (international) tools for corporate human rights responsibility continue to fail to effectively address corporate human rights violations:[18] positive

[10] UN *Transforming our world: the 2030 Agenda for Sustainable Development* (Doc no A/RES/70/1, 2015) (The 2030 Agenda).
[11] Ibid.
[12] J Gabriel and F Wettstein, '"Business and Human Rights" and the United Nations Sustainable Development Goals: Complementary or Conflicting Agendas?' (2021) 1; N Jägers, 'UN guiding principles at 10: Permeating narratives or yet another silo?' (2021) 6.2 *Business and Human Rights Journal* 198; S Zagelmeyer and R Sinkovics, 'MNEs, human rights and the SDGs–the moderating role of business and human rights governance' (2019) 26.3 *Transnational Corporations* 33 at 62; S Deva, 'Sustainable development: what role for the company law?' (2011) 8 *International and Comparative Corporate Law Journal* 76.
[13] Business & Sustainable Development Commission *Business, human rights and the sustainable development goals – forging a coherent vision and strategy* (*ShiftProject* November 2016) 4; S Deva, 'Sustainable good governance and corporations: an analysis of asymmetries' (2005) 18 *Georgetown International Environmental Law Review* 707; K McPhail, 'Corporate responsibility to respect human rights and business schools' responsibility to teach it: Incorporating human rights into the sustainability agenda' (2013) 22.4 *Accounting Education* 391.
[14] E George, 'Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals' (2018) 36 *Wisconsin International Law Journal* 298.
[15] The 2030 Agenda (n 10) para 19.
[16] The UNGPs (n 7).
[17] K Buhmann, J Jonsson and M Fisker, 'Do no harm and do more good too: Connecting the SDGs with business and human rights and political CSR theory' (2019) 19.3 *Corporate Governance: The International Journal of Business in Society* 399.
[18] International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (Ottawa 2001a) VIII; C Woods, 'It Isn't a State Problem: The Minas Conga Mine Controversy and the

duties are imposed only on states, while a 'responsibility to respect' is imposed on business actors.[19] This is true despite the fact that transnational corporations enjoy almost unfettered access to resources, human and otherwise, across the globe.[20] In response to this reality, the concept of duty-bearers has started to shift in order to bring businesses 'under the human rights umbrella'.[21] This development marks the start of a new era of shared responsibility among state and non-state actors, or, the creation of 'multi-duty bearer human rights regimes' where responsibility can be 'based on unique expertise, resources or skills that actors have to offer',[22] rather than on the state/non-state dichotomy.[23] Social expectations regarding corporate accountability continue to increase,[24] which is also reflected in the academic debate.[25] UN Special Rapporteur on the right to development, Surya Deva has argued that

> the traditional public-private distinction to differentiate human rights duties is no longer sustainable … The duties or responsibilities of business cannot be confined to merely respecting human rights if the goal is to realize fully all human rights for everyone … Businesses would also need to protect and fulfil human rights, at least in certain circumstances and situations.[26]

The SDGs echo this sentiment, leading to a co-mingling of the sustainability and the BHR agendas.[27] Business actors have also been seen as political institutions who can 'impact the capabilities of all human beings from a long-term perspective'.[28] The extension of corporate duties to positively protect human rights lies in the need

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Need for Binding International Obligations on Corporate Actors' (2014) 46 *Georgetown Journal of International Law* 629; D Birchall, 'The role of civil society and human rights defenders in corporate accountability' in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (The Edward Elgar, 2020) 443-465.

19 F Wettstein, 'Human rights as a critique of instrumental CSR: Corporate responsibility beyond the business case' (2012) 18.106 *Notizie di POLITEIA* 22.

20 K L McCall-Smith, 'Tides of Change–Expanding the Term 'Duty-Bearer' in International Human Rights' (2015) 2015/23 *Edinburgh School of Law* at 3-4, 9.

21 Ibid, 12.

22 L Lane and M Hesselman, 'Governing disasters: Embracing human rights in a multi-level, multi-duty bearer, disaster governance landscape' (2017) 5.2 *Politics and Governance* 93 at 100-01.

23 A Rashed and A Shah, 'The role of private sector in the implementation of sustainable development goals' (2021) 23 *Environment, Development and Sustainability* 2934; S Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights-A Quiet (R) Evolution?' (2015) 32 *Social Philosophy & Politology* 247.

24 S Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale LJ* 443; I Kolstad, 'Human rights and positive corporate duties: the importance of corporate–state interaction' (2012) 21.3 *Business Ethics: A European Review* 276; D Augenstein and D Kinley, 'When human rights 'responsibilities' become 'duties': the extra-territorial obligations of states that bind corporations' (2013) *SSRN* 22.

25 D Karp, 'Business and Human Rights in a Changing World Order: Beyond the Ethics of Disembedded Liberalism' (2023) *Business and Human Rights Journal* 135; Birchall (n 18) 443.

26 Deva (n 5) para 78 and 79.

27 A Clapham, 'Rights and responsibilities: a legal perspective' (2006) 7 *PSIS special Study* 61.

28 Renouard and Ezvan (n 6) 147.

for collaborative responsibility, where a variety of different actors and institutions come together and contribute their share to the responsibility puzzle'.[29] We believe that this extension should be grounded in an explicit normative framework, which would help explain and test its implications and guiding principles moving forward.

This article identifies Amartya Sen and Martha Nussbaum's capability approach as a normative framework that would allow the reading of positive corporate human rights responsibilities into the SDG agenda.[30] The capability approach articulates well-being through two interlinked normative concepts: capabilities and functionings.[31] Capabilities refer to people's ability to make their own decisions, while functionings refer to 'various states of human beings and activities that a person has achieved'.[32] Capabilities and functionings make a strong claim for sustainability justice, recognizing that the aim of ensuring intra-generational and inter-generational equity is not (only) a fair distribution of resources or goods but rather a fair distribution of human opportunities to lead a valued life.[33] Against this theoretical backdrop and practical reality, we set out to answer the following question: how does the interpretation of the SDGs through the lens of the capability approach lead to articulating positive corporate human rights obligations? In addition, we explore how such interpretation can affect human rights due diligence (HRDD) legislation on a practical level. We suggest that a capability approach reading of the SDGs obliges business actors to act in ways that enhance human capabilities and thus functionings,[34] i.e., to positively protect human rights.[35] This normative interpretation of the SDGs and the related UNGPs and BHR agenda has implications for the aim and scope of the growing number of national mandatory HRDD legislation.

The remainder of this article sets out our analysis in four steps. First, Section 2 positions the SDGs within the BHR literature, specifically the scholarly debate on the corporate responsibility to 'respect' and 'protect' human rights. Section 3 then sets out how viewing the SDGs through a capability approach lens requires a move towards positive corporate obligations (as opposed to negative corporate human

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[29] Wettstein (n 19) 28.
[30] I Robeyns, 'The capability approach' In G Berik, E Kongar (eds) *The Routledge handbook of feminist economics* (Routledge, 2021) 72; C Cantón, 'Empowering People in the Business Frontline: The Ruggie's Framework and the Capability Approach' (2012) vol. 23, no. 2 *Management Revue* 191.
[31] I Robeyns, *Wellbeing, freedom and social justice: The capability approach re-examined* (Open Book Publishers 2017) 36.
[32] Stanford Encyclopedia of Philosophy *The Capability Approach* (2020), https://plato.stanford.edu/entries/capability-approach/#:~:text=By%20focusing%20on%20what%20people,are%20effectively%20able%20to%20lead (accessed 7 August 2023).
[33] F Rauschmayer, T Masson, O Leβmann and R Gutwald 'Sustaining Human Well-Being Across Time and Space—Sustainable Development, Justice and the Capability Approach' in A Crabtree (ed) *Sustainability, Capabilities and Human Security* (Palgrave Macmillan, 2020) 75-102.
[34] Clapham (n 27) 61.
[35] Cantón (n 30) 203.

rights responsibilities). Section 4 discusses the practical implications of such an alternative reading of the SDGs for mandatory due diligence legislation. Section 5 concludes and provides recommendations for moving towards a broader positive corporate human rights obligation.

2.2. Corporate Human Rights Responsibilities: The Business and Human Rights Perspective

This section positions our argument as to the normative value and implications of a capability approach to the SDGs within the ongoing debates on corporate human rights responsibility in the business and human rights sphere. First, we show why the responsibility to 'respect' human rights was chosen as the basis of corporate responsibility in early BHR documents including the UNGPs (sub-section 2.1). Second, we show how the responsibility to 'respect' has been interpreted as being (1) a not exclusively negative obligation and (2) as extending beyond 'do no harm' (sub-section 2.2).

2.2.1. Responsibility to Respect as Touchstone for Corporate Human Rights Responsibility

The UNGPs establish a division between corporate responsibility to respect and state responsibility to protect.[36] Under the UNGPs, business actors' responsibility to respect human rights translates to a responsibility to refrain from infringing human rights. Conversely, states have a positive obligation to protect individuals from human rights violations.[37] The UN Working Group on the issue of human rights and transnational corporations and other business enterprises emphasizes that 'the essence of the Guiding Principles is the distinction made between the State duty to protect and the business responsibility to respect human rights.'[38] Similarly John Ruggie, the former UN Secretary-General's Special Representative for Business and Human Rights who developed the UNGPs, distinguishes the state duty to protect as a key requirement of international law and the business responsibility to respect human rights as a social norm,[39] or basic social expectation ('a company's social licence to operate').[40] Several motivations have been provided for this distinction

[36] Renouard and Ezvan (n 6) 151.
[37] Wettstein (n 19) 22.
[38] UN Working Group (n 8) para 16.
[39] J Ruggie, 'The social construction of the UN Guiding Principles on Business and Human Rights' (2020) in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (The Edward Elgar, 2020) 63-86 at 75; Interestingly, Ruggie already refers to the works of Amartya Sen, the founder of the capability approach, at p. 77: 'Besides, in Amartya Sen's felicitous words, viewing human rights solely as "parents" or "progeny" of law would "unduly constrict"—Sen even uses the term incarcerate—the social logics and processes other than law that drive enduring public recognition of human rights'.
[40] J Ruggie, 'Protect, respect and remedy: A framework for business and human rights' (2008) *Innovations: Technology | Governance | Globalization 3*(2) 189 at 191, 199; J Ruggie, R Caroline, and R Davis, 'Ten years

between states and corporates: (1) the responsibilities of companies cannot mirror those of the state, as companies are (typically) not actors performing public functions;[41] (2) overlaps or duplication in obligations between states and corporations could lead to uncertainty on 'who is responsible for what in practice';[42] (3) those subjected to wrongful acts of companies could be left without 'adequate sanctioning or reparation'.[43] Moreover, Ruggie pragmatically aimed to form 'workable human rights norms'[44] amidst general business resistance to any mandatory human rights obligations.[45]

The concept of the corporate responsibility to respect gave rise to extensive debates in the literature about what 'respect' means for the scope of business responsibilities in the field of human rights.[46] One school of thought limits the responsibility's scope to a negative obligation to do no harm.[47] Within this line of reasoning, Steven R. Ratner has argued that 'to extend their (*i.e. business actors*) duty away from a dictum of "doing no harm" … toward one of proactive steps to promote human rights outside their sphere of influence *seems inconsistent with the reality of the corporate enterprise'* (emphasis added).[48] Similarly, Francis West argues that while the company's impact can sometimes go beyond its own activities, this cannot put

> an expectation on companies to take pre-emptive action on all social issues, everywhere, all the time. There must be a connection to the business, its products or services. Not to apply such rigor would dissolve the consensus behind the expected standard of conduct and obstruct attempts to hold companies accountable for their actions against that framework.[49]

To assign additional duties on business actors, other conditions would have to be met, such as the performance of some public functions,[50] or for corporations to have 'undertaken particular voluntary commitments'.[51] According to proponents of this

after: from UN Guiding Principles to multi-fiduciary obligations' (2021) *Business and Human Rights Journal 6*(2) 179-197 at 191.

41 Ibid, 199.

42 Ibid, 190.

43 Ruggie (n 40) 189.

44 S Aaronson and I Higham, "'Re-righting business": John Ruggie and the struggle to develop international human rights standards for transnational firms' (2013) *Human Rights Quarterly 35*(2) 333-264 at 338.

45 R Mares, "'Respect" Human Rights: Concept and Convergence' (2014) *Law, Business and Human Rights* 20.

46 Ruggie (n 39) 75.

47 C Apodaca, 'The Human Cost of Naming and Shaming' (2018) in Alison Brysk and Michael Stohl (eds) *Contracting HumanRights: Crisis, Accountability, and Opportunity* 73–88 at 83; F West, 'The Quiet Radicalism of the Responsibility to Respect (2021), https://shiftproject.org/ungps-radicalism/, (accessed 14 July 2024); F Wettstein, 'Silence as complicity: Elements of a corporate duty to speak out against the violation of human rights' (2012) *Business Ethics Quarterly* 22:1 37-61 at 42.

48 Ratner (n 24) 443.

49 West (n 47).

50 Kolstad (n 24) 278.

51 Wettstein (n 47) 56.

school of thought, as they stand, the UNGPs lack 'a solid, principled justification for this protect component'.[52] This reading of the responsibility to respect is in line with Ruggie's initial work, when he states that 'to respect rights essentially means not to infringe on the rights of others—put simply, to do no harm'.[53] Companies were expected to assess the impact of their activities on human rights without the necessity to assess what they can do to respect human rights as part of their activities.[54]

However, in later works related to the interlinkages between the UNGPs and the SDGs, Ruggie claimed that he sees the risk for the effectiveness of such interlinkages

> when businesses are encouraged to believe that advancing respect for human rights involves merely doing no harm, and that to do positive good they need to go beyond respecting rights… this whole discourse that respecting human rights is merely about stopping a negative practice, lacking the more inspirational virtue of making a positive contribution… rests on a false dichotomy, between compliance-based views of 'respect' on the one hand, and voluntary efforts to 'promote' human rights on the other.[55]

Ruggie provides an example of companies who seek to ensure non-discrimination in their business practices, realizing that this requires 'extensive training and other support systems that did not exist before. These are not negative acts. They are powerfully affirmative, transformative and even disruptive of traditional practices.'[56]

Ruggie's statements are symptomatic of the blurred line between responsibility to respect and duty to protect. This also comes to the fore when considering the corresponding uncertainty about the correlative duty to provide remedy.[57] While Guiding Principle 11 clearly establishes the duty to respect as a wholly negative duty, Guiding Principle 13 muddies the waters by creating the duty 'to influence the conduct of third parties,' which has indirectly been recognized in international human rights law as a duty to protect.[58] More generally, Danwood Chirwa and Nojeem Amodu argue that commonly recognized dichotomies in the BHR sphere between the responsibility to protect by the state and the responsibility to respect

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[52] Mares (n 45) 6, 1, 9-10, 14-19, 56, 47.
[53] Ruggie (n 40) 194.
[54] Ibid, 201.
[55] J Ruggie, 'Making Globalization Work for All: Achieving the Sustainable Development Goals Through Business Respect for Human Rights' (2016), https://shiftproject.org/making-globalization-work-for-all-achieving-the-sustainable-development-goals-through-business-respect-for-human-rights/, (accessed 14 July 2024).
[56] Ibid.
[57] J Bonnitcha and R McCorquodale 'The concept of 'due diligence' in the UN guiding principles on business and human rights' (2017) *European Journal of International Law 28*(3) 899-919 at 901.
[58] Ibid, 916.

by business actors are artificial.[59] They argue that

> …the UNGPs themselves acknowledge the link between positive and negative aspects of the concept of 'business responsibility to respect', but they muddle the concept of 'respect' in the process. This responsibility under the UNGPs includes the concept of due diligence to prevent and mitigate human rights violations and to account for them if they have already occurred. This is practically the definition of the duty to protect as it has been developed in international human rights law.[60]

Notwithstanding the initial framing of the UNGPs, scholarly debate on corporate human rights and responsibilities has moved away from avoiding harm towards responsibility for the protection and fulfillment of human rights.[61] This is especially noticeable in the sustainability discourse which poses the question of whether business actors can be fully recognized duty-bearers required to take positive actions to protect human rights as a part of sustainable development.[62] Sustainable development requires all possible actions to create conditions for SDG implementation, which is not possible with mere avoidance of harm, as already existing harm is so significant now that both public and private actors need to act proactively and positively to overcome its consequences. The next sub-section discusses what a corporate responsibility to protect may look like.

2.2.2. Towards a Responsibility to Protect

Moving from a responsibility to respect to a responsibility to protect necessitates 'engage[ment] with the deeper normative questions regarding the ambit and scope of corporate human rights obligations'.[63] Following the argumentation of Henry Shue, Florian Wettstein identifies three basic duties related to human rights: the duty to avoid deprivation ('responsibility to respect'), the duty to protect from such deprivation ('responsibility to protect'), and the duty to remedy a deprived.[64] Combined, these three duties create a comprehensive structure of effective realization of human rights.[65] While the responsibility to respect is typically framed

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[59] D Chirwa and N Amodu, 'Economic, social and cultural rights, sustainable development goals, and duties of corporations: rejecting the false dichotomies' (2021) *Business and Human Rights Journal* 6.1 22.
[60] Ibid, 31-36.
[61] Kolstad (n 24) 276.
[62] Clapham (n 27) 61; Besson (n 23) 247; Renouard and Ezvan (n 6) 151.
[63] S Deva and D Bilchitz (eds), '*Human rights obligations of business: beyond the corporate responsibility to respect?*' (Cambridge University Press 2013) 23. See also: B Choudhury, 'Balancing soft and hard law for business and human rights' (2018) International & Comparative Law Quarterly 67(4) 961; Wettstein, 'The history of business and human rights and its relationship with corporate social responsibility' (2020) in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (The Edward Elgar, 2020) 23-45; Kolstad (n 24); Wettstein (n 19); Buhmann, Jonsson and Fisker (17); Augenstein and Kinley (n 24).
[64] Wettstein (n 19) 28.
[65] Besson (n 23) 250.

as a negative duty, [66] in contrast with the positive duty that is the responsibility to protect, [67] both duties could require *active* duties, as negative duties could also in certain cases require active actions 'to actively eliminate risks or dangers to others'.[68]

With respect to the latter distinction, it is worth noting that several institutions are already working on going beyond 'do no harm', for example through the Gender Dimensions framework of the UNGPs, and the UNDP Standards of Conduct for Business 'Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People'.[69] These documents insist that business actors 'should do everything legally possible to question, challenge, delay, and resist' human rights violations in the states where they operate, which can be implemented through 'public advocacy, collective action, social dialogue, financial, and in-kind support'.[70] While these are clearly active duties, and some may argue, positive ones, they are still placed under the umbrella of corporate 'respect' for human rights.

In this regard, Florian Wettstein poses the question of 'what ought to count as "above and beyond" … in the protection and realization of human rights'.[71] According to him, the extension of corporate duties also to protect human rights 'fundamentally challenges' the distinction of responsibility between business and state in the UNGPs.[72] Further, David Karp perceives business actors as moral agents who 'need to take more human rights factors than 'harm' or 'impact' into account when doing HRDD' as they share not only moral but also collective and political responsibility with other actors 'in public fields of moral and legal obligation'.[73] Thus, the author proposes to see business collective and political responsibility not merely in avoiding harm, and not even in providing protection, but also in advocating and using business actors' leverage to promote all aspects of human rights implementation. Beate Sjåfjell and Sarah Cornell claim that to contribute to sustainable development, the minimalist approach of 'do no harm' to business responsibilities is insufficient and 'requires a fundamental change in the regulation of business. The current regulatory framework for business has encouraged the

66 Besson (n 23) 251.
67 H Shue, *Basic rights: Subsistence, affluence, and US foreign policy* (Princeton University Press, 2020) 19, 173; Kolstad (n 24) 277.
68 Wettstein (n 47) 41.
69 UN Working Group on Business and Human Rights *The Gender Dimensions of the United Nations Guiding Principles on Business and Human rig*hts (A/HRC/41/43, 2019). Office of the High Commissioner for Human Rights, 'Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of Conduct for Business' (2017), https://www.unfe.org/wp-content/uploads/2017/09/ UN-Standards-of-Conduct.pdf (accessed 27 July 2024); D Bilchitz *Fundamental Rights and the Legal Obligations of Business* (Cambridge University Press, 2021) 440-441.
70 T Horbachevska, O Uvarova, and D Vovk, 'Freedom of Religion and Non-discrimination Based on Gender Identity and Sexual Orientation in Ukraine: Corporate Policy Commitments in Situations of Conflicting Social Expectations' 2024) *Human Rights Review*, 205-301 at 212.
71 Wettstein (n 19) 28-30.
72 Ibid, 30.
73 D Karp (n 25) 138.

perception that minimum compliance with (insufficient) legal requirements is adequate'.[74] In other work, Beate Sjåfjell has advocated for incorporating a corporate duty to act sustainably within sustainable value creation, where the business has a role as 'a contributor to the fundamental transformation to sustainability',[75] which requires a company board 'to include sustainability assessment of the full life of the products and processes that the company bases its business on'.[76]

Though there are numerous voices calling for the shift from negative to positive corporate human rights responsibilities, the normative basis for such a shift remains elusive.[77] In the next section, we argue that the capability approach may fill this gap.[78]

2.3. A capability approach perspective on the Sustainable Developments Goals

Numerous models of business responsibility go beyond do no harm or the responsibility to respect. These include the UN Global Compact 'support human rights' voluntary approach,[79] the UN Norms approach,[80] the leverage-based responsibility model,[81] virtue ethics,[82] the progressive model of corporate accountability,[83] and the objective-oriented approach.[84] These models remain mostly theoretical. In contrast, the capability approach, being both a theoretical and a practical approach, is already implicitly

[74] B Sjåfjell and S Cornell, 'What the actual….? Tensions in the science-business-policy interface for global sustainability' Under review with European Law Open (2024).
[75] B Sjåfjell, 'A General Corporate Law Duty to Act Sustainably' in H Birkmose, M Neville and K Engsig Sørensen (eds), *Instruments of EU Corporate Governance: Effecting Changes in the Management of Companies in a Changing World* (Kluwer Law International, 2023) Ch. 3 at 4-8. Preprint available at SSRN: https://ssrn.com/abstract=4224255 (accessed 17 July 2024).
[76] B Sjåfjell, 'Revisiting agency theory: A radical rethinking of allocation of responsibility, accountability and liability' (21 May 2024) Preprint of chapter in N Chevrollier, A Argyrou and R Jeurissen (eds) *Radical business perspectives for sustainability transitions,* forthcoming, (Edward Elgar Publishing, 2024) University of Oslo Faculty of Law Research Paper No. 2024-06 at 4, https://ssrn.com/abstract=4835681(accessed 17 July 2024).
[77] Surya Deva and David Bilchitz argue for the 'sound normative base' in which corporate responsibilities should ground in contrast to perceiving corporate responsibilities as social expectations: see Deva and Bilchitz (n 63) 23.
[78] A Kalfagianni, 'Addressing the global sustainability challenge: The potential and pitfalls of private governance from the perspective of human capabilities' (2014) *Journal of business ethics* 122 307-320; Robeyns (n 30) 72-80.
[79] United Nations Global Compact (2019), https://unglobalcompact.org/what-is-gc/mission/principles/principle-1, (accessed 10 July 2024); N Bernaz, *Business and human rights: history, law and policy-bridging the accountability gap* (Routledge, 2016) 176-185.
[80] Ibid, 185-190.
[81] S Wood, 'An Argument for Leverage-Based Business Responsibility for Human Rights' (2011) *EUI Working Paper RSCAS* 2011/48 1.
[82] A Bertland, 'Virtue ethics in business and the capabilities approach' (2009) *Journal of Business Ethics 84* 25-32.
[83] N Bernaz, 'Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty' (2021) *Human Rights Review* 22 45–64 at 58.
[84] B Sjåfjell, 'Solidarity, sustainability and the role of business' in C Bailliet (ed) *Research Handbook on International Solidarity and the Law* (Edward Elgar Publishing, 2024) 203-222 at 218-219.

enshrined in the SDGs – the globally recognized, current policy framework to enhance human well-being. Following the introduction of the UNGPs, several articles were published on how the capability approach could strengthen the UNGPs 'by laying out the theoretical foundation of the moral case for corporate social responsibility'.[85]

The capability approach was introduced in the development discourse by Amartya Sen as a response to the drawbacks of the basic needs approach underpinning the Brundtland report.[86] The capability approach provides an alternative to economic criteria used for establishing levels of human well-being.[87] Sen argued that the capability of a person to fulfil their basic freedoms and opportunities should be the main indicator of the quality of life, human development, justice and sustainability.[88]

The capability approach aimed to initiate a shift in perspective on what we should value in development policy,[89] by seeking to establish both equality of functionings (achieved results) and equality of capabilities (possible opportunities).[90] Sen perceives human capabilities as shorthand for the freedom to choose alternative lives, i.e., to achieve a range of human functionings, which are the practical outcomes of capabilities. The capability approach sees people as agents 'who do things',[91] which means that the focus is not only on the potential to act but also on actual acts (effective functionings). Marta Nussbaum built on this framework and characterised capabilities as fundamental entitlements that are preconditions of basic freedoms.[92]

Human capabilities are universal, but they adapt to the specific context in which a person or community exists. In the words of Pereira, the capability approach has 'sensitivity to interpersonal variability, embodied in the concept of capability'.[93] Relatedly, business policies and activities can reflect the set of cultural and traditional specifications which deteriorate or enhance human capabilities depending on their use. Thus, the capability approach provides a universal metric for measuring individual and collective well-being, which is not dependent on subjective circumstances. Put differently, human capabilities are of universal value

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85 Cantón (n 30) 212.
86 World Commission on Environment and Development *Our Common Future* (Doc No A/42/427, 1987) (Brundtland report).
87 V Guibou, 'Critical analysis of the millennium development goals (MDGs)' (2017) *SSRN* 1.
88 A Sen, 'The economics of happiness and capability' in *Bruni L et al* (Oxford University Press, 2008) 16; M Nussbaum, 'Creating capabilities: The human development approach and its implementation' (2009) 24(3) *Hypatia* 211; J Conill, 'The philosophical foundations of the capabilities approach' in C Luetge (ed) *Handbook of the philosophical foundations of business ethics* (Springer, 2013) 661-674.
89 Renouard and Ezvan (n 6) 150.
90 A Sen, *Development as Freedom* (New York, 1999) 75.
91 K Watene, 'Nussbaum's capability approach and future generations' (2013) 14.1 *Journal of Human Development and Capabilities* 21.
92 M Nussbaum, 'Capabilities as fundamental entitlements: Sen and social justice' (2003) 9(2-3) *Feminist Economics* 40.
93 G Pereira, 'Poverty as a lack of freedom: A short history of the capability approach' in C Luetge (ed) *Handbook of the philosophical foundations of business ethics* (Springer, 2013) 709-718.

and cannot be affected by traditional, cultural, and social characteristics of the community, however, human needs are sensitive to personality and circumstances.[94]

According to Sen, in the context of sustainable development, freedom can include both the satisfaction of material and financial needs as well as political and social liberties.[95] Being a theory of both ends and means,[96] the capability approach determines valuable ends to achieve as 'people's effective opportunities to undertake the actions and activities they want to engage in, and be who they want to be'.[97]

Human capabilities deprivations are 'interdependent and mutually reinforcing', because a lack of education, healthy nutrition and access to work of parents will definitely impact the capabilities of their children and increase restrains on the substantive freedoms (capabilities) to live in equitable social arrangements.[98] The underlying reason for the poor distribution of goods, resources and opportunities can thus be traced back to 'the institutionalized domination and oppression that underlies injustice'.[99] As a result, 'the poor will remain poor', as people born already impoverished are limited in their capacity to function as free beings due to social, economic, and ecological negative impacts.[100] Injustice throughout countries leads to the 'incapability' (intellectual, related to mobility, or self-sustainment deprivations) of human beings to influence the outcomes of their life.[101] To this end, enhancing capabilities of vulnerable groups such as women or youth becomes a crucial part of sustainability justice.[102]

We argue here that an explicit reading of the SDGs framework through a CA lens reinforces the potential of this framework to develop positive corporate human rights obligations. A capability approach interpretation of the SDGs proposes that

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94 A Mahadi, 'Adopting the Capabilities Approach in Developing a global Framework for measuring Sustainable Development' (2012) *Examensarbete i Hållbar Utveckling* 31.
95 A Sen, 'The ends and means of sustainability' (2013) 14.1 *Journal of Human development and Capabilities* 12.
96 M Seckler and J Volkert, 'The capability approach: A promising foundation for sustainable development?' (2021) 183 *Ecological Economics* 3; P Anand, 'Sustainability and the capability approach: from theory to practice?' in S Ibrahim and M Tiwari (eds) *The capability approach: from theory to practice* (Palgrave Macmillan, 2014) 118-147.
97 I Robeyns, 'The capability approach: a theoretical survey' (2005) 6.1 *Journal of human development* 95.
98 Independent Group of Scientists *Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development* (United Nations, 2019) at 39-40 and 43; E Page, 'Intergenerational justice of what: Welfare, resources or capabilities?' (2007) 16:3 *Environmental Politics* 453 at 462.
99 *D Schlosberg 'Climate justice and capabilities: A framework for adaptation policy' (2012) 26 Ethics & International Affairs* 450.
100 N Ndubuka and E Rey-Marmonier, 'Capability approach for realising the Sustainable Development Goals through Responsible Management Education: The case of UK business school academics' (2019) 17(3) *The International Journal of Management Education* 8-9.
101 C Basta, 'From justice in planning toward planning for justice: A capability approach' (2016) 15(2) *Planning Theory* 205.
102 K Stumpf, S Baumgärtner, C Becker and S Sievers-Glotzbach, 'The justice dimension of sustainability: A systematic and general conceptual framework' (2015) 7(6) *Sustainability* 7438 at 7440-41.

human development towards sustainability enshrines principles of equity, participation and efficiency.

The capability approach provides underpinnings for economic, environmental, and social pillars of sustainable development.[103] The social pillar of the SDGs focuses on improving societal functionings and capabilities of a human, and more generally, on increasing the well-being of 'both present and future generations'.[104] Achieving inter- and intra-generational justice builds on the real opportunities and abilities (capabilities) of a person in today's and future societies to live a valuable life that is to have the opportunity of choice and the ability to realise those choices. By choosing a concrete way of action a person moreover contributes to shaping the living conditions of future generations and thus bears responsibility for the choices made. This is reflected, for example, in SDG 1.4 ('ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources'), SDG 5.a ('to give women equal rights to economic resources'), and SDG 15.6 ('Promote fair and equitable sharing of the benefits arising from the utilization of genetic resources…').

Existing CA scholarship shows ways to enhance the business responsibility *to respect* human rights, but says little about how the capability approach can reinforce business responsibility *to protect* human rights. The SDGs provide an opportunity for the CA to do the latter. While we do not consider the SDGs *necessary* to impose explicit human rights responsibilities on businesses, we do find that a capability approach interpretation of the SDGs could contribute to the development of corporate human rights protection obligations. Building on these core concepts, this section outlines the implications of the SDGs for the role of corporations in the human rights field (sub-section 3.1). We then engage with the concept of justice as one of the motivators behind the capabilities approach (sub-section 3.2). We conclude by addressing certain limitations of the capability approach (sub-section 3.3).

2.3.1. A Capability Approach Reading of the Sustainable Development Goals

The text of the 2030 Agenda reveals multiple references to human capabilities.[105] The SDGs agenda explicitly refers to the lack of opportunities in developing human potential in the world, where a critical amount of people are 'denied a life of dignity' and where 'enormous disparities of opportunity, wealth and power' exist.[106] Presumably, the capabilities of a person to lead a valued life are normatively sustained by the SDGs, given that human capabilities are the goal, metric and justice

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[103] P Burger and M Christen, 'Towards a capability approach of sustainability' (2011) 19(8) *Journal of cleaner production* 791-92.
[104] Mahadi (n 94) 24; M Redclift, 'Sustainable development: needs, values, rights' (1993) 2.1 *Environmental values* 8.
[105] The 2030 Agenda (n 10).
[106] Ibid, para 14-15.

objective of sustainable development.[107] The SDGs speak of the necessity of creating such level of capabilities for people, where they can shape the world according to their personal vision and agency and not be passive recipients of norms created by others due to their lack of standing.[108] These references highlight that the SDG agenda follows the capability approach's logic as to the responsibility of various actors (including business) to act proactively to secure human capabilities. This extends to the protection of human rights.

The SDGs incorporate a 'people-centred' approach to human development,[109] as opposed to an economic one, with the help of human capabilities terminology. In comparison to previous development tools such as the Brundlandt report and the Millennium Development Goals (MDGs),[110] the SDGs take the importance of human capabilities as their starting point,[111] emphasizing the need 'to ensure that all human beings can fulfil their potential in dignity and equality'.[112] Moreover, they emphasise that there has to be an equality of opportunity (para 20) and lifelong learning (para 25) so that all people can achieve 'their full human potential' (para 50).[113]

The SDGs' references to human capabilities reflect the impact of Amartya Sen's work on the sustainability discourse.[114] The capability approach also brings together the SDGs and human rights agendas, as it emphasises that the SDGs Agenda is not only a formal proclamation of human rights but also has practical implications on how to measure and achieve them. For example, targets 5.5 (Ensure women's full and effective participation and equal opportunities for leadership at all levels), 10.2 (empower and promote the social, economic, and political inclusion of all), and 16.3 (ensure equal access to justice for all) embody capabilities. The implications for guaranteeing human capabilities are also found under SDG 1 (eliminating poverty); SDG 3 (good health and well-being); SDG 4 (quality education); and SDG 6 (clean water and sanitation).[115] Equally accessible education for everyone as well as 'universal health coverage and access to quality health care' are other examples of the human capabilities implications in the SDGs.[116] All capabilities of a person are

[107] Rauschmayer, Masson, Leβmann and Gutwald (n 33) 75 at 86, 91, 95.
[108] L Voget-Kleschin, 'Employing the capability approach in conceptualizing sustainable development' (2013) 14.4 *Journal of Human Development and Capabilities* 483 at 490, 495.
[109] S Fukuda-Parr and I Cid-Martinez, 'Capability approach and human development' in M Nissanke and J A Ocampo (eds) *The Palgrave Handbook of Development Economics: Critical Reflections on Globalisation and Development* (Springer, 2019) 442.
[110] World Commission on Environment and Development *Our Common Future* (Doc No A/42/427, 1987) 16.
[111] G Tascioni, 'SDGs and Human Rights: how to measure States' compliance?' (2016) 5.3 *European Journal of Sustainable Development* 140.
[112] The 2030 Agenda (n 10).
[113] Ibid.
[114] Fukuda-Parr and Cid-Martinez (109) 442.
[115] Independent Group of Scientists (n 98) at 43, 49 and 128.
[116] The 2030 Agenda (n 10) para 7 and 25-27.

interconnected and if one is insufficient this creates a negative impact on the fulfilment of the others.[117] Reaching SDG 8 on providing decent working conditions for all is not possible without healthy and safe working environments.[118] Taken together, the above-mentioned examples highlight a strong connection between the SDGs, human capabilities, and human rights.

With respect to corporate actors, the SDGs 'strongly encourage this [private] sector to eliminate or stop their negative impacts on the human and their environment, enhancing their positive participation'.[119] Specifically, paragraph 67 of the Agenda 2030 states:

> […]We call upon all businesses to apply their creativity and innovation to solving sustainable development challenges. We will foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard [...].[120]

Paragraph 67 and the concept of 'positive participation' could be interpreted in two ways; as recommending businesses aim for positive societal changes in their activities, or, more coercively, as a positive obligation that could entail binding corporate responsibilities for SDG implementation. The latter reading has received considerable scholarly support,[121] especially from an effectiveness perspective.[122]

For example, SDG 12.6 aims to 'encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle'.[123] The European Union (EU) implemented this target through Directive 2014/95/EU, later extended by the Corporate Sustainability Reporting Directive,[124] which establishes non-financial reporting by public-interest entities with over 500 employees and which will be also applicable to small and medium sized entities in 2026-2027.[125] Specifically, these entities must report on their "development, performance, position and impact of

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117 Ndubuka and Rey-Marmonier (n 100) 7.
118 A Cosbey, 'A Capabilities Approach to Trade and Sustainable Development: Using Sen's Conception of Development to Re-examine the Debates' (2004) *SSRN* at 17-18.
119 Rashed and Shah (n 23) 2937.
120 The 2030 Agenda (n 10) para 67.
121 R Tulder, *Business & the sustainable development goals: A framework for effective corporate involvement* (Erasmus University Rotterdam, 2018) 32: '…without detailing such specific responsibilities [the SDGs] remain a mere list with little moral force'.
122 K Buhmann, *Human Rights: A Key Idea for Business and Society* (Routledge, 2021) 52.
123 The 2030 Agenda (n 10).
124 EU Parliament and Council Directive No 2022/2464/EU 2022 (Corporate Sustainability Reporting Directive).
125 Ibid, article 5.

[their] activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters."[126]

The SDGs, in contrast to the MDGs, can be seen as a framework to 'instigate change compared to the state-centered, duty-based, and negatively framed agreement targeted both at developed and developing countries',[127] and one that is 'based on joint investment of energy and finance rather than subsidies or philanthropy'.[128] By putting the focus towards partnership among different actors, the process of achieving sustainable development becomes more transnational through explicitly including non-state actors, and moves past the 'do no/less harm' principle towards a 'do more good'[129] approach, which is shared between state and business actors. Despite this general change in perspective regarding negative and positive obligations of state and business actors and some promising examples, the SDGs continue to be characterised by voluntary commitments with few formal tools.[130] Moreover, references to the human rights agenda in the SDGs remain limited, such as the reference to the Convention on the Rights of the Child in Paragraph 67.[131]

One of the consequences of the diversity of the SDGs and the lack of overarching legally binding enforcement or implementation rules is that the nature of the responsibility contained in each SDG can vary.[132] For example, SDG 10.3— 'reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices'—creates a negative obligation to avoid harm, while SDG 5.c— 'adopt and strengthen sound policies and enforceable'—presupposes positive action. Even within one SDG target, one can find both negative and positive duties. Returning to SDG 10.3, we find a positive obligation to 'ensure equal opportunity … promoting appropriate legislation, policies and action in this regard' alongside the aforementioned negative obligation to 'reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices'.[133]

The SDGs aim to address economic, social, and environmental issues with a view to ensuring intra-generational equity (distribution within different groups of people of the same generation),[134] and inter-generational equity (distribution of goods

126 EU Parliament, Directive No 2014/95/EU 2014.
127 V Zanten, J Anton and R Van Tulder, 'Multinational enterprises and the Sustainable Development Goals: An institutional approach to corporate engagement' (2018) 1 *Journal of International Business Policy* 211.
128 Tulder (n 121) 13.
129 N Landrum, 'Stages of corporate sustainability: Integrating the strong sustainability worldview' (2018) 31.4 *Organization & Environment* 287.
130 Zanten and Tulder (n 127) 217.
131 I Saiz and K Donald, 'Tackling inequality through the Sustainable Development Goals: human rights in practice' (2017) 21.8 *The International Journal of Human Rights* 1030.
132 Zanten and Tulder (n 127) 231.
133 The 2030 Agenda (n 10).
134 E Folkesson, 'Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest' (2013) 6 *Erasmus Law Review* 144.

taking into account the interests of future generations).[135] Achieving equity within and among generations is a justice driven goal, which runs through the SDG Agenda.[136]

The concept of justice explains why justice claims are legitimate for a particular group of claim holders and claim addressees.[137] Further, it asks how the benefit, good, or advantage (also named 'currency of justice')[138] may be fairly distributed among recipients by actors obliged to provide such goods.[139] Within the sustainability discourse, the justice claims are actual SDGs—the conditions that must be reached to ensure intra- and intergenerational justice, where general justice claims are the SDGs and specific claims are the targets of the SDGs.[140]

Used throughout the 2030 Agenda, the terms 'everyone', 'all', 'no one will be left behind', 'equal opportunity', 'equality of outcomes', 'universality', and 'equitable social development and inclusion',[141] highlight that the just distribution of opportunities and outcomes within and among generations is possible only if every person regardless of their place in the world or in history is not left behind (see SDGs 3, 4, 5, 8, 10, 16, which all talk about the *inclusive, equitable*, and *full* provision of basic well-being goods to *all* people) (emphasis added).[142] The ideas that have been

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135 D Griggs, M Stafford-Smith, O Gaffney, J Rockstrom, M Ohman, P Shyamsundar, W Steffen, G Glaser, N Kanie and I Noble, 'Policy: sustainable development goals for people and plane' (2013) 495(7441) *Nature* 305; Pope Francis *Encyclical on climate change and inequality: On care for our common home* (Melville House, 2015).

136 The 2030 Agenda (n 10) para 3. The scale and scope of the justice literature is too extensive to do justice in a few references. We will refer to especially relevant writing in subsequent footnotes.

137 Stumpf, Baumgärtner, Becker and Sievers-Glotzbach (n 102) 7447.

138 Page (n 98) 454, 456 and 461.

139 N Oermann and A Weinert, 'Sustainability ethics' in H Heinrichs, P Martens, G Michelsen, and A Wiek (eds) *Sustainability Science* (Springer, 2016) 183; Stumpf, Baumgärtner, Becker and Sievers-Glotzbach (n 102) 7439.

140 Ibid, 7448 and 7452; This article focuses predominantly on intragenerational justice, as intergenerational justice is considered a '"just" an extension of intragenerational justice'. Detailed analysis of intergenerational justice requires separate research due to the significant philosophical questions that it raises. Since we consider inter-generational justice to be an 'almost inevitable' result of intra-generational justice, we analyse the obstacles to the latter created, or alleviated by, the actions of business actors. Therefore, we focus our attention on the current generations well-being and opportunities. See: R Gutwald, O Leßmann, T Masson and F Rauschmayer 'The capability approach to intergenerational justice: A survey' (2011) No. 8/2011 *UFZ Discussion Paper* 5, 7-10; Even within the definition of terms when current generation becomes the next generation there is no consensus, see Stumpf, Baumgärtner, Becker and Sievers-Glotzbach (n 102) 7438 at 7461, 7438-7472 and 7444: 'different conceptions of sustainability differ in the time horizons they consider—from 25 years (as a minimum time horizon of one generation into the future) to an unspecified "now and in the future" (as in the Brundtland report) to several generations ("at least 100 years" …) to forever'; B Barry, 'Sustainability and intergenerational justice' (1997) 44 *Theoria* 43.

141 *The Future We Want* UN Conference on Sustainable Development (Rio de Janeiro, Brazil, 2012) para para 4, 31, 45 and 58 (Outcome document).

142 The 2030 Agenda (n 10); Gutwald, Leßmann, Masson and Rauschmayer (n 140) 4-5.

brought up are strongly associated with the capability approach, which emphasises people's agency, universality, and equality in opportunities.[143]

While corporate involvement is essential to SDG implementation and achievement, the SDGs do not articulate an explicit normative foundation on which to build a positive corporate responsibility to protect human rights.[144] In the next sub-section we set out how sustainability justice – which underpins the CA – provides this normative foundation.

2.3.2. Sustainability Justice, Capabilities, and Business

The idea of business responsibility in the sustainability agenda also comes from the development of capitalist economics in the past using predominantly different forms of human or natural capital exploitations.[145] Activities of a garment factory in Bangladesh,[146] or mining companies in Mongolia,[147] can provide economic and income growth but at the same time create even greater inequalities and deterioration of capabilities, for example by using child labour, non-decent and unhealthy working conditions, or by growing inequalities for vulnerable groups (women, ethnic or religious minorities, etc). Current studies on business sustainability make references to the requirement to extend human capabilities within business activities such as 'creating jobs and economic opportunities for all' and enhancing government's public spending in 'building capabilities and opening up opportunities'.[148] Relatedly, the main idea of sustainability justice based on the capability approach is that privileging mere economic growth is insufficient to reach sustainability. Accordingly, it is vital to care not only about the distribution of income, but opportunities (substantial freedoms) to live a dignified life, which the capability approach proposes.[149] Thus, for the capability approach as well as for the SDGs, the distribution of outcomes is crucial, including outcomes of business actors' activities at different decision-making levels.[150]

Bearing in mind the capability approach framework we set out in this article, business actors, to meet certain goals, have created an environment of collaboration between employees, local residents, customers, who have different opportunities

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143 Ibid, 15.
144 R Scheyvens, G Banks and E Hughes, 'The private sector and the SDGs: The need to move beyond 'business as usual'' (2016) 24(6) *Sustainable Development* 371.
145 M Winston, 'Sustainability and social justice' (2011) 2(16) *International Journal of Business and Social Science* 33.
146 P Anand, 'Sustainability and the capability approach: from theory to practice?' in S Ibrahim and M Tiwari (eds) *The capability approach: from theory to practice* (Palgrave Macmillan, 2014) 129.
147 Ibid, 142; A Ariunzaya and M Munkhmandakh *Women and the future of work in Mongolia* (September 2019) 7.
148 Independent Group of Scientists (n 98) 45; Business Commission to Tackle Inequality (BCTI) *Tackling inequality: An agenda for business action* (2023) 28.
149 Gutwald, Leßmann, Masson and Rauschmayer (n 140) 365-66; S Lockie, 'Beyond resilience and systems theory: reclaiming justice in sustainability discourse' (2016) 2(2) *Environmental Sociology* 116.
150 Kalfagianni (n 78) 307.

and thus different capabilities.[151] Within Sen's approach distributive justice demands different levels and ways of ensuring resource distribution according to personal circumstances in the same way as different metabolic rates require different needs in nutrition.[152] Turning back to the case of mining in Mongolia, capability-sensitive approaches to 'ethic based on either ecological or anthropological norms' of workers distinguish such different capabilities and enhance inclusivity of corporate policies.[153] For instance, a Mongolian company 'Natural Essentials LLC', producing organic cosmetics and lead by 29-year old female CEO provided jobs for twenty eight women, including young women and former housewives.[154]

Within the capability approach discourse, corporations are considered moral actors,[155] political institutions,[156] and 'agents of justice'.[157] Corporations are seen as key actors in the promotion of human capabilities, either via 'positive allocative manner (that is to contribute or to act) or negative manner (to refrain from or to take due care to avoid)' in the jurisdictions where they operate.[158] Specifically, the capability approach helps to improve distributional justice and guide corporate ethics on human rights.[159]

The concept of intra- and inter-generational justice inspires scholars to elaborate on the capabilities of the person but also on how we realize our functionings being 'agents who do things'.[160] Functionings are not just the results of human capabilities which benefit (or not) the person. By choosing a concrete way of action a person contributes to shaping the living conditions of future generations and thus bears responsibility for the choices made.[161] Under the capability approach, individuals therefore not only have the right to acquire capabilities and functionings but also *a duty of* taking into account the effects of their realization as agents 'who do things'. This principle extends to business actors who can influence the human rights and

151 L Miles, 'The capabilities approach and worker wellbeing' (2014) 50.8 *The Journal of Development Studies* 1043.
152 Page (n 98) 462.
153 Anand (n 146) 142.
154 UNDP *Beyond the Glass Ceiling: Expanding Female Leadership in Mongolian Politics and Businesses* (31 October 2016), https://www.undp.org/mongolia/blog/beyond-glass-ceiling-expanding-female-leadership-mongolian-politics-and-businesses (accessed 3 November 2023).
155 G Enderle 'The capability approach as guidance for corporate ethics' in C Luetge (ed) *Handbook of the philosophical foundations of business ethics* (Springer, 2013) 675-691 at 685.
156 Renouard and Ezvan (n 6) 146-147.
157 D García-Marzá, 'Business contribution to human development from the capabilities approach standpoint' (2013) in C Luetge (ed) *Handbook of the philosophical foundations of business ethics* (Springer, 2013) 719-729 at 721.
158 A Okoye, *CSR and a Capabilities Approach to Development: CSR Laws as an Allocative Device?* (Cambridge University Press, 2019) 32, 45.
159 Enderle (n 155), 686, 688.
160 Watene (n 91) 34.
161 Ibid, 34-35.

human rights capabilities of many people and communities.[162] In this sense, *reading the SDGs explicitly through the capability lens explains that in addition to the responsibility for the negative effect caused, business actors must anticipate the impact they may create on human capabilities in intra- and inter-generational justice within business economic activities*. Furthermore, the ultimate goal of sustainable development of reaching intragenerational justice requires that business actors not only *control* impacts but also *create more* opportunities for those affected by business activities, i.e., communities and individuals.

David Bilchitz uses the example of a person incapable of receiving an expensive cancer treatment.[163] He questions whether a pharmacy company has a duty to lower the price of the treatment, which would go far beyond a negative duty to avoid harm.[164] He further asks:

> If they have such positive obligations, a further set of questions arise concerning the substantive content thereof: does Roche have a more onerous set of obligations given that it operates in the healthcare sector, which significantly affects the fundamental rights of individuals? Once it has developed the drug, must it provide it to all those who cannot afford that drug for free? If not, how far do its obligations extend and what are their limits?[165]

The theory of the capability approach read through the SDGs can provide answers to these questions. Recognizing that the business actors are 'agents who do things' changing the lives of present and future generations with sustainability goals, business actors should take into account impacts beyond their own activities. It would be unreasonable to require a pharmaceutical company to pay an ill person's taxes or to do other actions which are non-related to the company's activities. However, perceiving the business actor as an agent capable not only of achieving certain economic results but of contributing to inter- and intra-generational justice makes this pharmaceutical company obliged to create a certain system of providing more accessible prices for a wider part of the human population because the company has the ability and power to do so. It would then contribute to reaching such goals as SDG 1 (end poverty in all its forms everywhere), SDG 3 (Ensure healthy lives and promote well-being for all at all ages), SDG 16 (Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels).

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[162] Renouard and Ezvan (n 6) 146-47: '[…] the scale and scope of corporate responsibilities refer to all corporate actions and decisions that impact the capabilities of all human beings (current stakeholders, but also citizens of the world or future generations, if impacted) from a long-term perspective.'
[163] Bilchitz (n 69) 1-3.
[164] Ibid, 4.
[165] Ibid.

2.3.3. Limitations to the Capabilities Approach

We consider the potential of the capability approach interpreted as an explicit normative foundation of the SDGs on which to build a positive corporate responsibility to protect human rights. As mentioned, the SDGs envisage an important role for state *and* non-state actors in the implementation of the Agenda.[166] However, the question as to *who* would be responsible for ensuring the creation and maintenance of capabilities requires further consideration, as existing work on the CA only marginally addresses this point.[167]

A promising starting point for future research on this question is scholarly work on how to stipulate a minimum duty on companies, for example by stipulating a minimum standard requirement in ensuring human freedoms, and opportunities for people to exercise their rights, as suggested by Nussbaum and Tjon Soei Len.[168] The minimum standard requirement is 'the idea that a minimally just society ought to secure certain central capabilities up to a threshold level for all its members, which is compatible with human dignity'.[169] Such minimum threshold can be identified through lists of basic capabilities. For instance, Nussbaum proposes a list of basic capabilities consisting of life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; friendship; respect; other species; play; control over one's environment.[170] As highlighted by Jane Buckingham and Venkataraman Nilakant, the capability approach provides a basis to measure a company's performance as this approach asks not only

> whether the company's performance will produce a profit in economic terms. But it also asks whether the company will contribute to the opportunity of its employees and suppliers to not only feed, clothe and

166 The 2030 Agenda (n 10) SDG 17.

167 Robeyns (n 30) 157-159. See conversely, M Ulriksen and S Plagerson, 'Social protection: Rethinking rights and duties' (2014) World Development, 64, 755-765 at 757 and A Cortina, 'Capabilities, Human Rights and Business' in C Luetge (ed) Handbook of the philosophical foundations of business ethics (Springer, 2013) 693. See also Anand (n 146) 118-147.

168 Tjon Soei Len, *Minimum contract justice: a capabilities perspective on sweatshops and consumer contracts* (Bloomsbury Publishing, 2017) 31.

169 Ibid. The author writes at p 55: 'From a capabilities perspective we can say that minimum contract justice requires that freedom of contract is constructed as to create an enabling environment in which persons have the ability to pursue *valuable* functionings through market exchange on an equal basis with others... A capabilities approach to minimum contract justice identifies those agreements that are incompatible with securing and protecting basic capabilities…'.

170 M Nussbaum, 'Capabilities and human rights' (1997) 66 *Fordham L. Rev.* 273 at 287-288; See also: R Saith, *Capabilities: the Concept and its Operationalisation* (Oxford: Queen Elizabeth House, 2001); C González-Cantón, S Boulos, and P Sánchez-Garrido, 'Exploring the link between human rights, the capability approach and corporate responsibility' (2019) *Journal of Business Ethics 160*(4) 865-879.

> shelter themselves and their dependents, but also educate their children and enjoy a social and cultural life that is meaningful to them.[171]

In the next section, we consider the implications, and the applications, of the capability approach lens for business and human rights legislation.

2.4. Implications of the Capabilities Approach for the Business and Human Rights Agenda

This section sets out the pathways to adapting the business and human rights agenda to incorporate a positive corporate obligation to enhance human capabilities. Specifically, we consider how concrete provisions within emerging human rights due diligence (HRDD) legislation could be shaped to include procedural mechanisms to protect human rights. HRDD legislation requiring business actors to prevent human rights abuses provides a particularly good example of how business actors can sustain human rights capabilities.[172]

Carrying out human rights due diligence is mentioned in Pillar II of the UNGPs as one of the ways in which companies can meet the corporate responsibility to respect human rights. Companies should 'identify, prevent, mitigate and account for how they address their impacts on human rights'.[173] HRDD aims to prevent human rights abuses that a company has caused or contributed to through its own activities or to which it is linked through its business relationships.[174] Such prevention, according to the UNGPs articulation of HRDD, requires adopting and integrating human rights policies, conducting human rights impact assessments, and tracking the performance of such policies in practice.[175]

Following France's adoption of the duty of vigilance law,[176] requiring large French companies to identify and address their human rights impacts across their value chains, Norway and Germany have followed suit with their own corporate due diligence laws.[177] Moreover, since 2022, the European Union had been developing

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171 J Buckingham and V Nilakant, 'Conclusion: New Directions in Corporate Social Responsibility' in J Buckingham and V Nilakant (eds) *Managing Responsibly*: *Alternative Approaches to Corporate Management and Governance* (Routledge, 2016) 209-222 at 218.

172 D Terán, 'Beyond corporate social responsibility: Strengthening human rights due diligence through the legally binding instrument on business and human rights' (2021) 138 *Research Paper* 4; R McCorquodale and J Nolan, 'The effectiveness of human rights due diligence for preventing business human rights abuses' (2021) 68 *Netherlands International Law Review* 467.

173 The UNGPs (n 7).

174 Ruggie (n 40) para 25; T Van Ho, 'Defining the Relationships: "Cause, Contribute, and Directly Linked to" in the UN Guiding Principles on Business and Human Rights' (2021) 43.4 *Human Rights Quarterly* 625.

175 G Quijano and C Lopez, 'Rise of mandatory human rights due diligence: a beacon of hope or a double-edged sword?' (2021) 6(2) *Business and human rights journal* 249.

176 French Law No. 2017-399 2017 'Duty of Vigilance Act' (Loi de Vigilance).

177 German Law No. 19/30505 2021 'Supply Chain Act' (Sorgfaltspflichtengesetz); Norwegian Law No. 150 L 2021 'The Transparency Act' (Forbrukertilsynet).

a Corporate Sustainability Due Diligence Directive, which includes human rights aspects.[178] The Directive was adopted in May 2024 and will have to be transposed in all twenty-seven Members States by 26 July 2026. It has the potential to profoundly transform corporate practices within the European Union, with spillover effects beyond the EU.

However, the new Directive still mostly focusses on preventing negative impact.[179] The preamble to the Directive states that one of the key aims of the Directive is to contribute to sustainable development[180] and that 'existing international standards on responsible business conduct specify that companies should protect human rights'.[181] The phrase regarding the companies' protection of human rights is the only reference to the role of business in human rights *protection* in the text. The new Directive requires extensive actions by companies to conduct due diligence in regard 'to prevent, mitigate, bring to an end or minimize all identified adverse impacts at the same time and to their full extent, companies prioritize adverse impacts'.[182] Moreover, the recital emphasizes that companies should pay special attention to the adverse impacts of their activities on such individuals.[183]

The wording of the recital suggests that the responsibility to respect can extend further than merely avoiding harm. This is also implied in the Directive; Article 8 provides that companies should carry out an in-depth assessment of their own operations not only in the areas 'where adverse impacts were identified to be most likely to occur and most severe',[184] but they also could extend this assessment to the identification of the most pressing social need to protect or contribute to the protection of certain human rights capabilities. In this regard, Bilchitz has explained that human rights obligations derive directly from the rights and cover 'negative obligations not to harm rights, and also positive obligations actively to advance the realization of rights.'[185]

The Directive further suggests that to conduct due diligence sufficiently, 'companies should also make necessary modifications of, or improvements to, their design and distribution practices… Adopting and adapting such practices, as necessary, could

[178] EU Parliament and Council Directive No 2024/1760 /EU 2024 (Corporate Sustainability Due Diligence Directive).
[179] Ibid, para 20, 40 of the preamble.
[180] Ibid, para 8 of the preamble.
[181] Ibid, para 5. The question of protect aspect of human rights is incoherent and rather implicit in the Directive. As set out in para 32 of the Directive, in 'order to achieve a meaningful contribution to the sustainability transition, due diligence under this Directive should be carried out with respect to adverse human rights impacts on persons resulting from the abuse of one of the rights as enshrined in the international instruments' – is talking about the result of the abuse but not the achievement of stronger human rights protection.
[182] Corporate Sustainability Due Diligence Directive (n 178) article 9.
[183] Ibid, recital, para 33 (the recital of the Directive reveals that there can be additional standards applied to the individuals at heightened risk because of marginalization, vulnerability, or other reasons.)
[184] Ibid, article 8.
[185] Bilchitz (n 69) 176.

be particularly relevant for the company, to avoid an adverse impact in the first instance.'[186] These actions, along with the obligation to influence its business partners to respect human rights entails an implicit duty to protect and fulfil as it 1) establishes the obligation to influence third parties to enhance human rights respect; 2) calls for additional action to contribute to human rights protection and sustainability. HRDD can be more explicitly extended to include the legal obligation of companies to protect and fulfil human rights in certain situations. Moreover, it could be extended to also include enhancing human capabilities. Specifically, using the tools of due diligence, the company could ask what capabilities it could enhance in its policies and practices, in what context, and to what extent.

The Directive already oblige businesses, at least those falling within its scope, to respect human rights. We argue that such legislation also has the potential to force businesses to actively protect human rights. For example, businesses may be operating in national contexts without public regulation regarding gender inequality. In such cases, corporate policies can actively combat gender inequality in lieu of state action. In addition, business could use HRDD principles to evaluate risks of human rights abuses, and to assess gaps in human rights protection.[187] The latter would allow the company to enhance its protection in line with its commitment to bring positive change to human well-being according to the SDGs. As argued by Ruggie, Rees, and Davis

> human rights due diligence is more about a consistent practice of reviewing how business decisions and actions may impact different people in different contexts, than it is about a single technical exercise.[188]

The use of HRDD would also allow for the prioritization of the most relevant aspects to focus on in achieving sustainability such as addressing structural inequalities.[189] In this regard the Independent Group of Scientists appointed by the UN Secretary-General emphasizes that policymakers have to approach human well-being as a co-benefit for all policies in a way that such co-benefit is included in impact assessments 'in line with the inter-linkage ethos of the Goals'.[190] They further provide the following example: interventions focusing on adequate water and sanitation services positively affect implementation of other goals such as environmental and human health, reducing poverty, and empowering women.[191]

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[186] Corporate Sustainability Due Diligence Directive (n 178) para 45 of the preamble.
[187] J 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* 241.
[188] J Ruggie, C Rees and R Davis, 'Making 'Stakeholder Capitalism' Work: Contributions from Business & Human Rights' (2020) *SSRN* 186.
[189] D Karp (n 25) 138.
[190] Independent Group of Scientists *Global Sustainable Development Report 2023: Times of crisis, times of change: Science for accelerating transformations to sustainable development* (United Nations, 2023) 107.
[191] Ibid, 109.

Business actors can enhance human rights capabilities and, more generally—increase the well-being of present and future generations—through their HRDD policies and practices.[192] Business actors can moreover establish vulnerability-sensitive HRDD in societies where certain groups are un(der)protected. A company that conducts capability mapping can become aware of the specific circumstances in which certain employees work and adapt their working hours to allow them to fulfil other duties such as child-care or household duties, or to create flexible hours schedules to allow employees to full-time if needed. For example, the company Baker McKenzie has realized a 'bAgile' program where employees can work productively in 'different ways and at different times' within flexible working conditions 'including remote work, alternative working hours and non-standard leave arrangements.'[193] Therefore, to create real capabilities for certain employees to work efficiently, the company provides additional safeguards in work conditions. In this way, the employer not only avoids harm but acts positively to create equal opportunities for employees with different capabilities. Thus, such additional safeguards equalise employees' working opportunities for both employees with or without child-care, mobility constraints due to (partial) disability, or household duties.

Another approach is through Lessmann and Rauschmayer's four-step implementation of the capability approach into sustainable development and sustainable business practices. They propose four elements to be taken into account both individual and collective capabilities: 1) what resources are available for ensuring individual capabilities; 2) how realized capabilities that became achieved functionings impact the economic, social and environmental systems; 3) how such systems are changing under this impact; 4) and how these changed systems affect the capability sets of future generations.[194] These four elements highlight the role of human functionings in worsening or enhancing sustainable development of the whole system. As such, the abovementioned example of flexible hours provides an opportunity to see how vulnerability mapping assists in enhancing employees' opportunities. The capability of employees with additional non-work-related duties to have the same opportunities as other colleagues creates possibilities of agency and, thus, capabilities for the whole group of workers in this company. As such, sensitive and flexible working conditions created by the employer are not an example of mere respect for human rights but of human agency; they may strengthen opportunities for others and enhance systematic sustainable changes. Human rights protection in business activities engages systematically with bringing positive and sustainable opportunities for present generations.

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192 *Schlosberg* (n 99) 458.

193 Business Commission to Tackle Inequality (n 148) 65.

194 O Lessmann and F Rauschmayer, 'Re-conceptualizing sustainable development on the basis of the capability approach: A model and its difficulties' (2013) 4(1) *Journal of Human Development and Capabilities* 99.

When being used to shape the HRDD process through supportive legislation, such as national transposition legislation of the EU's new Corporate Sustainability Due Diligence Directive, the capability approach can act as a explicit normative basis for the SDGs to move the aim of HRDD legislation from 'respect' to 'protect' human rights. Adopting such approach would allow businesses to be crucial actors in encouraging and promoting effective public, public-private, and civil society partnerships (SGD 17.17). For example, HRDD legislation could incorporate requirements to conduct a capability mapping of the environment where the business operates and, as a result, introduce vulnerability-sensitive HRDD policies that specifically aim to enhance the capabilities of certain vulnerable groups. Reimagining HRDD tools not only to prevent human rights abuses but to protect human rights would contribute to combating structural inequality in reaching intra- and inter-generational justice within sustainable development.

2.5. Conclusion

This article aims to provide a normative basis in which to ground a positive corporate responsibility to protect human rights. Reading the SDGs through the lens of the capability approach helps to rethink business actors' responsibilities in the human rights sphere, and to move beyond the 'do no harm' formula enshrined in the UNGPs. Human rights capabilities cannot be fulfilled only by avoiding causing harm; human rights capabilities need to be enhanced by creating additional safeguards for people for human flourishing. Therefore, business actors have the responsibility to create additional protection mechanisms to enhance affected individuals' opportunities and functionings.

The capability approach perspective also allows us to bring together two parallel regulatory frameworks, that of the SDGs and the UN Guiding Principles on Business and Human Rights (UNGPs), which considerably enhances the transformative potential of existing and developing corporate human rights due diligence legislation. Taking existing legal and policy frameworks as a starting point, we highlight how HRDD can be used for assessing where business actors can contribute to enhancing human rights capabilities, thus creating conditions for human rights protection in this developing area of law.[195]

[195] Canada Bill S-211 2023 'Fighting Against Forced Labour and Child Labour in Supply Chains'; South Korea Bill 제410회-기획재정제3차(2023년11월13일) 2023 'Human Rights and Environmental Protection for Sustainable Business Management' (HREDD Bill); Macchi and Bright (n 210) 218-247.

Chapter 3

Freedom of Religion and Non-discrimination Based on Gender Identity and Sexual Orientation in Ukraine: Corporate Policy Commitments in Situations of Conflicting Social Expectations

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3. Freedom of Religion and Non-discrimination Based on Gender Identity and Sexual Orientation in Ukraine: Corporate Policy Commitments in Situations of Conflicting Social Expectations

Abstract

Conflicting social expectations in a particular state affect the interpretation and implementation of international human rights law. Ideological, religious, and legal factors related to the protection of freedom of religion or belief (FoRB) and freedom from discrimination based on sexual orientation and gender identity (SOGI) in Ukraine put businesses under social pressure. Businesses thus face a legitimate dilemma regarding whether to follow national social expectations perceiving FoRB and freedom from discrimination based on SOGI as rights in conflict or expectations arising from international human rights law establishing both freedoms as equal and non-clashing. Based on desk research and in-depth interviews with business policymakers the article identifies neutrality, ignoring, and active engagement strategies when providing corporate respect to FoRB and SOGI under the business and human rights framework 'Protect, Respect, Remedy' which requires responsible business conduct. The article concludes with the implications each strategy has for resolving presumed clashes between FoRB and SOGI at the community level.

Keywords: Social Expectations, Business and Human Rights, Freedom of Religion or Belief, Sexual Orientation and Gender Identity, Social Conflicts, Ukraine.

3.1. Introduction

One business makes its corporate emblem rainbow-colored to combat religiously-based stereotypes about LGBT+ people.[1] The business next door puts out a job vacancy with the requirement for candidates *not* to be representative of the LGBT+ community with the aim to defend religious culture.[2] Another business down the street refuses to hire a transgender person and prohibits art exhibitions about Muslim feminism due to the religious views of its management. These are all examples of tensions that arise between freedom of religion or belief (FoRB) and freedom from discrimination based on sexual orientation and gender identity (SOGI)[3] or restrictions on SOGI expressions with the appeal to FoRB protection arguments within businesses' activities in Ukraine today. In this context, should businesses be neutral or actively involved in providing respect for SOGI and FoRB at the corporate and community levels?

FoRB and freedom from discrimination based on SOGI often seem to be rights that exist in constant conflict.[4] The UN Special Rapporteur on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, says that 'religion and the human rights of LGBT persons are often placed in antagonistic positions in social and political discourse, feeding the contention that there is an inherent conflict between FoRB and the human rights of LGBT individuals.'[5] Presumed conflicts between FoRB and SOGI are mostly analysed in the context of the vertical dimension of human rights (obligations of the

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[1] The paper uses a CoE definition of 'LGBT+'. According to CoE 'LGBT' stands for lesbian, gay, bisexual, and transgender/transsexual people. However, it is recognised that those four letters do not necessarily include all those whose sexuality is not heterosexual, or whose gender identity is not based on a traditional gender binary. The '+' symbol is therefore used to include people whose identities do not fit typical binary notions of male and female, or who decide to identify themselves using other categories to describe their gender identity or their own understanding of their sexuality. Other abbreviations such as 'LGBT', 'LGBTI', 'LGBTIQ+', and 'LGBTIQ' are used within direct citations.

[2] M Brovinska, 'Zashkvar roku. IT-kompaniia Soft.ua opublikuvala vakansiiu iz dyskryminatsiinoiu normoiu shchodo predstavnykiv LHBTK-rukhu, i tse ne yedyna dyvna vymoha — aitishnyky v hnivi' ['Zashkvar of the year. The IT company Soft.ua published a vacancy with a discriminatory norm against representatives of the LGBTQ movement, and this is not the only strange requirement - IT users are angry'] https://dev.ua/news/lhbt-1686647729.

[3] Sexual Orientation or Gender Identity (SOGI) is a legal term international institutions such as CoE use in their legal standards (Recommendation CM/Rec(2010)5) which covers, inter alia, protection of lesbian, gay, bisexual and transgender people (LGBT+) from discrimination. Thus, SOGI is a legal term for a social term of LGBT+. See https://www.coe.int/en/web/sogi.

[4] D NeJaime, 'Inclusion, accommodation, and recognition: Accounting for differences based on religion and sexual orientation' (2009) *Harv. JL & Gender* 32 303; M Shevtsova, 'Fighting "Gayropa": Europeanization and instrumentalization of LGBTI rights in Ukrainian public debate' (2020) *Problems of Post-Communism* 67(6) 500.

[5] V Madrigal-Borloz, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* (A/HRC/53/37, 2023); M Gas-Aixendri, 'Advancing Gender Equality Without Forfeiting Religious Autonomy: Squaring the Circle?' (2022) T*he Review of Faith & International Affairs* 20(3) 19.

state, role of courts). However, these conflicts go far beyond the traditional spheres of society (same-sex marriages, equal access to medical treatment, etc.) and exist in the horizontal dimension. In particular, they arise in the field of business, which is a much less researched issue, especially in Eastern Europe and the post-Soviet region, to which Ukraine belongs.[6] The issue of protection from discrimination based on SOGI also extends to discrimination in the workplace; abuses against LGBT+ customers, suppliers, or contractors; and debates about SOGI protection at the community level.[7] 'Corporate level' in this article means the decision-making processes within various, state, non-state, international, and national businesses. 'Community level' includes numerous social processes, contradictions, and discussions among various political, religious, cultural, and professional groups or individuals in a given society.

The corporate responsibility to respect human rights, as defined in the United Nations Guiding Principles on Business and Human Rights (UNGPs), is based on social expectations.[8] Social expectations that companies respect human rights entail that they respect all human rights irrespective of possible clashes in a concrete society because of ideological, religious, and legal factors. At the same time, meeting those social expectations in the business and human rights sphere may create contradictions in those cases when social expectations themselves are contradictory and society perceives certain human rights as conflicting. This dimension of the corporate responsibility to respect human rights is overlooked by the business and human rights literature, and, more broadly, by human rights studies.

Within a human rights framework FoRB and freedom from discrimination based on SOGI are non-clashing rights.[9] The human rights framework recognizes that all human rights are equal and deserve the same level of protection.[10] Nevertheless, conflicts between FoRB and SOGI arise at the community level. Human rights and social expectations and attitudes towards the concepts of FoRB and SOGI can create conflicts at the implementation level, within which business actors need to 'navigate.'[11] This impacts strategic responses businesses use when facing

[6] M Shevtsova, 'Religion, nation, state, and anti-gender politics in Georgia and Ukraine' (2023) *Problems of Post-Communism* 70(2) 163.

[7] Office of the High Commissioner for Human Rights *Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of Conduct for Business* (Office of the High Commissioner for Human Rights, 2017).

[8] The concept of 'social expectations' for responsible business conduct was developed by John Ruggie, former UN Secretary-General's Special Representative for Business and Human Rights.

[9] N Ghanea, 'Piecing the Puzzle - Women and Freedom of Religion or Belief' (2022) *The Review of Faith & International Affairs* 20(3) 4.

[10] N Ghanea, A Stephens and R Walden, *Does God Believe in Human Rights* (Martinus Nijhoff Publishers, 2007); E Klein, 'Establishing a hierarchy of human rights: Ideal solution or fallacy?' (2008) *Israel law review* 41(3) 477.

[11] A Gaur, A Settles and J Väätänen, 'Do Economic Sanctions Work? Evidence from the Russia-Ukraine Conflict' (2023) *Journal of Management Studies* 60 1391 at 1410.

international and national social pressures.[12] Focusing on a specific example of conflicting social expectations on FoRB and SOGI protection in Ukraine, this article makes a more general contribution to the development of the concept of business and human rights in a situation where certain human rights are considered to be in conflict. The article aims to determine what behavioral strategies companies use in a situation of conflicting social expectations, and whether the choice of strategy is influenced by the business being 'international' or functioning mainly (or only) at the national level. To answer these questions, the paper uses a method of desk-based research and in-depth interviews with businesses operating in Ukraine.

Business and human rights scholarship attempted to establish strategies to respect human rights which *global* businesses may use engaging with human rights issues 'across legal and cultural environments.'[13] The models of business involvement in providing respect to human rights, in particular, for FoRB and SOGI, vary in the literature. Certain authors propose to see such strategies as 'internal, external, reactive, and proactive'.[14] Other authors describe three models of actions businesses can use to ensure LGBT+ inclusion such as 'when in Rome model' – when business actors 'abandon their non-discrimination policies in inhospitable political and legal environments'; 'Embassy model' – when business actors 'create a welcoming workplace in a hostile national environment without challenging that environment'; Advocate model – when business actors 'actively try to change anti-LGBTI laws and social attitudes wherever they operate.'[15]

However, such theoretical inquiries should be further extended to the study of national and religious contexts which formulate business respect for SOGI and SOGI. We modified such an approach to the case of Ukraine which has a specific national, legislative, religious, and cultural environment, where business actors have to operate. Based on the empirical research, we identified three strategies businesses use when operating in Ukraine: strategy of *neutrality* – a tendency to privatize both FoRB and SOGI as private life components; strategy of *ignoring* – the omission of FoRB and SOGI in corporate policy commitments because businesses' employees do not request respect; strategy of *an active engagement* – substantive efforts to 'identify, prevent, mitigate and account' business impacts on issues related to providing respect for SOGI and FoRB.

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[12] J Li, J Xai, E Zajac and Z Lin, 'Have a go or lay low? Predicting firms' rhetorical commitment versus avoidance in response to polylithic governmental pressures' (2022) *Journal of Management Studies* 61(2) 307.
[13] A Lyons and C Christiancy, 'Reclaiming the human rights foundations of the UN standards of conduct for business on tackling discrimination against LGBTI people' (2022) *Business and Human Rights Journal* 7(1) 134; D Glasgow and K Yoshino, *Opening Up the World: How Multinational Organizations Can Ascend the Maturity Curve on LGBTþ Rights* (2020) https://www.law.nyu.edu/sites/default/files/OpeningUpTheWorld_report_FINAL_508.pdf.
[14] L Mara, M Ginieis and I Brunet-Icart, (2021) 'Strategies for coping with LGBT discrimination at work: A systematic literature review' *Sexuality Research and Social Policy* 18 339.
[15] Lyons and Christiancy (n 9) 144.

The article is organized as follows. Section 1 discusses the methods used to collect the empirical data. Section 2 looks at the legal, ideological, and religious inconsistencies in Ukraine that businesses have to consider when ensuring respect for SOGI and FoRB. Section 3 provides an overview of international frameworks for business responsibility to respect SOGI and FoRB within their activities. Section 4 analyses corporate policy commitments to respect SOGI and FoRB of the 100 largest businesses operating in Ukraine. Section 5, based on interview results, identifies three strategies businesses in Ukraine use to address issues in providing respect to SOGI and FoRB: neutrality, ignoring, and active engagement. Section 6 discusses the results of corporate policy commitments assessment and interviews. Finally, the article concludes that businesses that use neutrality and ignoring strategies depend more on national conflicting social expectations regarding FoRB and SOGI, whereas those businesses using the active engagement strategy are more inclined toward international human rights expectations in the business and human rights sphere.

3.2. Methodology

The article combines desk-based research[16] on businesses' corporate policy commitments (e.g., human rights policies of companies, non-human rights policies, reports, etc.) and in-depth interviews with businesses. Empirical data was analysed to explore whether and in what ways national and international businesses in Ukraine address the need to respect FoRB and SOGI at the corporate and community levels. The companies examined are those 100 Ukrainian business entities with the largest revenue in 2022 according to the Ukrainian government database.[17] Empirical findings have two inherent limitations.

First, the results of the empirical data collection are based on businesses that have their corporate policy commitments publicly available or provided such data during the interviews. Locating the human rights policies of all 100 businesses was challenging. A considerable number of these businesses do not have any information available on their websites. Forty-four out of 100 of the businesses do not have publicly available human rights policies.

The paper analyses different types of corporate policy commitments, which are important for research. There are various corporate policy commitments to respect human rights: human rights policies, non-human rights policies (Codes of Conducts) with some human rights provisions, reports, and general sections on the websites expressing human rights commitments, public statements, adoption of corporate symbols that include LGBT+ colours, and advocacy events in support of SOGI. Additionally, there are reports (ESG and SDGs reports) that some businesses publish

[16] Desk or desk-based research is a method that explores data from existing documents and previous research - secondary data - to gather information over a particular topic.
[17] State Statistics Service of Ukraine, 'Financial reporting of enterprises (annual)' (2023) https://data.gov.ua/en/dataset/7436ae83-dfc1-4836-9962-8af3e831c522.

because of legal requirements. All of these commitments, irrespective of their format may address the gender, sexual and religious identity of the individual. Therefore, for the purpose of the research presented in this article, corporate policy commitments as a collective concept include any of the abovementioned types of commitments that deal with providing respect for FoRB and SOGI.

Second, a low level of responding to interview inquiries resulted in a relatively small sample pool: only 12 businesses responded positively to participate in interviews out of 50 who had responded to inquiries. A 'snowball method' was used to find businesses willing to participate in the interviews after there was a low level of response to the initial interview inquiries. Interviews were conducted face-to-face in Ukrainian language online using Zoom, Teams and Google Meet platforms between May and July 2023. The sample was 12 business representatives (one from each company) including human resources managers, chief executives, and compliance officers involved in the process of policymaking. The duration of the interviews was from 40 to 70 minutes. In addition, in preparation for the 12 interviews, the first co-author interviewed 5 experts in the business and human rights field in Ukraine.

The results from the 12 interviews are presented in a generalized manner, and the names of policymakers and companies remain anonymous. All of the participants agreed to the ethical standards of the research and voluntarily participated. Manual coding was used to analyse the interview content related to FoRB and SOGI in businesses' activities. The data gathered from these interviews highlight several strategies national and international businesses use in Ukraine to provide respect for FoRB and SOGI: neutrality, ignorance and active engagement strategies.

3.3. Social Expectations Under the Pressure of Ideological, Religious, and Legal Factors

3.3.1. Freedom of Religion and Non-Discrimination Based on Gender Identity and Sexual Orientation in Ukrainian Society

The state engagement with respecting and ensuring respect for FoRB and SOGI is further affected by religious actors' attitudes towards the legal protection of SOGI and its alleged conflicts with FoRB by religious organizations, leaders of religious groups, and inter-faith institutions.[18] Since the Russian war against Ukraine started in 2014, opposition to FoRB and freedom from discrimination based on SOGI rights has decreased due to a reduction of Russian religious homophobic and anti-gender rhetoric influence.[19] However, the idea of SOGI being a threat to traditional and religious values is still one that is actively supported by some Ukrainian political

[18] In this article the notion of 'religious actors' means religious organizations, leaders of religious groups, churches, inter-faith institutions, religious-based entities and other individuals or groups that identify themselves as following specific religions.

[19] M Shevtsova, 'Fighting "Gayropa": Europeanization and instrumentalization of LGBTI rights in Ukrainian public debate' (2020) *Problems of Post-Communism* 67(6) 500.

parties and nationalistic movements.[20] For example, there are numerous cases of right-wing organisations opposing LGBT+ events in Ukraine and attacking openly LGBT+ persons.[21]

Religious actors refer to such reasons against the introduction of SOGI-sensitive legislation as the non-legitimate and threatening influence of international organizations and countries such as the Russian Federation, family values, and demography crisis.[22] The interim report of the UN Special Rapporteur on SOGI from June 2023 also criticizes Ukrainian religious actors who support restricting SOGI and LGBT+ rights with the aim of safeguarding the 'traditional family.'[23] Religious actors usually do not discuss what constitutes discrimination but rather attempt to build an image of nationwide rejection of the protected category of SOGI.[24] This opposition in turn marginalizes SOGI at the community level.

One of the participants the first co-author interviewed, who worked in a business's compliance office stated that, among other reasons, religious views play a role in creating bias when sexual orientation besides heterosexuality and gender identity besides cisgender identity are viewed as unacceptable identities in Ukrainian society:

> SOGI is radicalized, because two groups at once - both religious and right-wing radicals are very exorbitantly opposed to the topic of SOGI... For example, I know that a number of nationalist groups did not love the topic of gender equality, women's feminism, but at this moment it was only about women, the religious actors somehow were silent, but then these two very

[20] Ukrainian Council of Churches and Religious Organizations, 'Rada Tserkov obhovoryla z Holovoiu Verkhovnoi Rady problemni zakonoproiekty' ['The Council of Churches discussed problematic draft laws with the Chairman of the Verkhovna Rada'] (2023) https://vrciro.org.ua/search?query=%D0%B3%D0%B5%D0%BD%D0%B4%D0%B5%D1%80%D0%BD%D0%B0%20%D1%96%D0%B4%D0%B5%D0%BE%D0%BB%D0%BE%D0%B3%D1%96%D1%8F&fbclid=IwAR033Cvidv1T2slu7cQZdhFXqX7X6c_-Q3Qhe2PXEks0doV49r_u3obhEgA; Pravyi sektor, 'Prohrama natsionalnoho vyzvolennia ta derzhavotvorennia' ['Program of national liberation and state building'] (2023) https://pravyysektor.info/programa-nacionalnogo-vyzvolennya-ta-derzhavotvorennya.

[21] Eu-Ukraine Civil Society Platform *Anti-discrimination legislation and practice: The rights of vulnerable groups in the context of the Association Agreement* (2016) https://eu-ua-csp.org.ua/media/uploads/3d_CSP_UA_antidiscr_report_eng_3gMKt0f.pdf.

[22] Madrigal-Borloz (n 5) para 24.

[23] Ukrainian Council of Churches and Religious Organizations, 'Statement on the inadmissibility of equating same-sex cohabitation with family' (2023) https://vrciro.org.ua/en/statements/zayava-vseukrainskoi-radi-tserkov-i-religiynikh-organizatsiy-pro-nepripustimist-zrivnyannya-odnostatevikh-spivmeshkan-iz-simeyu.

[24] The Independent Advisory Group on Country Information, 'Country Policy and Information Note Ukraine: Sexual orientation and gender identity' (2017) https://www.ecoi.net/en/file/local/1404143/1226_1499930201_ukraine-sogi-cpin-v2-0-july-2017.pdf at 17.

> powerful groups are turning severe opposition on in this topic (SOGI). — Interview, Director of Sustainable Development, June 2023

Such a discourse shifts freedom from discrimination based on SOGI protection from an internationally recognised human right to a politically contested topic with an ambiguous legal meaning, making this right one of the most vulnerable. The social conflicts between FoRB and SOGI that exist at ideological and religious levels in the community significantly affect national legislation providing protection to FoRB and SOGI.

3.3.2. Ukrainian National Legislation on Freedom of Religion and Non-Discrimination Based on Gender Identity and Sexual Orientation

One of the most significant gaps in Ukrainian legislation on anti-discrimination laws for SOGI protection is that the legislation lacks a coherent definition of SOGI. Various Ukrainian laws have different definitions of what characteristics are actually protected from discrimination.[25] This lack of clarity has been recognized by the state in the National Human Rights Strategy.[26]

Whether to include gender-sensitive terminology such as 'gender identity', 'gender', and 'sexual orientation' in national legislation instead of, or alongside the traditional term 'sex' is an ongoing debate among lawmakers, religious actors, and human rights protection organizations.[27] At present, sexual orientation is generally assumed by lawmakers to be included under the definition of 'other characteristics.' The Law of Ukraine 'On the Principles of Preventing and Combating Discrimination in Ukraine' does not include sexual orientation as a protected characteristic.[28] The Constitution of Ukraine also does not include sexual orientation as ground for discrimination.[29] The inclusion of SOGI as a protected characteristic in the Labor

[25] See the laws: On the Principles of Preventing and Combating Discrimination in Ukraine', 'On Ensuring Equal Rights and Opportunities for Women and Men', Cabinet of Ministry Decree 'On approval of the State Strategy for Equal Rights and Opportunities for Women and Men until 2030', 'On Freedom of Conscience and Religious Organizations in Ukraine', The Labour Code of Ukraine; Eu-Ukraine Civil Society Platform (2016).

[26] Decree of the President of Ukraine *On the National Human Rights Strategy* (119/2021, 2021) para 16.

[27] E Ketelaars, 'Geographical value spaces and gender norms in post-Maidan Ukraine: the failed ratification of the Istanbul Convention' (2019) *Review of International Studies* 45(5) 731; T Martsenyuk, 'Gender equality situation in Ukraine: challenges and opportunities' (2016) *Gender Equality Policies and eu Integration - experience of Visegrad for EaP Countries* 203.

[28] The Law of Ukraine *On the Principles of Preventing and Combating Discrimination in Ukraine* (BVR, 2013) № 32:412 art 1.

[29] The definition in the Constitution of Ukraine, does not use the word 'discrimination': 'Citizens shall have equal constitutional rights and freedoms and shall be equal before the law. There shall be no privileges or restrictions based on race, skin colour, political, religious, and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.' The Constitution of Ukraine (BVR, 1996) № 30:141 art 24.

Code of Ukraine was done as a requirement of the EU Association agreement.[30] At the same time, *all* of the abovementioned laws include FoRB or religious views as a protected characteristic. Furthermore, specific regulations on FoRB, such as the Law of Ukraine 'On Freedom of Conscience and Religious Organizations in Ukraine', do not address discrimination issues based on sex, gender identity or sexual orientation but rather in more general terms. Particularly, this law requires that 'religious organisation shall not interfere … or preach any form of hostility or intolerance towards non-believers or believers of other faiths'.[31] A careful analysis of these provisions arguably provides the right not to be discriminated against by religious organizations on the grounds of SOGI. Ukrainian law is unclear on issues of SOGI, which naturally leads to businesses' confusion when they have to make their own interpretations, especially when businesses develop corporate policy commitments. As a result, businesses may include FoRB but not SOGI in their corporate policy commitments because the Constitution of Ukraine and other laws protect FoRB but do not explicitly address discrimination due to SOGI. This absence of clarity creates confusion for businesses as to whether they need to follow vague national legal regulations heavily influenced by social conflicts or to follow international frameworks. International recommendations and the business and human rights framework discover crucial role of business actors' engagement in ensuring respect for FoRB and SOGI in the situation of conflicting social expectations.

3.4. International Legal Frameworks to Respect Freedom of Religion and Non-Discrimination Based on Gender Identity and Sexual Orientation at the Corporate Level

3.4.1. International Recommendations for How Businesses Respect Freedom of Religion and Non-Discrimination Based on Gender Identity and Sexual Orientation

FoRB and SOGI are protected differently in international law. FoRB is a well-established human right enshrined in customary and treaty law.[32] In contrast, SOGI has generally been recognized as an element of different human rights (right to private life, non-discrimination, and self-expression).[33] Freedom from discrimination based on SOGI does not appear as a separate right in any human rights treaties with the exception of the Charter of Fundamental Rights of the European Union which prohibits discrimination based on sexual orientation but still

[30] The Labor Code of Ukraine (BVR, 1971) № 50:375 art. 2-1; The Independent Advisory Group on Country Information (n 24).
[31] The Law of Ukraine *On Freedom of Conscience and Religious Organizations* (BVR, 1991) № 25:283 art. 5.
[32] See the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, The European Convention on Human Rights, etc.
[33] G MacArthur, 'Securing sexual orientation and gender identity rights within the United Nations framework and system: Past, present and future' (2015) *Equal Rights Review* 15 25.

does not address discrimination based on gender identity.[34] However, several soft law frameworks include principles for SOGI protection within business activities.

For instance, CoE Recommendation CM/Rec(2010)5 'On Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity in Terms of Labor Relations' calls states to adopt appropriate measures combating discrimination based on SOGI both in public and private employment and occupation. The Recommendation argues that 'neither cultural, traditional nor religious values, nor the rules of a 'dominant culture' can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity.'[35] The attention international legal documents pay to resolving clashes between SOGI and FoRB illustrates the importance of this topic in national and international discourses on human rights.[36]

Another relevant document that provides important guidance on how businesses can extend their respect to SOGI from the corporate to the community level is the UNDP Standards of Conduct for Business 'Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People' (the UNDP Standards of Conduct).[37] The UNDP Standards of Conduct are in line with the UNGPs, but also recommend that businesses should not just respect the rights of and not discriminate against, their LGBT+ workers, suppliers, and customers. Rather, the Standards argue that businesses should actually encourage their business partners to do the same and should also stand up for LGBT+ rights in communities where they operate. Support may include 'public advocacy, collective action, social dialogue, financial, and in-kind support for organizations advancing LGBTI rights.'[38] The Standards also claim that companies should do everything legally possible to 'question, challenge, delay, and resist implementing government orders that might lead to human rights violations.'[39]

Although the abovementioned documents are soft law, they can be used in court reasoning. For example, in April 2023, the Inter-American Court of Human Rights

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[34] C Thomas and C Weber, 'ILO information paper on protection against sexual orientation, gender identity and expression and sexual characteristics (SOGIESC) discrimination' (2019) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_700554.pdf; Charter of Fundamental Rights of the European Union (2012/C 326/02) [2012] OJ C 326/391.

[35] CoE Recommendation *On Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity in Terms of Labor Relations* CM/Rec(2010)5.

[36] CoE Recommendation *Tackling discrimination on the grounds of sexual orientation and gender identity* 2021 (2013); CoE Resolution *Discrimination against transgender people in Europe* 2048 (2015); Council of Europe *Combating Discrimination on Grounds of Sexual Orientation or Gender Identity: Council of Europe Standards* (Council of Europe Publishing, 2011); C Grinspan, M Carpenter, J Ehrt, K Sheherezade, N Arvind, P Patel, C Sidoti and M Tabengwa, *The Yogyakarta Principles plus 10* (2017) http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

[37] Office of the High Commissioner for Human Rights (n 7).

[38] Ibid.

[39] Ibid.

in the decision Olivera Fuentes v. Peru established that it is unacceptable for state and non-state actors to consider belonging to the LGBT+ community as a pathology.[40] The Court emphasized in para. 103-104 that private actors, in accordance with the UNDP Standards of Conduct are obliged not only to passively not interfere in the violation of rights, but also to provide access to their services LGBT+ representatives and 'to promote positive changes for the LGBTIQ+ community.'[41]

The UN Working Group on business and human rights' report on The Gender Dimensions of the UNGPs provides businesses with detailed explanations on how to 'identify, prevent, mitigate and account for how they address their impacts.'[42] The guidance includes recommendations that businesses should use tools such as benchmarking, risk assessment, due diligence, and inner conflict resolution that can be applied to resolve clashes that arise between FoRB and SOGI at the corporate level. Therefore, the role of corporate actors in providing respect for FoRB and SOGI should be active, as explained in the next sub-section.

3.4.2. The Role of Business in Providing Respect for Freedom of Religion and Non-Discrimination Based on Gender Identity and Sexual Orientation

Existing guidance in the field of SOGI and FoRB protection explains on a more operational level how and to what extent businesses should be involved in addressing conflicting social expectations regarding FoRB and SOGI protection. The UNDP Standards of Conduct claim that the duty of businesses goes beyond avoiding infringement on human rights of freedom from discrimination based on SOGI and FoRB.[43] The Standards call for businesses to actively participate in social debates about LGBT+ protection through advocacy, social dialogue, and other activities, such as resisting governmental infringements on SOGI.

Specifically, in a debate on the extent to which businesses should be involved,[44] the UN Interim Report of the Special Rapporteur on FoRB at the workplace claims that

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[40] C Zelada, 'State and Corporate Homophobia: A Commentary on the Olivera Fuentes v. Peru case' (2023) https://www.ejiltalk.org/22455-2/?fbclid=IwAR0nrKZmw6fpEQzmO_N2Soi6B9bszTKPhtYVGkt1WDzHQQuL8dz8laf_eD4

[41] *Olivera Fuentes v. Peru* Inter-American Court of Human Rights Preliminary Objections, Merits, Reparations and Costs. Judgment of February 4, 2023. Series C No. 484; Zelada (n 40).

[42] The UN Working Group in its report from 2019 in explanation of the Gender Dimensions scope specifies that even though the framework is created for women, it can also be used in relation to any group of right holders (e.g., men, women and gender non-binary persons). UN Human Rights Council (UNHRC). 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (A/HRC/17/31); UNHRC. 2019. *The gender dimensions of the United Nations guiding principles on business and human rights* (A/HRC/41/43).

[43] Lyons and Christiancy (n 9) 135.

[44] A Ramasastry, 'Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability' (2015) *Journal of Human Rights* 14(2) 237.

> responsibility goes far beyond ensuring non-discrimination in employment within State institutions; they *(state institutions)* must also combat discrimination within the larger society, including as regards employment in the private sector. Other stakeholders — companies, trade unions, religious communities, civil society organizations — are also encouraged to use their potential to contribute to a climate of tolerance and to an appreciation of the diversity of religion or belief in the workplace.[45]

This UN Interim report claims that businesses are not only private profit entities, but they should also be active social actors as their activities influence communities, 'the larger society'[46] and even countries as a whole.[47] Such encouragement to participate in combating discrimination within society recognizes that businesses are not a neutral actor in society.[48] According to the official commentary on Principle 16 of the UNGPs, businesses are expected by society to make public commitments to respect human rights.[49] The commentary to Principle 23 states,

> Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.[50]

The need to consult international principles on human rights protection when the state protection is not effective encourages businesses to not be neutral on important human rights issues in countries where they operate, especially in those countries where insufficient national protection is provided to certain human rights.[51] Finally,

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45 H Bielefeldt, Interim report of the Special Rapporteur on freedom of religion or belief (A/69/261, 2014).

46 Ibid.

47 J Moon, A Crane and D Matten, 'Can corporations be citizens? Corporate citizenship as a metaphor for business participation in society' (2005) *Business ethics quarterly* 15(3) 429; A Crane, D Matten, S Glozer and L Spence, *Business ethics: Managing corporate citizenship and sustainability in the age of globalization* (Oxford University Press, 2019); T Brühl and M Hofferberth, 'Global companies as social actors: Constructing private business in global governance' in J Mikler (ed) The handbook of global companies (John Wiley and Sons, 2013) 351.

48 H Hulievska and L Adashys, 'The Concept of Business and Human Rights in the Context of Current Global Trends' (2021) *Philosophy of Law and General Theory of Law* 1 48; F Wettstein, 'The duty to protect: Corporate complicity, political responsibility, and human rights advocacy' (2010) *Journal of Business Ethics* 96 33.

49 K Buhmann, 'Neglecting the proactive aspect of human rights due diligence? A critical appraisal of the EU's non-financial reporting directive as a pillar one avenue for promoting pillar two action' (2018) *Business and Human Rights Journal* 3(1) 23.

50 UNHRC (n 42).

51 Organisation for Economic Co-operation and Development *Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing, 2023) at 25; N Bernaz, *Business and human rights: history, law and policy-bridging the accountability gap* (Routledge, 2016); T Dyllick and K Muff, 'Clarifying the meaning of sustainable business: Introducing a typology from business-as-usual to true business sustainability' (2016)

not only is it critical for businesses to become involved, but businesses who choose to do so can actually make a contribution to resolving conflicting social expectations regarding FoRB and SOGI at the corporate and community levels as evidenced by the following sections.

Taking into account all of the above legal, ideological and religious conflicting social expectations, the next section uncovers the results of the empirical research on which frameworks international and national businesses operating in Ukraine use to provide respect for FoRB and SOGI in their corporate policy commitments.

3.5. Corporate Policy Commitments to Respect Freedom of Religion and Non-Discrimination Based on Gender Identity and Sexual Orientation

3.5.1. Assessment of the 100 Biggest Businesses in Ukraine

The search findings showed that 44 out of the 100 largest businesses in Ukraine (with largest defined as receiving the highest annual revenue in 2022) do not have any public corporate policy commitments to respect human rights. The other 56 businesses have corporate policy commitments to respect human rights publicly available on their websites. Out of these 56 businesses with publicly available policy commitments, 19 are international businesses with branches operating in Ukraine, 16 are national businesses (both national and private and national state-owned businesses), and 21 businesses are branches of the larger businesses from the list (DTEK, Metinvest, Ferrexpo etc.).

The data further show that out of the 56 companies who have public corporate policy commitments, only five have specific policies. By specific policies, we mean policies on anti-discrimination, gender equality, LGBT+, FoRB, separate programs to support LGBT+ workers such as employee resource groups, equal opportunity policy and board diversity policies. In other words, only 5% of businesses out of the 100 biggest businesses in Ukraine have public corporate policy commitments that address specific anti-discrimination issues, and all 5 are international businesses. Hence, we can identify the first problem with business engagement with respect to human rights in Ukraine: half of the biggest 100 businesses in Ukraine do not have corporate policy commitments at all, and only a few of them have separate policy commitments that specifically address rights of LGBT+, SOGI or gender equality.

Furthermore, the first co-author coded the existing policy commitments to see how frequently those commitments include FoRB and SOGI terminology. Eighteen businesses use the term ‘sexual orientation’, 9 businesses use the term ‘gender identity’, 23 businesses use the terms ‘religion’, ‘belief’, ‘religious freedom’, or

Organization & Environment 29(2) 156; J Ruggie, ‘Business and human rights: the evolving international agenda’ (2007) *American Journal of International Law* 101(4) 819.

'freedom of religion and belief', and 12 businesses only included less specific terms such as 'diversity', 'equity', and 'inclusion'.

The data demonstrate that even businesses that have public corporate policy commitments to respect human rights do not always address FoRB and SOGI. The lack of corporate policy commitments referring to FoRB and especially SOGI reflects the inconsistencies in national legislation that usually omits SOGI protection. The next sub-section provides examples of how businesses that have public corporate policy commitments use international and national legal frameworks.

3.5.2. National and International Frameworks in Corporate Policy Commitments

There is a noticeable difference between national and international businesses when it comes to the legal frameworks businesses use to articulate their respect for human rights. While international businesses actively use international legal frameworks, Ukrainian businesses tend to refer only to imperative national legislation whose breaches may entail administrative, civil, or criminal liability. For example, international businesses use frameworks such as the UN Global Compact and the UNGPs (used by Viterra Ukraine, Samsung Electronics Ukraine, etc.).[52] In contrast, Ukrainian businesses refer to obeying 'labor legislation' such as imperative norms on working conditions or imperative norms on quotas for people with disabilities under the Law of Ukraine 'On the Fundamentals of Social Security of the Disabled in Ukraine' (art. 19), or legislation prohibiting sexual harassment (used by Naftogaz, Energoatom, Ukrenergo, etc.).[53]

In addition, national businesses usually refer to terminology as understood in national legislation. For instance, the term 'inclusion' in corporate policy commitments by national businesses refers only to people with disabilities[54] and is not understood as a general concept of relevance to everyone. One reason for this might be that Ukrainian legislation requires employers to include a certain percentage of people with disabilities in their workplaces[55] as opposed to adopting different inclusivity strategies, as international legal frameworks propose.

Nevertheless, we note some attempts by national businesses to adopt a broader vision, which is not just state law oriented. For example, during one of the interviews, a compliance officer of one of the largest state-owned companies in

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52 T Horbachevska, 'Data underlying the publication: Freedom of Religion and Non-discrimination based on Gender Identity and Sexual Orientation in Ukraine: Corporate Policy Commitments in Situations of Conflicting Social Expectations' (2023) *4TU* https://doi.org/10.4121/2b643329-9814-404b-9bbe-4310659b0881.

53 Ibid

54 StarlightMedia Group *Code of Ethics* (2022) https://starlight.media/wp-content/uploads/2022/06/slm_kodeks_en_10.21.pdf.

55 The Law of Ukraine On the Fundamentals of Social Security of the Disabled in Ukraine (1991a) BVR, № 21:252

Ukraine stated that they changed their corporate emblem to the rainbow colors (the LGBT+ symbol) because

> we are a state-owned company, and we truly want to change and break these stereotypes that these companies are archaic, that they are not modern, that they do not respect modern trends, that they exist in a parallel world… it is not just a symbol. — Interview, Compliance officer, June 2023

Changing the corporate emblem to the rainbow colors was adopted by other Ukrainian businesses such as Comfy, Ukrposhta, Kyivstar, Vodafone, Lifecell, and Bimba Publisher.[56] However, such practices remain rare within other businesses' corporate policy commitments.

In contrast, businesses that referred to international soft law and were aware of international human rights expectations state that ignoring human rights issues is not effective for the business because individuals may feel excluded, which can lead to an overall low corporate respect to human rights. For example, JT International Company Ukraine states in its policy:

> If you don't know that there are people like you in your organization, it can be hard to feel that you belong there… As part of our LGBTIQ+ Inclusion pillar, we develop strategies, professional development opportunities, and LGBTIQ+ inclusive policies to create workplaces that are inclusive of all sexual orientations, gender identities, and gender expressions.[57]

The Ukrainian business 'Interpipe Nikotube' with offices in other countries states that 'we seek to provide a fair reflection of the diversity of Ukrainian society among our staff, including its cultural and ethnic diversity, at all levels of qualification and hierarchy.'[58] Thus, when using international tools businesses formulate some contextual conditions that are important to take into account when creating human rights corporate policy commitments.

Such differences in whether businesses align with international or merely national expectations also affect the strategies that national and international businesses use to respect FoRB and SOGI in their activities. Businesses that focus on domestic, sometimes contradictory, expectations and regulations tend to ignore the need to respect FoRB and SOGI as they are not coherently present in national legislation. As shown in the following section summarizing the interview results, businesses use three different strategies, i.e., neutrality, ignoring, and active engagement and each

[56] O Bereziuk, 'Minkult, 'Ukrposhta', inshi ukrainski kompanii ta ZMI u misiats praidu masovo pidtrymaly LHBT-spilnotu ['The Ministry of Culture, Ukrposhta, other Ukrainian companies and mass media supported the LGBT community massively during Pride month'] (2023) https://m.gordonua.com/ukr/news/society/minkult-ukrposhta-inshi-ukrajinski-kompaniji-ta-zmi-u-misjats-prajdu-masovo-pidtrimali-lgbt-spilnotu-1668977.html.
[57] Horbachevska (n 52).
[58] Ibid.

strategy results at the corporate and community levels of providing respect for SOGI and FoRB.

3.6. Interview Results

3.6.1. Strategies Businesses Use to Respect Freedom of Religion and Non-discrimination Based on Gender Identity and Sexual Orientation at the Corporate Level

The interview results outline strategies businesses use at *the corporate* level in providing respect to FoRB and SOGI and the implications each strategy may have for the *community level. The corporate level* means human rights regulations within the business workspace. *The community level covers business relationships* with other actors such as investors, contractors, business partners, civil actors and society in general.

At the corporate level, the interviews revealed three strategies businesses use to respect SOGI and FoRB in business activities: *neutrality* which tends to *privatize* both FoRB and SOGI as private life components; *ignoring* FoRB and SOGI in corporate policy commitments because businesses' employees do not request respect; and finally *an active engagement* strategy, relying on international soft law to 'identify, prevent, mitigate and account for how they address their impacts' related to SOGI and FoRB.[59] The results show that national businesses mostly use neutrality and ignoring strategies in resolving SOGI and FoRB clashes within business activities. In contrast, international businesses, which take into account international human rights law, tend to use the active engagement strategy.

Using the *neutrality* strategy, some national businesses restrict their employees' FoRB and ban so-called 'religious propaganda' in the workplace.[60] The first reason business participants provided for using a neutrality strategy was that they aimed to not infringe on the rights of others to enjoy freedom from religion. In addition, one national business stated that by prohibiting religious expression, businesses preserve the neutral image of the company as a neutral and universal service provider:

> this is possible as a result of the context, which is Ukraine … about the Moscow and Kyiv Patriarchates and this is a very painful dispute, in which we as an employer have no right to integrate into this dispute... Therefore, there is a desire, in fact, for employees to refrain…from radical manifestations of religion at work. — Interview, Director of Sustainable Development, June 2023

[59] UNHRC (n 42).
[60] Horbachevska (n 52).

When responding to the question of why it is important for the company to adopt a specific rule to ban religious propaganda, the compliance officer of another business said:

> For us, it is not acceptable for someone to bring some postcards calling for political parties or some religious communities… because we expect that our workplace workers will be engaged in work, and other issues they need to deal with not within working hours. — Interview, Compliance officer, June 2023

Interestingly, the same business compliance officer stressed that it would be inappropriate for the business actor's office managers to work in hijab because it would infringe on the corporate image and would put at risk the same treatment for all employees, as no one can have special rights in comparison to others. Additionally, the motive for such policy is to ensure customers trust to employees. Business compliance officer stated that

> It is unlikely that even from an ethical point of view it would be acceptable if a person is served in Hijab. Imagine: you go, contact our company, and you are served by a person in Hijab, that is, it will create a certain situation, perhaps some tension for you... we want our customers to pass by, to understand who they are talking to, who it is. So that … creates a certain atmosphere of trust to the company, trust to its employees — Interview, Compliance officer, June 2023

The human resource manager of another business stressed that it is an enormous challenge for her to imagine that even though Ukrainian legislation allows wearing religious clothing, there is no prohibition for doing so at work. As the topic of hijab is not the main narrative in Ukrainian anti-discrimination discourse, not all businesses, specifically those businesses that only consult national legislation, know that religious clothing is a part of personal identity and is an internationally protected characteristic of religious identity. Therefore, forcing people to hide their personal identity at the workplace directly infringes on their rights to FoRB.[61]

Furthermore, the business neutrality strategy excludes FoRB and SOGI expressions from public life. The neutrality strategy leads to excluding employees' personal identities from public life and making FoRB and SOGI expressions private life

[61] K Alidadi, *Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation* (Bloomsbury Publishing, 2017); B Grim and K Johnson, 'Corporate religious diversity, equity, and inclusion as covenantal pluralism' in C Seiple and D Hoover (eds) *The Routledge Handbook of Religious Literacy, Pluralism, and Global Engagement* (Routledge, 2021) 228 at 234.

components.[62] For example, an interviewee who works as a compliance manager stated:

> We did not emphasize sexual orientation. Why? Because it seems to me that at work a person does not spread his private life, including sexual life. — Interview, Compliance manager, June 2023

Privatization of FoRB and SOGI also occurs because of the corporate policy commitments, which assume that there is no need to specifically address SOGI and FoRB in the workplace due to the absence of requests. Therefore, such commitments ignore clashes that can arise between SOGI and FoRB within business activities.

When adopting the *ignoring* strategy, businesses argue that there is no need to address and resolve issues related to SOGI and FoRB because society in general, business partners, and employees do not actually request it:

> …just neither board nor people feel as important… it is not vital to people, they do not see in that some criticality, a prize as in career growth to reveal that 'I was discriminated'. — Interview, Director of Social Policy, July 2023

Other businesses made similar statements. For instance, one advertisement business inclusivity officer stated that there is no need for their team to introduce some specific regulation for FoRB:

> We know for sure that we have these categories of diverse staff both by faith, by nationality, and by sexual orientation. They are, but there is no clear manifestation in the workplace… there is no request from these people to say that they have problems. Perhaps the culture does not allow them to appeal to company management. — Interview, Inclusivity officer, June 2023

Such opinions reflect the general cultural context in Ukraine where people avoid expressing their identities out of fear from being excluded from public space. For example, the following comments were made during the interviews:

> When you come to the company management to defend LGBT+, you say that among our people there are those who, because of the unwillingness of this society, because of the non-friendly workplace cannot be visible to show their personality, their experience of people they love. — Interview, Director of Sustainable Development, June 2023

[62] M Petersen, *Promoting Freedom of Religion or Belief and Gender Equality in the Context of The Sustainable Development Goals: A Focus on Access to Justice, Education and Health Reflections from the 2019 Expert Consultation Process* (the Danish Institute for Human Rights, 2020).

> The management apparatus has representatives of LGBT+. Of course, none of them ever talked openly about it... it is not customary to talk about it, to voice, and that is why there is no problem because no one says anything about it, and there is no indicator… look at the local context, we take a small settlement ... people do not have a choice, are afraid of losing their work. Because they know what perception is in society (of LGBT+), how will he or she be able to say it? — Interview, Director of Social Policy, July 2023

These statements highlight the ineffectiveness of the ignoring strategy, which leaves no space for employees to raise a problem of discrimination based on SOGI and FoRB. Therefore, businesses using the ignoring strategy avoid problems instead of resolving them.

With *an active engagement* strategy, a few national and mostly international businesses take their human rights policy commitments more seriously. Three business participants explained that their policies and practices are inclusive for both SOGI and FoRB. For example, a corporate social responsibility manager stressed that the company pays no attention to personal appearance, whether it concerns an LGBT+ or religious symbol; rather, this business's policy and practice allow everyone to express religious, gender, or sexual identities. Another business's human resource manager said that the company sees a significant difference in behavior and openness towards LGBT+ and religious people in Latin America where the business actor has offices (proactive expression of SOGI or religious identity) in comparison to Ukraine (culture of hiding personal identities). Despite these differences, the business promotes the same principles of inclusion in both countries and encourages individuals with religious and SOGI identities to work with this business. This same business human resource manager stated that it is how a truly inclusive business should look – the business should accept people from all protected groups.

Furthermore, representatives of businesses that actively engage in providing respect for FoRB and SOGI stressed how important it is to use international guidance such as the UNGPs that provide tools to identify, prevent, mitigate and account possible infringements of freedom from discrimination based on SOGI and FoRB. Two examples of how to effectively respect FoRB and SOGI were provided during interviews. In the first case, the business hosted an exhibition of contemporary Ukrainian artists in its offices. The exhibition, devoted to freedom, included one work about women revolutionaries in Muslim countries. However, several Muslim male workers complained about the work, claiming that it was not acceptable to show such work as it went against their religious beliefs. Muslim male workers requested to exclude the artwork from the exhibition. The business actor's managers undertook an assessment of the problem and asked the opinion of the female workers on the potential harm feminist exhibitions can cause to Islamic believers. Muslim women working for the business did not agree that the artwork about women revolutionaries in Muslim countries was humiliating for the Muslim faith. The assessment conducted within the business concluded that the art work about women

revolutionaries in Muslim countries did not infringe on the FoRB of the male Muslim employees, and as a result, the company ultimately did not exclude the work from the art exhibition.

In the second example, after successfully recruiting a new employee, a human resource manager who was Muslim realized that the person he had hired was transgender. The human resource manager argued before the company board: 'religion allows me to hang such people on trees.' He wanted to fire the transgender individual. After several similar situations, the human resources manager was dismissed due to different values between him and the business. The company and its management experienced constant opposition of this manager to SOGI expressions in the workplace using his religious freedom to legitimize such restrictions. In contrast, the business management wanted to uphold inclusive values and respect for all possible personal expressions of employees.

These examples of active business engagement in resolving conflicts between FoRB and SOGI prove that businesses that are sensitive and attentive to identities employees express, can provide better respect for internationally recognised human rights. One of the human resource officers of a company that grew from a Ukrainian project to a larger international business explained that it is crucial to conduct a benchmark analysis in the company to discover 'what is in the world, in this region and accordingly, on the level of personal insights.' — Interview, Human Resource Officer, June 2023. The corporate social responsibility officer of Ukrainian IT-business operating abroad highlighted that despite some regional and local religious or cultural specifications, such as a considerable number of employees belonging to the Catholic confession in Lviv (the city of the West of Ukraine), who's needs the company should take into account, the universal values of human rights respect should exist in the corporate policy commitments.

It is the way to create a corporate human rights policy commitment in a specific country, which simultaneously corresponds to the UNGPs**.** A risk of income and investments decrease without appropriate corporate due diligence regulations was also mentioned as a reason for active engagement in providing respect to FoRB and SOGI. A compliance officer of one interviewed business stressed that as Ukrainian businesses go to international markets, especially to Europe and America, the quality of their human rights corporate policy commitments will directly affect the income of these businesses. For example, she said,

> In many European and American companies, which have quite a high level of diversity, they have a requirement to cooperate in tenders where vendors should also be diverse and tolerant to win the tender. — Interview, Compliance officer, June 2023

Each of the analysed strategies impacts not merely the corporate level of providing respect for FoRB and SOGI but positively or negatively contributes to the community level of resolving clashes between FoRB and freedom from

discrimination based on SOGI. The next sub-section explores what effects businesses may have at the community level when these businesses actively engage in providing respect to SOGI and FoRB.

3.6.2. Implications for the Community Level

Some companies in Ukraine make public statements or actions, such as painting corporate emblem in rainbow colors, in support of LGBT+ community rights.[63] Such a way of expressing respect for LGBT+ community rights has two effects. First, at the corporate level, corporate policy commitments in support of SOGI and position as not acceptable religious freedom justifications of discrimination based on SOGI for business actors' management. Second, at the community level, such policy commitment expresses the business actor's active social position in public debates that arise among religious actors, state actors, and civil society.

The active social positioning of businesses can affect community level discussions within conflicting social expectations regarding FoRB and SOGI protection. Several businesses representatives during the interviews claimed that it is important for the company to work on debunking stigma and stereotypes. The same interviewees claimed that it is also important to create a corporate culture of inclusion at the top-managers' level and shared specific examples of successfully resolving issues in providing respect to FoRB and SOGI at the corporate level. With regard to the businesses' actions to enhance respect of SOGI and FoRB, one interviewed business representative referred to changing worldviews of both company management and employees. The human resource officer of one of the largest state-owned companies in Ukraine also referred to the company influence on the community level:

> In our management opinion, big companies are not only about profit, not only about the economy, but they are also about social responsibility because their voice has an impact, it matters, that is, if they support some things, they will be able to influence general public opinion… if its clients are an enormous number of people, then it is has a social responsibility for its actions. If people start changing their minds, it should not be, you know, just regulation. That is, if we even write 100 policies, it will have no effect. — Interview, Human Resource Officer, June 2023

A chief operating officer of another business shared the company's vision of changing its logo to the LGBT+ rainbow colours:

> is not just to change the logo, it is to state your position… about a bunch of narratives in general, which Ukrainian society now has, but these are specific things where people are discriminated. — Interview, Chief Operating Officer, June 2023

[63] Bereziuk (n 56).

Another business's compliance manager highlighted that one of their company board members is

Greek-Catholic, a very religious person, who has publicly said that when we take gender stereotypes, we are are taking stories that we have received from scripture and who publicly told one of the clergy that the wedding ceremony should be rewritten, because she is not sensitive to women, and this is the same person who supported LGBT+ community. — Interview, Compliance Manager, June 2023

The interviews further revealed how businesses' firm positions on conflicting social expectations regarding FoRB and SOGI affected the mind-set of the business owner who was also religious. This religious owner stated when responding to the interview questions that his personal religious views on LGBT+ community rights and SOGI had transformed significantly throughout the last ten years under the influence of his management. For example, he stated that when he wrote a post on social media about not being willing to see LGBT+ parades in Kyiv, he received intense remarks from the business actor's management that those remarks were not in line with corporate views towards SOGI protection. He continued that

> It was very revolutionary that, for example, I had more stiff views on LGBT+…I was attempting to bring them to the true path… but then, after a certain evolution of reflections, LGBT+ friends appeared to me, then people who openly declared their orientation appeared… business's management recommendation that I should not express opinions against LGBT+ protection as it is not appropriate for the company's values… I lost the desire to convert them, I realized that it was their business, and it is not my business to convince them. — Interview, Business owner, June 2023

In this way, a business owner's perception changed over time under company pressure, namely after people on the business board expressed their resistance to religious claims in restricting SOGI. Therefore, the business board changed this business owner's attitude to religion as the obstacle for accepting the freedom from discrimination based on SOGI.

3.7. Discussion

The core idea of corporate responsibility to respect human rights – the idea of social expectations – may go in conflict with other expectations in society. A passive reflection of such conflicting social expectations by businesses in their corporate policy commitments can lead to a negative impact on human rights. Ideological, religious, and legal inconsistencies of SOGI and FoRB protection in Ukraine are examples of such conflicting social expectations placing businesses in 'a legitimacy

dilemma from contradictory expectations and pressures'[64] businesses face between human rights and national or social perspectives on FoRB and SOGI protection. The introduction of SOGI protection in Ukrainian legislation is followed by strong opposition from religious and traditionalist actors. This affects relationships at the corporate level when some business representatives believe that their religious freedom allows them to discriminate against colleagues, customers, or contractors. On the other side, internationally oriented businesses can express their support for SOGI rights. As a result of such conflicting social expectations, businesses need to manoeuvre in this 'legitimacy gap' in an attempt to balance social pressures and requirements from both international and national conflicting expectations.[65] Such balancing can create 'a dual state of equity for their LGBTQ employees while balancing the needs of sensitive stakeholders' in the situation of competing imperatives such as 'a human rights imperative, internal organizational pressure, parity with other companies.'[66] However, endeavoring to satisfy interests of different stakeholders can result in 'strategic ambiguity',[67] when a business actors may ignore or avoid being explicit about corporate standing in the situation of conflicting social expectations.

In-depth interviews identified three strategies businesses operating in Ukraine apply to address conflicting social expectations to protect FoRB and SOGI – *neutrality*, *ignoring*, and *active engagement*. These three strategies actually reflect various social views on the need to implement SOGI and FoRB. Ignoring and neutrality strategies do not apply business and human rights frameworks to resolve issues that arise in FoRB and SOGI fulfilment. Neutrality and ignorance strategies illustrate a poor understanding of human rights and FORB in particular (FORB is not an excuse for discrimination based on SOGI, FORB and religion are different things, FORB protects individuals, not their religion).

The neutrality strategy is widely used by businesses in European countries. Decisions of the Court of Justice of the European Union such as WABE and MH Mueller Handels GmbH v. MJ upholding the lawfulness of corporate neutrality policies on an absolute ban on wearing religious symbols initiated a discussion on prioritizing corporate interest in neutrality image over human rights to FoRB or self-expression.[68] In a debate about neutrality policies, Mateo Corsalini argues that by applying such policies businesses 'prioritize their "neutral" financial performance

[64] A Gaur, A Settles and J Väätänen, 'Do Economic Sanctions Work? Evidence from the Russia-Ukraine Conflict' (2023) *Journal of Management Studies* 60 1391 at 1395.
[65] Li, Xai, Zajac and Lin (n 12) at 2-4.
[66] B Opall, 'Motives in creating an LGBTQ inclusive work environment: A case study' (2021) *Qualitative Research in Organizations and Management. An International Journal* 16(1) 237 at 238-242.
[67] S Long, S Doerer and O Stewart, 'Virtual ethnography: corporate virtual diversity communication' (2015) *Qualitative Research in Organizations and Management: An International Journal*, 10(2) 175.
[68] J Mulder, 'Religious neutrality policies at the workplace: Tangling the concept of direct and indirect religious discrimination. WABE and Müller' (2022) *Common Market Law Review* 59(5) 1501.

over their social performance.'[69] Additionally, to avoid losing money, businesses can choose neutrality as a strategy of avoiding participation in social debates about religious objections to SOGI protection not to fail to meet expectations of either side.[70] For instance, when adopting neutrality and ignoring strategies, businesses operating in Ukraine attempt to avoid involvement in discussions on highly contested notions such as SOGI in Ukrainian society. However, this attempt to satisfy both sides leaves no space for substantive respect to human rights in business activities, as businesses leave issues of providing respect to SOGI and FoRB unresolved at the corporate level.

Within the active engagement strategy businesses use specific tools like benchmarking, risk assessment, 'public advocacy, collective action, social dialogue, financial, and in-kind support for organizations advancing LGBTI rights.'[71] Such specific tools are in line with the UNGPs and can effectively resolve clashes that appear within business activities among individuals of different religious, sexual, and gender identities. The active engagement strategy provides an understanding of FoRB and SOGI respect as this strategy 'requires both protection from religious discrimination and freedom of religion.'[72] Therefore, the active engagement strategy is the closest to the human rights level (i.e., the level of non-clashing rights).

The examples in section 5 of active engagement by businesses in resolving SOGI and FoRB issues also have important implications for the role business can play in de-marginalization of SOGI. Business active engagement with the move for LGBT+ rights can shift the marginalized perception of SOGI for religious workers in the company, for suppliers, and for other stakeholders. Such public solidarity can more generally contribute to changes in social, religious, and ideological thought on the marginalization of SOGI when FoRB can be used as a legitimate reason to restrict SOGI expressions, as evidenced by changing business owner's attitude towards using FoRB to restrict SOGI in the above-provided example. Therefore, reflecting 'societal and legal changes' in society businesses can reinforce such changes and contribute to resolving SOGI and FoRB issues on both corporate and community levels.[73]

Identified strategies reflect on other countries' systems, though the choice of the most appropriate strategy can differ from the national context, in particular, on the model of state-church relations. Even though the political orientation of a state can

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[69] M Corsalini, 'Religious Freedom, Inc: Business, Religion, and the Law in the Secular Economy' (2020) *Oxford Journal of Law and Religion* 9(1) 28 at 36; M Corsalini, *Business, Religion and the Law: Church and Business Autonomy in the Secular Economy* (Taylor & Francis, 2022) at 113-114.

[70] Li et al. (n 12) at 9-10; Gaur, Settles, and Väätänen (n 64) at 1410.

[71] Office of the High Commissioner for Human Rights (n 7).

[72] L Vickers, *Religion and belief discrimination in employment: the EU law* (Office for official publications of the European communities, 2007) at 38.

[73] S Kotiloglu and A McDonald, 'Is LGBT inclusion motivated by organizational performance? Exploring the relationships between performance feedback and LGBT inclusion in firms' (2023) *Strategic Organization* 00(0) 1.

affect the chosen strategy[74] it does not necessarily define the exact strategy some business may choose. In France, a democratic and liberal state, where *laïcité* is proclaimed as an absolute separation between state and religion, the neutrality strategy is the most widespread in the public sphere and at the workplace and, as a result, affects the choice of the strategy by businesses.[75] This strategy is also used in other European countries like Denmark, Austria and Belgium.[76] Though, even being implemented in the democratic state, this strategy is widely criticized among scholars and human rights protection actors as a practice eliminating religious and cultural pluralism.[77] Particularly, the neutrality strategy can lead to an almost unlimited discretion of the employer in regulating expressions of SOGI and religious identities, which often results in a violation of FoRB and intersectional discrimination by excluding religious women from the public sphere.[78]

Conversely, Ukraine is characterized as a developing democracy with multi-confessionality and diverse legal culture on church-state relations.[79] The absence of such a strict separation between state and church results in the use of other strategies along with neutrality. The active engagement was identified as the most efficient corporate policy commitment strategy in resolving issues arising when providing respect to FoRB and freedom from discrimination based on SOGI in Ukraine as this strategy reflects the demands set out for substantive respect for human rights in the core business and human rights instruments.

It should be briefly noted that the interview results revealed that along with the important role business plays in society, a purely business interest in obtaining more international funding and investments may be another explanation for active business engagement with respect to human rights.[80] The interpretation that better compliance with business and human rights standards can increase profits provides an interesting angle to the question of how frameworks such as the UNGPs can shift the meaning of profit maximization within business activities. In this way, the more

[74] D Roumpi, P Giannakis, J Delery, 'Adoption of LGBT-friendly practices: The effect of institutional pressures and strategic choice' (2020) *Human Resource Management Journal* 30(4) 604 at 618.
[75] S Berghahn, G Çorbacioğlu, P Rostock and M Sanna, 'In the Name of Laïcité and Neutrality: Prohibitive regulations of the veil in France, Germany and Turkey' in S Rosenberger and B Sauer (eds) *Politics, Religion and Gender* (Routledge, 2013) 150.
[76] F Segovia, M Gallego and B Hernández, 'Inclusion as an essential aspect in organisations: religion and gender' (2024) *Journal of the sociology and theory of religion* 16(1) 13.
[77] I Tourkochoriti, 'Is Neutrality Possible? A Critique of the CJEU on Headscarves in the Workplace from a Comparative Perspective' (2023) *The American Journal of Comparative Law* 71(2) 444.
[78] Alidadi (n 61); Berghahn et. al. (n 75); Mulder (n 68).
[79] Y Tsvietkova, 'Confessionalization, Symphony, or Democratization?: Legal Regulation of State-Church Relations in Ukraine in the Context of Internal and Foreign Conflicts' (2020) *Journal of Law, Religion and State* 8(1) 62; J Diez, D Schiller and D Zvirgzde, 'Doing business in Ukraine–multinational companies in the trap of regional institutions?' (2016) *Environment and Planning C: Government and Policy* 34(4) 638.
[80] Gaur, Settles, and Väätänen (n 64) at 1399.

international investors pay attention to human rights compliance when deciding on funding, the better respect to human rights businesses will provide.

Furthermore, when giving preferences to one of the strategies, businesses' responses in favour of a neutrality strategy or a strategy of ignoring these issues vary from fear of potential conflict to perceived lack of demand on behalf of employees or 'unwillingness of this society' due to general cultural context in Ukraine, where people avoid expressing their identities because of personal fear of being excluded from the public space or because of business's fear to not to comply with cultural or religious specifications of a certain community. Correspondingly, selecting an active engagement strategy can be situational, resulting from real-life conflicts that need to be resolved or normative, arising from the company's corporate policies to provide substantial respect for human rights, or the will to enter international business market, specifically, European Union. Different motivations of companies to uphold the respect for SOGI and FoRB in Ukraine lies in a broader world trend of a businesses to implement inclusivity policies in order to 'stay competitive and relevant as a brand' in societies which orient more and more on inclusion and human rights.[81]

The business and human rights framework indicates the social expectations for businesses to respect human rights, but at the same time, it connects the very respect for human rights with minimum internationally recognized standards of human rights protection. This gives reason to see the corporate responsibility to respect human rights as having a transformative effect on social expectations themselves, especially in cases where there is a conflicting understanding of human rights in society itself. Businesses focused on the need to ensure internationally recognized standards can potentially have this transformative impact on resolving social conflicts around FoRB and SOGI rights that may exist at the level of a particular society.

In regard to the transformative effect on conflicting social expectations on FoRB and SOGI, Lucy Vickers argues that realizing non-absoluteness of religious freedom and equality on religious grounds gives space for compromising FoRB with other rights.[82] Such compromise can bring the understanding of FoRB and freedom from discrimination based on SOGI as non-clashing and complementary rights in anti-discrimination discourse. Additionally, an active engagement strategy can lead to a change of mind-set of the religious workers, religious customers or contractors, or other affected communities in addressing their personal religious, gender, and sexual identities, and more generally – *it can change legal, ideological, and religious discourses and lead to a reduction of SOGI marginalization at the community level.*

[81] S McClure, 'Lesbian, Gay, Bisexual, and Transgender Inclusion: Business Imperative' in W Swan (ed) *Gay, Lesbian, Bisexual, and Transgender Civil Rights: A Public Policy Agenda for Uniting a Divided America* (Routledge, 2012) 179 at 184.
[82] Vikers (n 72) at 40.

3.8. Conclusion

This article started with the question of whether businesses should be neutral or actively involved in providing respect for SOGI and FoRB at the corporate and community levels. In answering this question, we argued that public expectations cannot be considered in isolation from the crucial aspect of the corporate responsibility to respect human rights, which is that such respect must ensure internationally recognized human rights principles. Through the idea of business actors' indispensable responsibility to respect human rights, it was important to discover which strategy of providing respect to FoRB and SOGI is the most effective.

Our empirical research on corporate policy commitments to respect human rights by businesses operating in Ukraine illustrated a difference in how international and national companies frame their human rights commitments to respect FoRB and SOGI. Businesses operating in Ukraine apply three strategies to address conflicting social expectations to protect FoRB and SOGI – neutrality, ignoring, and active engagement. National companies tend to use the neutrality or ignoring strategy when providing respect to FoRB and SOGI, which cannot resolve or contribute to resolving conflicts that exist at the community level regarding FoRB and SOGI. In contrast, international companies or national companies with international branches are more oriented towards the active engagement strategy, as they are less affected by conflicting public expectations. The active engagement strategy in the business and human rights sphere can contribute to the creation of a more consistent policy of de-marginalization and recognition of freedom from discrimination based on SOGI, where FoRB is a non-clashing right but not a ground for discrimination based on SOGI.

Chapter 4

Reimagining Heightened Human Rights Due Diligence: A Capability Approach Informed by Women's Experiences in Wartime Ukraine

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4. Reimagining Heightened Human Rights Due Diligence: A Capability Approach Informed by Women's Experiences in Wartime Ukraine

Abstract

This article examines limitations of existing Business and Human Rights (BHR) frameworks on the matter of addressing the complex ways war undermines women's capabilities. The war in Ukraine serves as a stark illustration of how peacetime-oriented human rights due diligence processes are not able to grasp the multiple responsibility burdens placed on women comprehensively. This conceptual article addresses such deficiency by proposing to reinterpret BHR frameworks through the lens of the capability approach, conceptualizing war as a form of radical social change. By re-articulating the World Benchmarking Alliance Gender Benchmark through a capability lens, we develop a set of practical assessment points that shift the focus from merely avoiding harm to proactively enhancing women's rights. Our primary contribution is a replicable methodology that potentially can equip businesses to conduct more meaningful, gender-responsive due diligence, ensuring that women's rights and empowerment are central to corporate conduct during conflict and recovery.

Keywords: Women's Rights, Capability Approach, Heightened Human Rights Due Diligence, Business and Human Rights, Wartime, Ukraine.

4.1. Introduction

One of the key challenges for law is its ability to respond effectively to severe crises like war in the context of instability and societal chaos. In the business and human rights (BHR) context, ensuring companies meet the corporate responsibility to respect human rights in situations of war is a vivid example of the law's limitations.[1] In this article, we argue that existing BHR instruments, designed primarily for peacetime, are ill-suited to address the heightened and gender-specific human rights risks that emerge during conflict.[2]

The United Nations Guiding Principles on Business and Human Rights (UNGPs), a leading non-binding framework in the business and human rights sphere introduced in 2011, established the concept of human rights due diligence, which is a process whereby business actors prevent, mitigate, and redress human rights abuses they have caused or to which they have contributed.[3] However, the UNGPs focus mostly on due diligence processes in 'ordinary environments.'[4] Such focus misses the gender-specific risks and impacts that arise in conflict-affected and high-risk areas,[5] and during post-war recovery periods, requiring 'heightened human rights due diligence' (hHRDD).

An analysis of the *Gender Dimensions of the Guiding Principles on Business and Human Rights* (Gender Dimensions) (2019),[6] contained in a Report of the UNWG, issued specifically to address the issues of gender equality within business activities, also reveals significant limitations in the UNGPs' ability to address issues of gender equality in these contexts of heightened human rights risks. While the Gender

[1] J Bray and A Crockett, 'Responsible risk-taking in conflict-affected countries: the need for due diligence and the importance of collective approaches' (2012) *International Review of the Red Cross* 94(887) 1069 at 1072, 1086; O Uvarova, 'Business and Human Rights in the Recovery Agenda for Ukraine' in L Jakuleviciene, PH Hugg PH and D Luchenko *The Impact of War and Extraordinary Situations on Law in the Context of Aggression against Ukrain*e (Peter Lang Group AG, 2024) 286.

[2] A Reynolds, 'Women at work and war: integrating gender and conflict into impact assessment' (2021) *Impact Assessment and Project Appraisal* 39(3) 196 at 197; K Webster, C Chen and K Beardsley, 'Conflict, peace, and the evolution of women's empowerment' (2019) *International Organization 73*(2) 255 at 257.

[3] UN Human Rights Council (UNHRC). 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (A/HRC/17/31).

[4] L I Álvarez, 'Responsible business conduct in conflict-affected areas: the notion of heightened human rights due diligence' (2024) *Revista Española de Empresas y Derechos Humanos* (2) 29 at 34.

[5] G Khrystova and O Uvarova, 'Gender component of internal displacement in Ukraine: A case of business (in) capability to localize human rights impact assessment' (2022) *Business and Human Rights Journal* 7(3) 500; KE McNamara, R Clissold and R Westoby, 'Women's capabilities in disaster recovery and resilience must be acknowledged, utilized and supported' (2021) *Journal of Gender Studies* 30(1) 119; P Simons and M 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) *Canadian Journal of Women and the Law 31*(1) 113; L Näre, 'Agency as capabilities: Ukrainian women's narratives of social change and mobility' (2014) *Women's Studies International Forum* 47(B) 223.

[6] UN Human Rights Council *The Gender Dimensions of The United Nations Guiding Principles on Business and Human Rights* (A/HRC/41/43, 2-19).

Dimensions emphasize on harassment and violence – undoubtedly some of the most severe human rights impacts during the war – they fail to encompass the broader burdens women endure during wartime and throughout peacebuilding and transitional justice processes.

Addressing these shortcomings requires more than minor adjustments; it demands a fundamental rethinking of how hHRDD is conceptualized and practiced. Therefore, this conceptual article argues that the capability approach (CA), developed by Amartya Sen and Martha Nussbaum,[7] offers a necessary interpretive lens for BHR frameworks. We posit that the CA does not add new rights but provides a more robust methodology to assess whether individuals – particularly women in conflict – have the *real, substantive capability* to exercise their existing human rights**.** Our central research question is: *How can the capability approach inform the development of a more effective hHRDD framework to address the gendered impacts of war?* To answer this question, this study employs a theory-building approach. We analyze key international BHR instruments, using the documented experiences of women in wartime Ukraine as a critical test case. This study focuses specifically on the capabilities of women, who, as a group, face distinct burdens in conflict zones that undermine their abilities to leave the life they value.[8]

We argue that the capability approach as an alternative normative approach to human welfare offers a valuable framework for strengthening BHR frameworks globally and nationally with specific attention to the gender dimension of business activities during war and expected post-war recovery. Within the capability approach, women's capabilities are formulated as what women 'are actually able to do and to be,' highlighting how individual life circumstances shape possible opportunities (capabilities) that influence achieved functionings (achieved results based on a person's capabilities), such as productivity at work.[9] This perspective extends beyond already existing gender-based approaches[10] by offering a concrete list of capabilities to be prioritized.[11] The capability approach can inform *gender-responsive assessments, gender-transformative measures, and gender-*

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[7] A Sen, *Development as Freedom* (New York, 1999); M Nussbaum, 'Women's Capabilities and Social Justice' (2000) *Journal of Human Development* 1(2) 219.

[8] Khrystova and Uvarova (n 5); McNamara et al. (n 5); D Krivonos, S Fam, P Kotlina, and M Kvych, 'All roads lead to the railway station: How young Ukrainian refugee volunteer women challenge sexism, racism, and homophobia in refugee support networks' in M Shevtsova (ed) *Feminist Perspective on Russia's War in Ukraine: Hear Our Voices* (Rowman & Littlefield Publishers, 2024) 109.

[9] Nussbaum (n 7).

[10] These include (1) gender-neutral or 'gender blind' assessments, 2) mere 'monitoring of women's human rights or gender-based violence against women', (3) gender-sensitive approaches only collecting sex-disaggregated data but not forming or transforming it, and (4) gender-responsive and gender-transformative approaches aiming to empower women in gaining gender equality beyond "'formal" equality measures that treat women and men alike.' For more extensive explanation see section 4.

[11] I Robeyns, 'Sen's capability approach and gender inequality: selecting relevant capabilities' (2003) *Feminist economics 9*(2-3) 61.

transformative remedies that address the unique challenges faced by women in the recovery and rebuilding processes.[12]

Our primary contribution is an operational framework that translates the capability approach into a practical tool for human rights due diligence. Drawing on the World Benchmarking Alliance Gender Benchmark (Gender Benchmark) methodology, we develop a set of key assessment points that equip businesses to conduct more meaningful, gender-responsive hHRDD. This moves the practice of human rights due diligence beyond procedural compliance towards a substantive evaluation of impacts on women's capabilities. Ultimately, this article provides a replicable methodology to ensure that women's rights and empowerment are central to corporate conduct in conflict zones in Ukraine and beyond.

The article is structured as follows. Section 2 outlines the methodology and scope of our study. Section 3 then illustrates the core problem by describing the documented impacts of the war on women's capabilities in Ukraine. Section 4 analyzes the shortcomings of existing BHR frameworks in addressing these realities. In Section 5, we present our theoretical argument, detailing how the capability approach can serve as an interpretive mechanism for hHRDD. Section 6 operationalizes this framework, presenting and explaining our proposed assessment points. Finally, Section 7 concludes.

4.2. Methodology and Scope of the Study

This article employs a qualitative, theory-building research design. Our primary objective is not to test a pre-existing hypothesis, but rather to develop a new conceptual framework for heightened human rights due diligence (hHRDD) by synthesizing existing theories, normative standards, and practical challenges. This approach is particularly suited for addressing complex social phenomena where existing frameworks are limited, and new theoretical lenses are needed to make sense of the problem.[13]

The study draws on a corpus of documents, divided into two categories:

1) *Primary (Normative) Corpus*: the key international and regional BHR instruments. We selected the UNGPs, the CSDDD, and the OECD Guidelines for Multinational Enterprises because they represent the foundational and most influential standards shaping corporate due diligence obligations globally. These documents were analyzed to identify their explicit and implicit approaches to gender and their operational logic in conflict-affected and high-risk areas.

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12 UN Human Rights Council (n 6).
13 K M Eisenhardt, 'Building Theories from Case Study Research' (1989) *The Academy of Management Review* (14)4 532.

2) *Secondary (Illustrative) Corpus*: academic and grey literature (e.g., reports from UN Women, UNDP, World Bank) published since the full-scale invasion in 2022. This corpus was not used to generate primary empirical data, but to provide a rich, documented account of the lived realities and challenges faced by women in wartime Ukraine. These sources were selected based on their relevance and credibility to illustrate the specific gendered impacts of the conflict on work, care, mobility, and security.

Our analysis proceeded through a three-stage, manual process. We first conducted a critical reading of the primary normative corpus to identify significant gaps and 'gender-blind' assumptions. We analyzed the texts for their treatment of gender, noting where it was included (often narrowly, in relation to sexual violence) and, more importantly, where it was absent (e.g., in considerations of economic disruption, care burdens, and supply chain continuity). Next, we juxtaposed the formal requirements and assumptions of the BHR frameworks against the documented realities of women in Ukraine, as detailed in our secondary corpus. This process allowed us to identify points of 'friction' or 'disconnect' – instances where a company following standard due diligence procedures would fail to see or address the most salient gender-specific risks emerging from the conflict. In the final stage, the 'disconnects' became the central problems to be solved. We employed the capability approach as our primary theoretical lens to synthesize these findings. This involved systematically mapping Robeyns's [14] list of capabilities 'at the ideal level' onto the practical indicators of the Gender Benchmark. This mapping served as the foundation upon which we developed our original contribution: 'Key hHRDD Assessment Points' presented in Table 1, which translates abstract theory into a concrete, operational tool for businesses.

It is essential to acknowledge the boundaries of this research. The primary limitation is its reliance on secondary data. This study did not involve original empirical fieldwork, such as interviews or surveys with Ukrainian women. Consequently, our findings are conceptual and illustrative; they aim to build a robust theoretical framework, not to make generalizable empirical claims about the experiences of all women in Ukraine. We operate with epistemological humility, recognizing that a document-based analysis cannot capture the full nuance of lived experience; however, it can serve as a robust theoretical basis for such empirical investigations in future research.

A second key limitation is our analytical focus on cisgender women. This choice was made deliberately to allow for a deep and focused analysis of one of the most significant dimensions of gendered inequality in conflict, using established theoretical tools (like Robeyns' list) that are primarily oriented toward this group. We acknowledge that the experiences of LGBTQIA+ individuals in wartime are

[14] Robeyns (n 11).

critically important and involve distinct vulnerabilities that demand their own dedicated and specialized research. Future research should address these gaps through direct, community-engaged fieldwork.

4.3. Impacts of the War on Women's Capabilities in Ukraine

The full-scale Russian invasion of Ukraine has acted as what Näre calls a 'radical social change,' profoundly disrupting every aspect of life, a moment where habitual practices 'are no longer useful as new ways of acting and doing need to be invented.'[15] Due to the multiple responsibility burdens and permanent life threats from the Russian aggression, women in Ukraine do not have the possibility of fully ensuring their health, safety, integrity, shelter and environment, mobility, leisure, and autonomy capabilities.[16] Simultaneously, millions of women have become internally displaced persons (IDPs), facing immense barriers to securing stable employment while caring for children and other relatives.[17]

Corporate responses to these dynamics have been inconsistent. Research from the first year of the full-scale invasion revealed that while some companies provided robust support, many failed to apply a vulnerability lens to their policies.[18] For example, evacuation plans that did not account for employees' family responsibilities – such as caring for relatives with limited mobility – forced some women to remain in situations of high risk to their lives and safety.[19] This is a clear example of how a delinquency to assess capabilities results in a failure to respect the fundamental rights to life and security. The constant threat of physical harm from shelling and missile strikes fundamentally undermines the most basic capabilities for life and physical health. Some companies do not require workers to go to bomb shelters during alarms, 'leaving the decision to individuals' and sometimes not counting time spent in shelters as paid work.[20] Additionally, women spend a significant amount of time volunteering and rebuilding life environments after being displaced to safer territories.[21]

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[15] Näre (n 5) at 223.
[16] UN Security Council *Report of the Secretary-General on women and peace and security* (S/2022/740, 2022) para 36, 43.
[17] World Bank, Government of Ukraine, European Union, United Nations. 2023. Ukraine Rapid Damage and Needs Assessment: February 2022 – February 2023.
[18] UNDP. 2022. *Rapid Assessment of the Experience of Evacuating People with Disabilities in Ukraine Due to the War.* Study Report; UNDP. 2023. *Responsible Business Conduct During War in Ukraine.* Context Assessment Study.
[19] Ibid.
[20] D Nagaivska and O Uvarova, 'Companies Operating in Conflict-Affected Environments Without Impacting the Conflict: Between Regular and Heightened Human Rights Due Diligence' (2024) *Business and Human Rights Journal* 9(2) 315 at 318.
[21] Rubryka, '"Don't be afraid — do": stories of female entrepreneurs who dared to rebuild their businesses during the war' (2023) https://rubryka.com/en/article/vona-hab-dlya-zhinok-pidpryyemyts/;

The war has also prompted significant changes to Ukraine's labour laws, directly impacting the capability for just and favorable work. For instance, the regulation of labour relations under martial law permits the extension of the work week to 60 hours, suspends the right to strike, and grants employers greater discretion in dismissals and transfers. For women, who are often situated into precarious and informal employment to balance a triple burden of paid work, domestic care, and new war-related commitments, these weakened protections are particularly damaging. They are left with diminished job security and fewer formal channels for recourse, undermining their economic independence and well-being. The mass mobilization of men and women into the armed forces has had complex, gendered consequences that standard HRDD processes often miss, as the mobilization process

highlighted women's significant contributions, transcending traditional caregiver roles to include leadership in civic and military spheres. This shift indicates the expanding women's agency and challenges pre-existing societal norms, promoting a redefinition of gender roles within the context of national defence and wider socio-political participation.[22]

The environment of extreme stress and trauma created by war has led to a national mental health crisis, with an estimated 9.6 million people potentially having a mental health condition.[23] However, many employers still consider mental health a personal issue, rather than a corporate responsibility.[24] This normalisation of severe psychological strain creates a silent crisis where the capability for mental well-being is severely damaged, yet it remains largely invisible for corporate human rights due diligence, as women adapting to these 'new normal' conditions may not report harms or express needs through standard grievance mechanisms, rendering their struggles invisible to the company, thus corporate programs are not able to sufficiently assess 'more subtle and implicit' gender disparities.[25]

Succinctly, the war in Ukraine has created a context where women's fundamental capabilities are under constant and multifaceted assault. They must navigate compounded responsibilities within a framework of weakened legal protections and pervasive insecurity. It is against this backdrop that standard BHR frameworks prove limited. The next section will demonstrate how these instruments, designed

T Pavlushenko, 'Strong back. The war pushed women to run the family business. Seven inspiring stories' (2024) https://forbes.ua/leadership/mitsniy-til-viyna-pidshtovkhnula-zhinok-do-upravlinnya-rodinnim-biznesom-sim-istoriy-shcho-nadikhayut-10022024-19038.

[22] O Matveieva, 'Social mobilization in wartime Ukraine: the connection between gender identity, national unity, and societal transformation' (2025) *Journal of Gender Studies*, 1 at 3.

[23] World Health Organization, 'Scaling-up mental health and psychosocial services in war-affected regions: best practices from Ukraine' (2022) https://www.who.int/news-room/feature-stories/detail/scaling-up-mental-health-and-psychosocialservices-in-war-affected-regions--best-practices-from-ukraine.

[24] UNDP 2023 (n 18).

[25] B Shang, *Tackling gender inequality: definitions, trends, and policy designs* (International Monetary Fund, 2022).

for a peacetime are ill-equipped for the task of guiding responsible corporate conduct in such an environment.

4.4. The Institutional Gap: Limitations of Existing BHR Frameworks

According to the UNGPs, HRDD involves core actions that businesses must undertake: identification of impacts; ceasing, preventing, mitigating, and remediating those impacts; and tracking and accounting of conducted measures.[26] Contextualisation of HRDD is one of the key principles as it 'requires companies to consider the context in which they operate and assess whether the context increases the risks of becoming involved in severe human rights harms.'[27] HRDD processes may require additional safeguards in conflict-affected and high-risk areas. Thus, in these areas, businesses should apply 'a "heightened" version of human rights due diligence.'[28] Heightened HRDD, a term coined by the UNDP with the UNWG, is a process that, additionally to ordinary due diligence, considers what negative human rights impacts businesses can create or contribute to when operating in conflict-affected and high-risk areas.[29]

In this section, we demonstrate that existing BHR frameworks do not sufficiently address the gender dimension of heightened human rights due diligence during war and expected post-war recovery. The first sub-section illustrates the limitations of the UNGPs as a gender-neutral framework omitting women's capabilities in the framing of the corporate responsibility to respect human rights. The second sub-section introduces the Corporate Sustainability Due Diligence Directive, a key new instrument of the BHR legal framework, which nevertheless adopts a largely gender-blind approach to the corporate responsibility to respect human rights. The third sub-section proceeds with an overview of other frameworks such as OECD Due Diligence Guidance and Policy Papers.

4.4.1. Limitations of the UN Guiding Principles on Business and Human Rights

While the UNGPs provide a foundational framework for addressing human rights challenges, they insufficiently capture the complex and intersectional burdens faced

[26] UN Human Rights Council (n 6).
[27] O Uvarova and S Milatovic, 'The CSDDD and BHR in Conflict-Affected and High-Risk Areas' (forthcoming, 2025).
[28] UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises *Report on business, human rights and conflict-affected regions: towards heightened action* (A/75/212, 2020); United Nations Development Programme and UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide* (UNDP and UNWG, 2022); Business and Human Rights Resource Centre. 2024. *Checklist on responsible business conduct for companies operating in Ukraine.*
[29] UNDP and UNWG (n 28) at 9; I Jędrzejowska-Schiffauer, D Nagaivska and J Minksztym, 'Learning from the Conflict Dynamics in Ukraine: Towards a Conceptual Framework for Heightened Human Rights Due Diligence' in A Ziegler, D Canapa and MI Cardozo (eds) *Business and Human Rights* (Brill Nijhoff, 2025) 77.

by women during war and post-war recovery. The Gender Dimensions, developed by the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises to address gender-related challenges within corporate sphere, establish three pillars of engaging with gender dimension in business activities: *gender-responsive assessment, gender-transformative measures, and gender-transformative remedies*.[30] In this regard the Gender Dimensions highlight that states have to perceive gender equality as a cross-cutting issue to be integrated into the strategies, policies, programs, and actions of state agents that form business practices, and to create policies on the SDGs implementation in a gender-sensitive manner.[31] Specifically, Principle 7 of the Gender Dimensions states that state should ensure that businesses operating in conflict-affected and high-risk areas identify, prevent, mitigate, and are held accountable for sexual harassment and gender-based violence (para. b, e).

While focusing narrowly on harassment and violence, the Gender Dimensions overlook other adverse impacts faced by women in these areas, followed by multiple burdens women face in wartime, peacebuilding, and transitional justice period.[32]

4.4.2. Gender Blindness of the Corporate Sustainability Due Diligence Directive

The Corporate Sustainability Due Diligence Directive (CSDDD)[33] provides a basis for binding human rights and environment due diligence regulation on the EU level. CSDDD[34] identifies human rights and environment due diligence as the process through which businesses identify, prevent, and mitigate the adverse impacts of their operations on human rights and the environment, and account for how they address those impacts. In the context of hHRDD, the CSDDD specifies that businesses may, under certain circumstances, need to incorporate additional standards. However, certain scholars argue that while introducing a legally binding obligation to conduct human rights and environment due diligence, the CSDDD still lacks a comprehensive approach regarding its gender perspective. Anaïs Tobalagba and Ana Santos Duarte[35] state that the CSDDD makes the women invisible when 'a largely "facially neutral" methodology' makes the Directive gender-blinded and perceives women's rights as secondary, thus putting double-bias on women's rights.

The CSDDD also refers to International Humanitarian Law (IHL) such as the Geneva Conventions as the main set of international standards regarding human rights protection in conflict-affected and high-risk areas.[36] However, IHL is widely

[30] UN Human Rights Council (n 6) para. 5, 38.
[31] UN Human Rights Council (n 6); *human rights: A mapping of topics for state attention in United Nations guiding principles on business and human rights implementation processes* (Danish Institute for Human Rights, 2018).
[32] Reynolds (n 2); Khrystova and Uvarova (n 5) 506.
[33] EU Parliament and Council Directive No 2024/1760 /EU 2024.
[34] Ibid, para 5.
[35] A Tobalagba and A Santos Duarte, 'The Gender Dimensions of the CSDDD' (2025) (forthcoming).
[36] EU Parliament and Council Directive (n 33) para 42.

criticized for its approach towards women's rights protection in war, reinforcing inherent gender bias and a narrow conceptualisation of gender.[37] Perceiving women preferably as mothers or victims of violations, IHL infantilises them and omits other types of protection needed by women in war circumstances, often narrowly focusing on securing from sexual violence.[38] The word 'gender' is absent in the text of the Geneva Conventions; they support binary gender divisions and stereotypes when 'men fight and women are vulnerable,' and omit gender 'as a structural factor driving conflict-related violence and other discriminatory harms.'[39] Furthermore, the Geneva Conventions identify three main characteristics of women during war: weakness, honour and modesty, pregnancy and childbirth. Such concepts 'fail to engage with women's experiences and lives in a meaningful way.'[40] Thus, there is a gap between legal definitions and real daily-lived experience of women in conflict-affected and high-risk areas.[41]

4.4.3. Additional Business and Human Rights Frameworks

The *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*[42] addresses the gender dimension only fragmentarily. Specifically, it proposes a Five-Step Framework for Risk-Based Due Diligence in the Mineral Supply Chain which includes the creation of a strong management system, identifying and assessing the risks, designing and implementing the risks, carrying out an independent audit, and reporting on supply chain due diligence. However, in terms of the gender dimension of the human rights due diligence in conflict-affected and high-risk areas, it only refers to women as a group whose human rights should be respected. The *OECD Policy Paper 'Responsible business conduct implications of Russia's invasion of Ukraine*,' which is supposed to provide specific policy guidelines for businesses operating in Ukraine in times of war and expected post-war recovery, only mentions higher risks of sexual violence and greater parental responsibilities, calling companies 'for adopting a

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37 F Krill, 'The protection of women in international humanitarian law' (1985) *International Review of the Red Cross (1961-1997)* 25(249) 337 at 59; N Raju and L Bruun, 'Integrating Gender Perspectives into International Humanitarian Law' (2023) *SIPRI Insights on Peace and Security 2023/08 at 3*.

38 M Jarvis and J Gardam, 'The gendered framework of International Humanitarian Law and the development of International Criminal Law' in I Rosenthal, V Oosterveld and S SáCouto (eds) *Gender and International Criminal Law* (Oxford University Press, 2022) 47 at 53; J Klugman, RU Nagel, MR Revkin and OM Stern OM, *Can the Women, Peace and Security Agenda and International Humanitarian Law Join Forces? Emerging Findings and Promising Directions* (Georgetown Institute for Women, Peace and Security, 2021) at 3.

39 Klugman et. al. (n 38) at 5; Jarvis and Gardam (n 38) at 53.

40 A Crowe, '"All the regard due to their sex": women in the Geneva Conventions of 1949' (2016) *Harvard Law School Human Rights Program* 16-001 at 3, 17.

41 C O'Rourke, *Women's Rights in Armed Conflict under International Law* (Cambridge University Press, 2020) at 53.

42 OECD. 2019. *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.* OECD Publishing, Paris.

gender-responsive approach.'[43] Similarly, regarding women in conflict-affected and high-risk areas, the EU Regulation 2017/821 refers exclusively to rape 'as deliberate strategy to intimidate and control local populations in order to preserve their interest' (para. 10).[44]

Guidelines and recommendations developed by various non-governmental organizations and experts also do not pay due attention to gender dimensions. *UN Women's Empowerment Principles* regarding the gender dimension of responsible business conduct prescribe sex-disaggregated data, gender-sensitive and gender-responsive policies, identifying intersectionality issues affecting women, women's equal participation in consultations and negotiations, grievance mechanisms that are gender-sensitive, as well as establish principles of women's empowerment.[45] However, they do not address *any* issues of heightened risks of women's rights abuses in the war-affected areas. Correspondingly, '*Security, Conflict, and Sustainability: Strengthening the GRI Sustainability Standards for Corporate Reporting on Conflict-Affected and High-Risk Areas*,' developed by the Global Reporting Initiative (GRI), only refers to GRI 405 about 'Diversity and Equal Opportunity Disclosure' demanding to report the percentage of employees by their gender.[46] Such document as '*Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors,'* a joint UN Global Compact – PRI publication, does not mention gender at all. The '*Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts*' Guide, developed by UNDP with the UNWG, emphasises the need to integrate a 'vulnerability' perspective, posing critical questions about the roles of men, women, and gender minorities within specific societies, how these groups interact, and how businesses can incorporate these dynamics into their human rights due diligence processes.[47] However, the Guide lacks comprehensive guidelines for incorporating a gender dimension into heightened human rights due diligence.

On the national policymaking level, several initiatives, which have emerged to support Ukraine's recovery, mention women's rights. *Ukraine Facility*,

[43] OECD. 2023. *Responsible business conduct implications of Russia's invasion of Ukraine*. OECD Policy Responses on the Impacts of the War in Ukraine. OECD Publishing, Paris.
[44] 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.
[45] UN Global Compact and UN Development Fund for Women. 2010. Women's Empowerment Principles: Equality Means Business. United Nations Entity for Gender Equality and the Empowerment of Women.
[46] J Kolieb, AM Burdzy, C Voillat, and JR Mohedano JR, *Security, Conflict, and Sustainability: Strengthening the GRI Sustainability Standards for Corporate Reporting on Conflict-Affected and High-Risk Areas* (DCAF-The Geneva Center for Security Sector Governance, International Committee of Red Cross, RMIT University Business and Human Rights Centre, 2024).
[47] UNDP and UNWG (n 28).

Environmental Compact for Ukraine,[48] and other national frameworks[49] extend to several key areas such as environment and climate, energy sector and just transition, labour market, demographic situation, internal and external migration.[50] While these initiatives acknowledge the corporate sector's critical role in recovery and emphasize the importance of gender equality and women's rights – particularly in the context of defense – they rarely address these dimensions in a systematic manner. These recovery programs largely fail to provide concrete guidance or establish requirements for how businesses should integrate gender considerations – particularly the impact on women's capabilities – into their heightened human rights due diligence *(hHRDD)* processes. Additionally, along with identifying such key actors in the sphere of women and conflict such as state, civil society, and international organizations,[51] the role of the private sector is mostly omitted.

This gap is reflected in legal scholarship, which notes that while guidance for corporations

> on gender and impact assessment might mention conflict, and guidance on conflict-sensitive impact assessment might touch on gender, to date, guidance on impact assessment has not fully integrated and elaborated on both gender and conflict issues.[52]

Consequently, existing normative documents offer companies limited practical guidance for addressing the complex challenges women face during war. They are designed to regulate social relations in 'normal life' and lack the conceptual tools to account for the radical social change that war entails.[53] This institutional gap necessitates a new framework, one that can move beyond formal procedures and address the substantive erosion of women's capabilities.

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[48] High-Level Working Group on the Environmental Consequences of the War. 2024. *An Environmental Compact for Ukraine – A Green Future: Recommendations for Accountability and Recovery.*

[49] Swedish Ministry for Foreign Affairs *Strategy for Sweden's reconstruction and reform cooperation with Ukraine 2023– 2027* (Ministry for Foreign Affairs, 2023); UN Global Compact Ukraine *Ukraine Business Compact* (UN Global Compact Ukraine, 2023); Cities Alliance, StreetNet International and WIEGO. 2022. *Rubuilding with Women: Amplifying Their Voices in Ukraine's Recovery*. Sweedish International Development Cooperation Agency, Sida.

[50] Oxford Human Rights Hub. 2024. *RE: Building Ukraine for All: Recommendations for Ukraine Recovery Conference 2025*; UN Women. 2023. Policy Brief: A Gender Responsive Recovery for Ukraine: Introduction. UN Women.

[51] H Manoilenko, "'UNHCR 1325" Women, Peace and Security in Ukraine' in M Shevtsova (ed) *Feminist Perspective on Russia's War in Ukraine: Hear Our Voices* (Rowman & Littlefield Publishers, 2024) 199 at 204-205.

[52] Reynolds (n 2) at 197.

[53] E Hillenbrand, P Mohanraj, J Njuki, D Ntakobakinvuna and A T Sitotaw, "'There is still something missing": comparing a gender-sensitive and gender-transformative approach in Burundi' (2022) *Development in Practice* 33(4) 451.

4.5. The Capability Approach as an Interpretive Lens for Human Rights Due Diligence

To address the abovementioned limitations of existing BHR frameworks, we propose the capability approach (CA), developed by Amartya Sen and Martha Nussbaum, as a necessary interpretive lens for hHRDD. The CA should not be seen as a replacement for the human rights doctrine, but rather as an essential framework to assess the *substantive opportunities* people have to realize in practice. As argued by César González-Cantón, Sonia Boulos, and Pablo Sánchez-Garrido 'promotion of human rights must be achieved through a "capability expansion."'[54] While human rights define universal *entitlements* (e.g., the right to work), the CA focuses on *capabilities* – what people are 'actually able to do and to be.'[55] It asks whether an individual has the genuine freedom to achieve a valued 'functioning' (an outcome, like being employed), considering the real-world structural constraints that may limit their choices.[56] It further compels businesses to consider whether a woman, facing a triple burden of paid work, domestic care, and new war-related commitments, truly has the *capability* to maintain her employment. The capability approach can potentially reinforce existing BHR frameworks to address heightened risks to women's rights during wartime, thereby making these rights *more sufficiently* protected in the corporate sphere.

In this section, we explain the core theoretical elements of the capability approach (sub-section 1), a conceptual link between the capability approach and human rights doctrine (sub-section 2), and its potential to enhance heightened human rights due diligence in conflict-affected and high-risk areas (sub-section 3).

4.5.1. The Capability Approach: Theoretical Elements

Two core concepts in the CA – conversion factors and adaptive preferences – are important for the study of women's capabilities. Conversion factors are 'body-related, while others are shared with all people from their community, and still others are shared with people with the same social characteristics and group membership.'[57] Existing in war, communities also form adaptive preferences, which are 'a strong set of limitations upon what women perceive they are free to do.'[58] Consequently, individuals adjust their desires and life choices according to the

[54] C González-Cantón, S Boulos, and P Sánchez-Garrido, 'Exploring the link between human rights, the capability approach and corporate responsibility' (2019) *Journal of Business Ethics 160*(4) 865.
[55] M Nussbaum, 'Human rights and human capabilities' (2007) *Harvard Human Rights Journal* 20 21 at 22.
[56] Sen (n 7); N Kabeer, 'Gender, livelihood capabilities and women's economic empowerment: reviewing evidence over the life course' (2018) *Gender and Adolescence: Global Evidence (GAGE)*; N Kabeer, 'Three faces of agency in feminist economics: Capabilities, empowerment, and citizenship' in edited by G Berik and E Kongar (eds) *The Routledge handbook of feminist economics* (Routledge, 2021) 99.
[57] Robeyns (n 11) at 77.
[58] S Goltz, M W Buche and S Pathak, 'Political empowerment, rule of law, and women's entry into entrepreneurship' (2015) *Journal of Small Business Management* 53(3) 605 at 609.

conditions of the society 'where the person declares herself satisfied with an obviously unsatisfactory situation.'[59] As a result of such constraints and adaptive preferences, 'an agency gap' may occur for different people in similar circumstances, affected by how such constraints and preferences 'are embedded in different national policy frameworks, mediated through firms/workplaces, and translated into individual lives and households.'[60] The CA distinguishes how structural constraints within certain societies limit female capabilities to choose and use 'the resources at their disposal and their ability to translate these resources into valued goals.' Thus, women's 'freedom of agency is inescapably qualified and constraint' during war.[61] Understanding the conversion factors and their influence on the adaptive preferences helps to identify how company actions might differentially impact women's ability to achieve well-being and ensure women's true priorities are heard.

Ingrid Robeyns developed a list of capabilities 'at the ideal level' for the conceptualization of gender inequality in post-industrialized Western societies.[62] This list consists of such capabilities as life and physical health, mental well-being, bodily integrity and safety, social relations, political empowerment, education and knowledge, domestic work and non-market care, paid work and other projects, shelter and environment, mobility, leisure activities, time autonomy, respect, religion – all these capabilities start from the phrase 'being able,' which means that the main indicator that women can lead a valuable life is the ability to freely choose and fulfill stated capabilities.[63] During wartime, the majority of such capabilities are heavily restricted. The provided list is crucial for understanding the aim of gender-responsive and transformative assessments, measures, and remedies in the war and post-war recovery. It also enhances human rights doctrine, by providing a more nuanced and context-sensitive analysis of gendered human rights risks that are exacerbated by war.

4.5.2. A Conceptual Link Between the Capability Approach and Human Rights Doctrine

The interconnection of the capability approach and human rights is widely discussed in the literature covering works of Amartya Sen[64] and Martha Nussbaum,[65] the

[59] S Deneulin, M Nebel and N Sagovsky, *Transforming unjust structures: The Capability Approach* (Springer, 2006) at 134.
[60] B Hobson, 'The agency gap in work–life balance: Applying Sen's capabilities framework within European contexts' (2011) *Social Politics* 18(2) 147 at 148.
[61] M Gilardone, I Guérin and J Palier, 'The weight of institutions on women's capabilities: how far can microfinance help?' in F Comim and M Nussbaum *Capabilities, Gender, Equality: Towards Fundamental Entitlements* (eds) (Cambridge University Press, 2014) 244.
[62] Robeyns (n 11) at 68.
[63] Ibid, 72.
[64] A Sen, 'Human rights and capabilities' (2005) *Journal of human development 6*(2) 151.
[65] M Nussbaum, 'Human rights and human capabilities' (2007) *Harvard Human Rights Journal* 20 21.

founders of the CA, other prominent scholars,[66] and specific investigations into how this correlation affects reforming the scope of corporate responsibility.[67] Jean-Michel Bonvin and Nicolas Farvaque claim that 'the CA main contribution is not simply to show the inadequacy of a monetary or income approach in terms of capabilities, but to insist on the necessity to bridge the gap between formal rights and freedoms on one side, and capabilities and real freedoms on the other side.'[68] Ingrid Robeyns, in analyzing Nussbaum's and Sen's approaches towards human rights and capabilities, states that both of them see human rights 'as entitlements to certain capabilities.'[69] Robeyns concludes:

> …if we want to protect human rights, in particular socio-economic rights, which sceptics believe cannot effectively be protected, the capability approach helps us see that promoting socioeconomic rights may require attention to specific parameters that affect the capabilities of people.[70]

The interlinks of the CA and HR approaches are also visible through the CA scholars' broad attitude to the use of concepts 'borrowed' from other theories, such as principles of equity, sustainability, responsibility, or efficiency, agency, and procedural fairness.[71] Human rights capabilities bring together universal human rights and individual capability to practice these rights. Within such approach, human rights become capabilities when

> participation, influence and voice' is 'inferred from the rights to peaceful assembly (ICCPR Art 21), freedom of association (ICCPR Art 22), participation in public affairs (ICCPR Art 25), and the right to form a trade union (ICESCR Art 8).[72]

Thus, the human rights capabilities can cover a combination of specific human rights, making an object for particular human rights capabilities. Consequently, the human rights agenda and the capability approach are mutually reinforcing

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66 P Vizard, S Fukuda-Parr and D Elson, 'Introduction: The Capability Approach and Human Rights' (2011) *Journal of Human Development and Capabilities 12*(1) 1; W F Birdsall, 'Development, Human Rights, and Human Capabilities: The Political Divide' (2014) *Journal of Human Rights 13*(1) 1; P Gilabert, 'The Capability Approach and the Debate Between Humanist and Political Perspectives on Human Rights. A Critical Survey' (2013) *Human Rights Review* 14(4) 299.

67 González-Cantón et. al. (n 54).

68 J M Bonvin and N Farvaque, 'Promoting capability for work: the role of local actors' in S Deneulin, M Nebel and N Sagovsky (eds) *Transforming unjust structures: The Capability Approach* (Springer, 2006) 121 at 124.

69 I Robeyns, *Wellbeing, freedom and social justice: The capability approach re-examined* (Open Book Publishers 2017) at 164.

70 Ibid, 165.

71 Ibid, 86; F Comim, M Qizilbash, and S Alkire, *The capability approach: Concepts, measures and applications* (Cambridge University Press, 2008) at 4-5.

72 B Thompson, 'Determining criteria to evaluate outcomes of businesses' provision of remedy: Applying a human rights-based approach' (2017) *Business and Human Rights Journal* 2(1) 55 at 80.

frameworks that can bring together effective tools for implementing the agency of humans to be able to act and bring change.[73] Specifically, the explanation of the potential of the capability approach to enhance human rights framework is being done on a more philosophical level: if one states that the right to gender equality should exist in society how one can assess whether real gender equality exists within concrete society and more importantly, whether women can practice this right truly, without taking into consideration influential factors outside the legal system? In this way, the capability approach 'helps employees and employers to form policies that take into account all what really matters,' as well as contributes to extended investigation and better understanding of factors that impact the practical realization of human rights.[74]

The empowerment of capabilities gives people stronger agency in promoting a life they value and thus strengthens realizations of their human rights. This interrelation also strengthens the responsibilities of business actors in the human rights sphere, as the capability approach requires not only avoiding harm, but also acting positively to anticipate business impact on human capabilities.[75] This approach enhances practical implementation of human rights in business activities going further than instrumental rationality, self-interest, and profit maximization, thus creating a notion of human rights capabilities that 'encompass what must be protected in human life.'[76] This is specifically evident in the war context that may affect the capabilities and functionings of people more vulnerable to subtle and implicit disparities.

4.5.3. The Potential of the CA to Enhance Heightened Human Rights Due Diligence

A CA-informed hHRDD process, therefore, assesses business impacts not merely against a list of human rights violations, but against their potential to either undermine or enhance these fundamental capabilities. *By doing so, it moves beyond merely 'gender-sensitive' approaches that might only disaggregate data, toward a truly 'gender-transformative' practice that seeks to alter the structural conditions and power relations that constrain women's agency*.[77] For instance, certain provisions in corporate human rights commitments can appear appropriate and

[73] T Burchardt and P Vizard '"Operationalizing" the Capability Approach as a Basis for Equality and Human Rights Monitoring in Twenty-first-century Britain' (2011) *Journal of Human Development and Capabilities* 12(1) 91 at 117-119.
[74] González-Cantón et. al. (n 54) at 875; Vizard et. al. (n 66) at 5.
[75] T Horbachevska, J van Zeben and N Bernaz, 'A capability approach to the sustainable development goals: towards positive corporate human rights obligations' (2024) *Transnational Legal Theory*, 15(3) 465; T Horbachevska, O Uvarova, and D Vovk, 'Freedom of Religion and Non-discrimination Based on Gender Identity and Sexual Orientation in Ukraine: Corporate Policy Commitments in Situations of Conflicting Social Expectations' 2024) *Human Rights Review*, 205-301; K Buhmann, J Jonsson and M Fisker, 'Do no harm and do more good too: Connecting the SDGs with business and human rights and political CSR theory' (2019) 19.3 *Corporate Governance: The International Journal of Business in Society* 399.
[76] González-Cantón et. al. (n 54) at 868; D Elson, S Fukuda-Parr and P Vizard, *Human rights and the capabilities approach: an interdisciplinary dialogue* (Routledge, 2014).
[77] Hillenbrand et. al. (n 53).

gender-sensitive but may not always be implementable because individual women lack necessary opportunities to fulfill them.

Nussbaum states that a woman's capability of control over her environment significantly deteriorates as 'violence and the threat of violence greatly influence a woman's ability to participate in politics, to seek employment and to enjoy a rewarding work life…'[78] In these conditions of new societal transformations, women's agency requires them not to resist these transformations but to adapt to new circumstances, act and live differently, which requires 'a capacity and capability to act.'[79] During war, for example, professional training and development may not be prioritized by women who choose to allocate their limited time to volunteering instead. The capability approach addresses this gap by identifying existing capabilities and real functionings that are both affected by conversion factors and adaptive preferences. Identifying these factors through the lens of the CA would allow 'to point out the difficulties, but not the impossibilities, of their agency, empowerment, and resilience within the stories of marginalization and subordination.'[80]

Furthermore, the capability approach can serve as an interpretative lens to hHRDD.[81] Specifically, it could help uncover and amend indirect discrimination of women in some contexts, thus supporting a substantive standard of equal treatment protected by human rights and labour law. The CA lens could also contribute to leveraging the minimum substantive standard protected by a concrete right (e.g. freedom to choose one's occupation, right to equal pay for equal work). To this extent, the CA 'helps account for the actual fulfillment of human rights.'[82] Such fulfillment is possible through the application of the capability mapping. The capability mapping can be applied as an extended HRDD during wartime by businesses 'to assess the individual capabilities of each person' to understand what a certain person needs to effectively engage in business activities.[83] Therefore, a carefully defined framework is needed to enhance those opportunities for business actors in addressing heightened risks for women's capabilities during war and post-war recovery. In the next section, we propose an *initial* assessment of the capability approach potential to inform the hHRDD process on subtle and implicit gender disparities women face in wartime.

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78 M Nussbaum, 'Women's bodies: Violence, security, capabilities' (2005) *Journal of Human Development 6*(2) 167 at 173.
79 Näre (n 5) at 226.
80 M Handl, S L Seck and P Simons, 'Gender and intersectionality in business and human rights scholarship' *Business and Human Rights Journal* 7.2 (2022) 201.
81 Horbachevska, van Zeben, and Bernaz (n 75).
82 Gilabert (n 66) at 306.
83 T Horbachevska, 'Fighting for peace, justice and sustainability: the role of business actors in war and post-war Ukraine' in B K Sjåfjell and C Liao (eds) *Sustainability and Corporate Accountability* (Edward Elgar, 2026) Forthcoming.

4.6. Operationalizing the Framework: A CA-Informed Tool for hHRDD

Having established the theoretical value of the capability approach, this section translates it into a practical, operational tool for businesses conducting hHRDD. To do so, we developed a new initial assessment framework (Table 1) that builds on the synergies between Robeyns'[84] list of capabilities 'at the ideal level' and the existing indicators of the Gender Benchmark. The Gender Benchmark is a methodology that was created by the World Benchmarking Alliance in 2021 to assess and compare how businesses ensure and promote gender equality and women's empowerment within their value chains. The current Benchmark comprises 6 pillars and 31 indicators to implement the gender perspective in business activities through a holistic approach. Measurement areas include governance and strategy, representation, compensation and benefits, health and well-being, violence and harassment, and marketplace and community (Benchmark 2024, 12).[85] These areas correlate with Robeyns' list of capabilities at the ideal level: life and physical health, mental well-being, bodily integrity and safety, social relations, political empowerment, education and knowledge, domestic work and non-market care, paid work and other projects, shelter and environment, mobility, leisure activities, time autonomy, respect, religion.[86] Table 1 illustrates the theoretical links between specific women's capabilities as per Robeyns and the measurement areas of the Gender Benchmark, and our assessment of how these specific capabilities can be reflected in hHRDD in war and post-war recovery.

Our contribution lies in adapting and attuning this foundation to the specific, heightened risks of a conflict context. As outlined in our methodology, we systematically mapped Robeyns' list of capabilities 'at the ideal level' to the Gender Benchmark measurement areas and then developed a set of 'Key hHRDD Assessment Points.' These are not generic questions; they are targeted inquiries designed to probe the specific ways war transforms and undermines women's capabilities. The resulting framework provides a concrete tool of capability mapping for companies to move beyond procedural compliance towards a substantive evaluation of their gendered human rights impacts in wartime. Furthermore, this mapping allows us to translate the abstract concepts of the capability approach into concrete, assessable domains relevant to corporate conduct. The key assessment points were then developed by us to specifically attune these domains to a *heightened*, conflict-affected, and high-risk areas. They are not used to replace existing human rights standards but to enhance more nuanced, individualized, and contextualized evaluation of how to enhance women's rights in the war context.

[84] Robeyns (n 11).
[85] World Benchmarking Alliance *Gender Benchmark* (2025) https://www.worldbenchmarkingalliance.org/gender-benchmark/ at 12.
[86] Robeyns (n 11) at 72.

Table 1. A Capability Approach-Informed Framework for hHRDD, with Illustrative Assessment Points for Women in Conflict

	Capabilities 'at the ideal level'	Benchmark's measurements areas and indicators	Key hHRDD Assessment Points
1.	Life and physical health	Non-discrimination against pregnant and married women (B.5), health, safety and well-being in the workplace (D.1), health information and services (D.2), safe and healthy work environment (D.3), health and well-being support in supply chains (D.4)	Does business have the ability to provide safe working conditions for women in conflict-affected and high-risk areas? Does business assess the ability to relocate workers, particularly women, to safer area, considering their family members and care duties? Does business consider women's needs after relocation? Does business engage with women's organizations or affected women to understand their needs and priorities? Does business address barriers that prevent women from reporting workplace abuses? Is the hHRDD process informed by data disaggregated by gender and other relevant factors?
2.	Mental well-being	Living wage (C.6), health, safety and the well-being in the workplace (D.1), health information and services (D.2), safe and healthy work environment (D.3), health and well-being	Does business provide mental health support for women workers in conflict-affected and high-risk areas? Does business assess the main well-being obstacles for

		support in supply chains (D.4)	women in conflict-affected and high-risk areas?
3.	Bodily integrity and safety	Non-discrimination against pregnant and married women (B.5), violence and harassment prevention (E.1), remediation (E.2), prevention and remediation in supply chains (E.3, E.4)	Does business assess the risk of violence against women; risk of higher level of discrimination against female workers, who are veterans, partners of servicemen, internally displaced persons? Does business effectively inform women about their rights and assist in the remediation in conflict-affected and high-risk areas?
4.	Social relations	Community support (F.2)	Does business contribute to local communities' and activists' practices in supporting women, who were relocated, are internally displaced, veterans, or volunteers, etc.?
5.	Political empowerment	Grievance mechanism (A.5), stakeholder engagement (A.6), leadership within the business and supply chain (B.1, B.4), enabling environment for freedom of association and collective bargaining (B.6)	Does business create opportunities for women to establish their own communities to advocate for their rights in the conflict-affected and high-risk areas? Does business provide women with the opportunity to participate on executive committees and boards of companies? Does business support women to run for elections in the local communities, at the regional or national level?

6.	Education and knowledge	Professional development (B.2), health information and services (D.2)	Does business provide opportunities for women's professional development of their choice such as professional, military, or volunteer training?
7.	Domestic work and non-market care	Non-discrimination against pregnant and married women (B.5), primary and secondary carer leave (C.2), childcare and other family support (C.3), and family-friendly benefits (C.7).	Does business consider the heightened burden of responsibilities for women in war zone and adapt working conditions to their needs (absence of partner to share care responsibilities, relocation to another place of living, injuries to the family members etc.)? Does business proactively offer and adapt flexible working arrangements (e.g., remote work, adjusted hours) specifically to accommodate the "triple burden" placed on women, particularly for *IDPs and those with new caregiving responsibilities* for wounded or displaced family members?
8.	Paid work and other projects	Gender targets (A.2), gender-responsive human rights due diligence (A.4)	Does business create targets to include the gender dimension in their due diligence process? Does business have a policy commitment to *uphold international labor standards* even when domestic law permits a lower standard of protection?
9.	Shelter and environment	Health, safety, and the well-being in the workplace (D.1), safe and healthy work environment (D.3), health and well-being	Does business provide assessments of the living conditions of affected women?

		support in supply chains (D.4)	Does business monitor its business partners' attention to women's capabilities in conflict-affected and high-risk areas?
10.	Mobility	Flexible hours (C.4)	Does business provide opportunities for flexible working hours according to women's specific needs in the conflict-affected and high-risk areas? Does business provide opportunities for working remotely?
11.	Leisure activities	Family-friendly benefits (C.7)	Does business provide additional family-friendly benefits to women in conflict-affected and high-risk areas?
12.	Time autonomy	Flexible hours (C.4)	Does business provide opportunities for flexible working hours according to women's specific needs in the conflict-affected and high-risk areas? Does business assess the possibility of women's own control over working tasks and a schedule? Does business provide women with the opportunity to negotiate with management and make the necessary changes, especially considering air alerts, relocation, and care work duties?
13.	Respect	Stakeholder engagement (A.6), leadership within the business and supply chain (B.1, B.4), health	Does business introduce the notion of respect for women in conflict-affected and high-risk areas (combats, volunteers,

		information and services (D.2)	servicemen partners, etc.) across its policies and practices?
14.	Religion	Gender targets (A.2), gender-responsive human rights due diligence (A.4), flexible hours (C.4)	Does business respect the need of everyday spiritual practices for women in conflict-affected and high-risk areas, if relevant? Does business provide women with the possibility to manage their working hours according to religious practices?

This framework demonstrates that a CA-informed hHRDD process is not only theoretically sound but practically achievable. By asking these more targeted and context-sensitive questions, businesses can *identify salient risks that would otherwise remain invisible*. This approach contributes to a more effective adaptation to the radical social changes brought by war and, most importantly, helps to ensure that women's capabilities are protected rather than eroded.

As illustrated in the Table, some indicators of the Gender Benchmark map to multiple capabilities. The core reason for this overlap is the holistic and interconnected nature of human capabilities. An action or corporate policy rarely impacts a single dimension of a person's life in isolation. For example: Flexible working hours (WBA indicator C.4) is not just about 'Time Autonomy' (Capability 12). It directly impacts a women's capability for 'Mobility' (Capability 10) by allowing them to manage care duties, and it is a key factor in ensuring their capability for 'Paid Work' (Capability 8) that remains viable under the extreme pressures of war. Similarly, 'Health, safety, and well-being in the workplace' (WBA indicator D.1) is central to 'Life and physical health' (Capability 1), but the constant stress and trauma of a conflict zone instigate this indicator equally crucial for 'Mental well-being' (Capability 2). Therefore, such intersecting maping recognizes how a single corporate policy can either enhance or undermine multiple, interdependent dimensions of a women's capabilities.

While the framework is illustrative and requires further research on its implementation, it offers a significant contribution to existing BHR tools by providing a clear methodology for integrating both gender and conflict analysis into corporate due diligence. Such methodology can be used for securing women's capabilities by policymakers, i.e., businesses and state actors to ensure that implicit gender disparities are addressed during war and expected post-war recovery. For

instance, the recovery programs can be framed with an additional requirement to assess the eligibility of the company to participate in such programs, taking into consideration their commitment specifically to address the silent risks women face in wartime. Furthermore, in addition to the requirements for private companies to incorporate proposed assessment points, they can be incorporated as an obligatory framework for state-owned companies.

While being grounded in the Ukrainian context, a proposed framework can serve as one of the research opportunities to study the possibility of more sufficient engagement of business actors with ensuring women's rights in other conflict-affected territories, which requires adaptation of the proposed framework to certain contexts.

4.7. Conclusion

In this article, we have investigated how the capability approach could enhance existing BHR frameworks to address the heightened, gender-specific risks of war. We have argued that conventional human rights due diligence, designed for peacetime, is insufficient for this task.

During wartime, women take on new roles due to multiple overlapping responsibilities as they may simultaneously act as care providers, volunteers, entrepreneurs, warriors, internally displaced or wounded persons. Women also ensure financial and physical safety, provide care for family and community members, and contribute to the national defence; they are the breadwinners, community members, politicians, CEOs, employees, etc. The list of intersecting roles women can have during wartime is inexhaustible. Consequently, multiple responsibility burdens collapse into mere functioning, as women's caregiving becomes an obligatory, unpaid task with little to no freedom to choose otherwise. Under the capability approach, these additional responsibilities of care lie under the distinction between 'the real freedom to care (a capability) and the actual caring (a functioning).'[87] The need to care about others usually does not leave any space for freedom of choice not to care; it is unpaid work and thus creates additional responsibility burdens on women during wartime.

An analysis of normative documents existing in the BHR sphere, such as the UNGPs, the CSDDD, or the OECD guidelines, revealed that the current scope of the HRDD and hHRDD is not able to sufficiently grasp these new circumstances of war impact on women's capabilities within business activities, which deteriorates protection of women's substantive rights and freedoms. To address this institutional gap, we proposed a fundamental conceptual shift in establishing the capability

[87] I Robeyns, 'The capability approach' In G Berik, E Kongar (eds) *The Routledge handbook of feminist economics* (Routledge, 2021) at 75.

approach as the necessary interpretive lens for this expanded view of human rights due diligence.

Our primary contribution is the translation of this theory into a practical, operational tool. By systematically mapping Robeyns' list of capabilities onto the Gender Benchmark and attuning it to the specific risk drivers of a conflict zone, we developed a new framework of hHRDD assessment points. This framework equips businesses to ask more incisive questions and to identify salient risks—from the impact of martial law on labor rights to the hidden burdens of non-market care—that would otherwise remain invisible.

While our framework is a starting point and requires further empirical testing, it contributes to the BHR field by providing a clear, replicable methodology for integrating both gender and conflict analysis into corporate human rights due diligence. Ultimately, by empowering businesses to better understand and enhance women's capabilities, this approach helps ensure that the 'window of opportunity'[88] for creating a more just and equitable post-conflict society is not missed.

[88] Webster et. al. (n 2) at 287.

Chapter 5

Women on Corporate Boards: American, European and Ukrainian Experience to Use Gender Quotas

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5. Women on Corporate Boards: American, European and Ukrainian Experience to Use Gender Quotas

Abstract

In this chapter, we compare the experience of corporate gender quotas implementation American, European and Eastern European traditions. We illustrate the current situation of the women representation in the corporate boards of companies though the example of legislation and judiciary in the USA, EU and Ukraine as countries representing these three traditions. We then underline what current counterarguments are used to object corporate gender quotas. We then contribute to the existing discussion by proposing to look at the BHR agenda though the concept of personal autonomy, namely, the principle of 'gendered autonomy'. Such perspective contributes to the debate on the necessity of introducing gender quotas at corporate boards.

Keywords: Corporate Boards, Diversity, Gender Equality, Gender Quotas, Affirmative Measures, USA, EU, Ukraine.

5.1. Introduction

A scientist who writes or speaks on a gender equality issue in the countries of the post-Soviet region is always forced to start with proof that gender inequality[1] exists, in principle, as a phenomenon. Perhaps the exception is when a scientist gets to a conference on women's rights. Gender equality is the subject of political campaigns in the region often. Papers, articles and reports are written on the contradiction of the ideas of gender equality to the values and traditions that are rooted in society. Any public discussion – whether it be a scientific conference or a social media – is accompanied by quite emotional statements about the contrivedness of the problem.

This is the first difference between the Eastern European context, on one side, and the European and American, on the other, where the fact of gender inequality is not put into question. Discussions are ongoing at the next level already – specific measures are being discussed to overcome gender inequality. And one of such discussions is about quotas aimed at ensuring that women are represented in company management.

While Western colleagues are talking about the intensity of discussion of gender quotas, including in the scientific literature,[2] there are very few examples in the Eastern European region and, specifically, in Ukraine. Among the whole variety of literature on the women's representation in company management, we want to note Aaron A. Dhir 'Challenging Boardroom Homogeneity. Corporate Law, Governance, and Diversity'[3] especially because of its strong consonance with our views on this issue in many ways.

We see our contribution to the discussion, first, in referring to the experience of Ukraine as both Eastern European and post-Soviet country and comparing it with American and European experience in the context of such a basic issue as the legitimate aim (important public interest) of using quotas in the management of private companies. Additionally, if Aaron A. Dhir considers the issue of women's representation in company leadership through the lens of the value of diversity (which is the result achieved or the goal to be pursued), we approach this issue from the point of view of the principle of personal autonomy as a normative requirement, which should be addressed to each entity – public or private – that significantly affects the possibility of a person realizing her or his life project.

In our opinion, factors that distinguish all three regions on the approaches to the fulfillment the state's obligation to protect human rights from violations by business

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[1] While focusing on women\male distinction in gender inequality, we understand gender as not a binary but pluralistic concept including various genders and people who identify themselves as women not depending on their biological or social role characteristic,

[2] E Lépinard and R Rubio-Marín, *Transforming Gender Citizenship: the Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press, 2018) at 5.

[3] A Dhir, *Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity* (Cambridge University Press, 2015).

(Pillar 1 of the UN Guiding Principles on Business and Human Rights) find their bright manifestation in the of women's representation in company leadership.

In this chapter the following issues will be considered in the context of all three of these regions:

(a) The current situation with the representation of women in the corporate boards of companies in the USA, EU and Ukraine as both Eastern European and post-Soviet state?

(b) What can sufficiently justify introduction of gender quotas at corporate boards?

The chapter proceeds as following. Section 2 analyses legislative framework in the context of gender equality as a state representing both Eastern European and Post-Soviet Region. Section 3 provides an overview of legislative measures introducing corporate gender quotas and their effects on gender equality and women's representation. Section 4 presents a concept of 'gendered autonomy' as a normative requirement legitimizing introduction of such affirmative actions like obligatory corporate gender quotas. Section 5 concludes.

5.2. Ukraine as a Country of Both Eastern European and Post-Soviet Region

5.2.1. General context

Ukraine is country that represents both Eastern European and Post-Soviet Region that provides an interesting example of a state aiming to integrate into the European context and overcome the rudiments of Post-Soviet legislation.[4] Generally, being transitional economy states, despite having quite different backgrounds, Post-Soviet countries can be characterized as countries with a high level of bureaucracy, a concentration of achieving maximum profit, and weak attention to human rights.[5] The region also suffers from low self-regulation and a weak engagement of non-state actors with BHR and SDGs agendas, as well as a lack of coherent state regulation, leading to so-called 'state controls gaps'.[6] Some facts about USSR which have significant impact to the current situation on the corporate responsibility to respect human rights and gender equality in particularly in this region.

Economic – private business has emerged in the territory of the former USSR only since 1991, with the beginning of privatization. Up to this moment, private entrepreneurship was banned (under the threat of criminal liability), the idea of private property was denied, all enterprises were state-owned. The economy was centralized and administered by command methods as 'the Soviet economy was

[4] It should be noted that the definition of the post-Soviet region is very conditional. We use this term to refer to countries that were part of the USSR, except for countries that have become EU members (Latvia, Lithuania, Estonia).

[5] United Nations Development Programme *The Status of the Implementation of the UNGPs on Business and Human Rights in Europe and Central Asia* at 11.

[6] United Nations Development Programme in Ukraine *Accelerating Sustainable and Equitable Development through Implementation of the UN Guiding Principles on Business and Human Rights* at 65.

embedded in the state; the state *was* the economy. Price and employment stability were closely linked to ideological legitimation of regime and system'.[7] The understanding the huge impact of private companies on human rights situation of people is still seen as a new trend in practice. A feature of the general 'prevalence of the state-centric view of human rights' in the field of BHR described by Western European countries scholars[8] is amplified in Ukraine.

All socialist countries, despite their obvious differences, shared the common features of a collectivist ideology, economic centralization, planning, and nationalization. In all such countries, the leadership sought to promote an economic model rooted in ideology but swiftly contradicted by the 'spontaneous' ideologies of various social groups. The outcome was the proliferation of a hidden economy largely based on market transactions but quite at odds with the legal principles of a market economy. In fact, in state socialism, the main problem for those operating in the second (legal or illegal) economy is not market competition but competition to purchase inputs from the official economy. This is why highly corrupt and ritualistic relations with the socialist bureaucracy constitute the central plank in the nonnative order that regulates the unofficial economy.[9]

Legal – the idea of human rights was subordinate to state policy; collective interest prevailed over the individual/private, legal regulation was based on the principle of the supremacy of the state will, but not on the rule of law principle. Ideas of human dignity and personal autonomy were not elements of law understanding.

Ideological – Civil society existed only in shadows of the Party-state. Not ready to burst out with liberalization, civil society instead had to create itself once the Soviet Union and its satellite states were sufficiently weak.[10]

Predictably, while 'the business and human rights field has developed rapidly in the last two decades',[11] the concept of corporate social responsibility of business, which is the ideological foundation of business and human rights concept, emerged in the post-Soviet space in the early 2000s and is still seen as a new trend in practice.

5.2.2. Gender equality issues in the USSR

The ideological basis of the political and legal regime in the USSR was called Marxism-Leninism. Marxism emerged in the 19th century as both a critique of capitalism and the main rival of liberalism. This ideology prescribed that women

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[7] J Hass, *Rethinking the Post-Soviet Experience: Markets, Moral Economies, and Cultural Contradictions of Post-Socialist Russia* (Palgrave Macmillan, 2012) at 5.

[8] L J Obara, '"What does this mean?": How UK companies make sense of human rights' (2017) *Business and Human Rights Journal* 2(2) 249; N Bernaz, *Business and human rights: history, law and policy-bridging the accountability gap* (Routledge, 2016).

[9] B Dallago, G Ajani and B Grancelli, *Privatization and Entrepreneurship in Post-Socialist Countries: Economy, Law and Society* (Macmillan Press LTD, 1992) at 9.

[10] Hass (n 7) at 5.

[11] D Baumann-Pauly and J Nolan, Business and Human Rights from Principles to Practice (Routledge, 2016) at 19.

emancipation is possible 'only through the emancipation of the working class by a proletarian revolution that would eliminate private ownership of the means of production, bring women to the production process as the equals of men, and treat childrearing as a social/collective responsibility.'[12]

By decrees adopted in December 1917, the Soviet government granted women the civil rights and freedoms, equating them with men in the face of the law. Simultaneously with the publication of these decrees, all independent women's associations were banned. The Soviet government took over the upholding female interests. Therefore, a completely new phenomenon 'state feminism' arose, within the framework of which 'emancipation' of Soviet citizens was now carried out. The state and the ruling party, within the framework of this policy, patronized the 'women departments', then the 'women councils', formed be the party itself. Soviet women's organizations did not raise questions about gender equality. They promoted party decisions that stated the need to 'improve the status of women.'[13] With the establishment of the new Government after the Revolution in 1917 women's rights were proclaimed equal to men's,[14] providing them with a right to work, vote, equal pay and reproductive rights. Economic crisis in the late 20s, the shift from woman-worker to woman-worker and family caregiver was created within new governmental policies family and work duties of parents and 'steady retreat to conservatism.'[15] Such a shift created a situation when women were working at two works – official workplace and household work[16] and the percent of men's participation in the household was lower[17] despite proclaiming equality between men and women in family duties.[18]

Considering the example of Ukraine, the Constitution of the USSR on March 10, 1919, indirectly guaranteed the right to vote and be elected for all citizens, men and women. Constitution of the USSR, 1929, in Art. 66 stated that

> Citizens of the Ukrainian Socialist Soviet Republic who have been 18 years old before the election day have the right to vote and to be elected to councils, regardless of sex, religion, race, nationality, etc.

Constitution of the USSR, 1936, in Art. 122 ensured that women in the USSR were granted equal rights with men in all spheres of economic, state, cultural and socio-political life. The exercising these rights by women was ensured by giving women

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12 Z F Kabasakal Arat, 'Feminisms, Women's Rights, and the UN: Would Achieving Gender Equality Empower Women' (2015) *American Political Science Review* 109(4) 674 at 680.

13 V Chernyakhivska, 'Історичний досвід становлення української моделі гендерного паритету' ['Istorychnyy dosvid stanovlennya ukrayinskoi modeli hendernoho parytetu'] (2016) *Державне управління: удосконалення та розвиток* 10 21 [in Ukrainian] at 22.

14 A Tay, 'The Status of Women in the Soviet Union' (1972) *American Journal of Comparative Law* 20(4) 662.

15 Ibid, 673.

16 Ibid, 674-681.

17 Ibid, 690.

18 V Klumbys, 'Equality just over the horizon: Soviet gender equality in law and policy' (2020) *Lithuanian Historical Studies* 24(1) 143.

equal rights with men to work, wages, vacations, social security and education, state protection of interests of mother and child.

Soviet legislation was formed aimed to solve 'the women's issue' and ensure equality and freedom of women in a socialist society. The involvement of women in social production was dictated not by the needs of their 'emancipation' as by the needs of modernization of the Soviet economy, its transition from the agrarian to the industrial phase. Beginning in the 1920s, the proportion of women in wage-labor was constantly increasing, though with certain fluctuations. In the 70s, the share of women in the total number of employees reached 51%, and this figure is maintained until the end of the 80s. Throughout the twenty years of the 70-80s, 92% of Soviet women of working age worked and studied. Women had two jobs – at their official workplace, doing household work – when the percentage of men's participation in the household was lower[19] despite proclaiming equality between men and women in family duties.[20]

This complex picture shifted again with the collapse of the USSR and the start of the process of economic transformation. Ukraine's rates of wage gap significantly increased from 1989[21] and a shift back from woman's emancipation towards traditional stereotypic constructs of the female gender was put in place,[22] which is also explained by growing religiosity in some Post-Soviet states such as Central Asia.[23] Fewer gender policies were implemented in newly created states than there were under Soviet gender equality laws, and the effort was made more towards economic stability in gender-neutral norms.

Being progressive and protective in Soviet times, the abovementioned women's rights became discriminative as Gender equality is directly affected by laws and policies that proclaim patriarchal and stereotypic attitudes to women (gender segregation within the labor market on women and men professions, and work responsibilities such as prohibition for sending pregnant women or women with children under 3 years in work business trips even with the will of woman).[24] This

19 Tay (n 14) at 690.
20 Klumbys (n 18) at 159.
21 E Brainerd, 'Women in Transition: Changes in Gender Wage Differential in Eastern Europe and the Former Soviet Union' (2000) *Industrial and Labor Relations Review* 54(1) 138.
22 S Szlek-Miller, 'Gender Equality and Transition from Communism in Eastern Europe' (1994) *Polish Political Science Yearbook* 24 101.
23 A Ishkanian, 'Gendered transitions: The impact of the post-Soviet transition on women in Central Asia and the Caucasus' in M Amineh and H W Houweling (eds) *Central Eurasia in global politics* (Brill, 2005) 161.
24 See for more Decree (No. 56) of Ministry of Social Policy 'On approval of Methodical recommendations on the inclusion in collective agreements and arrangements of provisions aimed at ensuring equal rights and opportunities for women and men in labor relations' para 3; United Nations Population Fund, 'Чим керуються українці та українки при виборі професії: результати національного дослідження щодо ключових чинників та стереотипів' ['Chym keruiutsia ukraintsi ta ukrainky pry vybori profesii: rezultaty natsionalnoho doslidzhennia shchodo kliuchovykh chynnykiv ta stereotypiv' (2021) https://ukraine.unfpa.org/sites/default/files/pub-pdf/prezetation_tramplin_ukr_1.pdf.

is also exacerbated by the practice of differentiation in social, public, and work-life between men and women,[25] and the underestimation of substantive gender equality in the region[26] that make them 'suffer from gender forms of subordination of status and non-recognition.'[27]

In current Ukrainian context, there is a significant problem of informal employment of women at work or decreasing the work hours and creating unpaid leaves[28] because the law and regulations themselves, and court decisions interpreting law provision align with patriarchal approaches towards female workers such as restrictions on women night work, intensified by administrative fines.[29] Legal regulations with the abovementioned Post-Soviet legal norms create a contradiction with a neoliberal economic model now entrenched in Ukraine, thereby maintaining considerable obstacles to the development of corporate responsibility according to international standards.

5.3. Adopting Women Quotas Experiences

There are different studies presenting both positive and negative impact quotas had on company performance. Some researchers claim that after such measure was integrated the company performance improved[30] and formed a positive correlation between women on the board and firms' corporate social responsibility ratings or 'social capital' and corporate reputation.[31] Other call introduction of quotas 'an imperfect strategy in an imperfect world.'[32] In contrast, more critical studies

[25] B Meyersfeld, 'Business, human rights and gender: a legal approach to external and internal considerations' in S Deva and D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect* (Cambridge University Press, 2013) 193.

[26] O Vodyannikov, *Гендерна рівність. Теорія і практика в порівняльному конституційному праві* [Genderna rivnist. Teoriia i praktyka v porivnialnomu konstytutsiinomu pravi, OSCE] (OSCE, 2021) [in Ukrianian].

[27] O Kharytonova, 'Людська гідність і гендерна рівність у конституційному просторі' ['Liudska hidnist i henderna rivnist u konstytutsiinomu prostori'] (2020) *Ukrainian Journal of Constitutional Law* 4 61 at 68 [in Ukrianian].

[28] International Labour Organization *Undeclared Work in Ukraine: Nature, Scope and Measures to Tackle it* (2018); M Skoryk, *Гендерна дискримінація у доступі до праці й послуг: оцінка стану впровадження Україною антидискримінаційних Директив Ради ЄС. Аналітичне дослідження. Київ, Бюро соціальних та політичних розробок* [*Henderna dyskryminatsiia u dostupi do pratsi y posluh: otsinka stanu vprovadzhennia Ukrainoiu antydyskryminatsiinykh Dyrektyv Rady YeS. Analitychne doslidzhennia*] (Biuro sotsialnykh ta politychnykh rozrobok, 2017) [in Ukrainian].

[29] O Uvarova, 'Принцип недискримінації за ознакою статті в судовій практиці України' ['Pryntsyp nedyskryminatsii za oznakoiu statti v sudovii praktytsi Ukrainy'] (2017) *Law of Ukraine* 7 56 [in Ukrianian].

[30] J J Yu, and G Madison, 'Gender quotas and company financial performance: A systematic review' (2021) *Economic Affairs* 41(3) 377 at 386; S Comi, M Grasseni, F Origo and L Pagani, 'Where women make difference: gender quotas and firms' performance in three European countries' (2020) *ILR Review: The Journal of Work and Policy* 73(3) 768 at 790; G Atinc, S Srivastava and S Taneja, 'The impact of gender quotas on corporate boards: a cross-country comparative study' (2022) *Journal of Management and Governance* 26(3) 685.

[31] Ch McCrudden, 'A Comparative Taxonomy of 'Positive Action' and 'Affirmative Action' Policies'(2012) *Queen's University Belfast Law Research Paper* 12-04 157 at 160.

[32] C Seierstad, 'Beyond the business case: The need for both utility and justice rationales for increasing the share of women on boards' (2016) *Corporate Governance: An International Review* 24(4) 390 at 396.

question the impact of this measure on deeper structural inequalities and the way businesses operate,[33] or that an ongoing discussion on women at corporate boards relates only to 'privileged white, middleclass, and educated' women, which undermines women of other backgrounds.[34] This section provides an overview of the recent developments in three regions regarding practical impacts of gender quotas.

5.3.1. United States

Until recently, it was believed that it was impossible to imagine the introduction of gender quotas in the United States.[35] Many authors were categorical in their statements that the US Constitution does not allow gender quotas.[36] Moreover, it was argued that

> in the United States, courts have consistently rejected quotas, as have thinkers across the ideological spectrum. Even supporters of affirmative action have distinguished incremental affirmative action programs from quotas, which have been characterized as malignant, unjustifiable, and inherently wrong.[37]

It was so until the State of California passed the law on mandatory gender quotas for companies' boards. In 2018, California introduced the first state-level obligation for gender-quotas on corporate boards (Senate Bill 826).[38] The study of board composition and stock return data on all firms in the Russell 3000 index from Bloomberg developed by Sunwoo Hwang, Anil Shivdasani, Elena Simintzi in 2018 and summarized the composition of the board of directors of California firms in the sample at the end of their most recent fiscal year.[39] The median board size was eight directors, and the median number of female directors on the board was one. The median percentage of female directors on the board in the sample was 14%. On average, only 4% of firms had a chairwoman on the board, and 7% of firms have a female CEO. More than half of the boards had at least one-woman director, implying that fewer than 50% of firms will be required to add a female director to the board by the end of 2019. To achieve compliance with respect to the law's 2021 requirements, firms needed to add a median of 2 female directors to the board, representing a median increase of 22% in the fraction of female directors. Overall, 27.4% of firms needed to add one female director, 42.5% need to add two female

[33] T D Barnes and M R Holman, 'Gender Quotas, Women's Representation, and Legislative Diversity' (2020) The Journal of Politics 82(4) 1271 at 1281.
[34] S Terjesen and R Sealy, 'Board gender quotas: Exploring ethical tensions from a multi-theoretical perspective' (2016) *Business Ethics Quarterly* 26(1) 23 at 45.
[35] J S Suk, 'Gender Parity and State Legitimacy: From Public Office to Corporate Boards' (2012) *Stanford Journal of Law, Business & Finance* 21(2) 194 at 196.
[36] V Magnier and D Rosenblum, 'Quotas and the Transatlantic Divergence of Corporate Governance' (2014) *Northwestern Journal of International Law & Business* 34 249 at 251.
[37] Ibid, 252.
[38] See California Senate Bill No. 826 (2018) Chapter 3. 'Directors and Management'.
[39] S Hwang, A Shivdasani and E Simintzi, *Mandating Women on Boards: Evidence from the United States* (Kenan Institute of Private Enterprise, 2018).

directors, and 16.1% need to add three female directors by 2021 to achieve compliance. The median percentage of female directors on the board of non-California firms is 14%. On average, only 4% of non-California firms had a female chairman of the board, and 4% have a female CEO. If non-California firms were required to comply with California's mandatory board quotas by 2021, they would also have to add a median of 2 female directors to their boards.[40] Generally, the introduced quota requirement had a considerable impact on the corporate landscape for women.[41]

This explains the increased focus on California law. About 12% of all public (traded on stock exchanges) US companies headquartered in California, 602 public firms headquartered in California. By the moment of the statute adaption, 171 (28%) of these firms needed to add a female director by the end of 2019 and 531 (88%) need to add one or more women by 2021.[42] In 2019, women represent, on average, 30% of the board for Russell 3000 firms, but the growth remains at 1%, which makes achieving gender parity in 20 years away.[43]

However, shortly after the adoption of the Senate Bill, a complaint was submitted regarding its unconstitutionality. According to its supporters:

> this 'Woman Quota' (SB 826) applies to all businesses across every industry. It applies in perpetuity and irrespective of whether there is any evidence of discrimination in the relevant industry. The law is not only deeply patronizing to women, it is also plainly unconstitutional.[44]

Other lawsuit claimed the Senate Bill is unconstitutional because it 'seeks to force shareholders to perpetuate sex-based discrimination'.[45] Previous case law practice of the U.S. Supreme Court that has rejected quotas, even as it has affirmed the appropriate inclusion of discrete remedies for past discrimination. The seminal case, *Regents of the University of California v. Bakke*, differentiated affirmative action (which it held was permissible within specific confines) from a quota, which it ruled was impermissible. In considering the legitimacy of a remedy, the U.S. Supreme Court applied strict scrutiny as it had in previous race cases. To survive this highest level of scrutiny, the law in question must involve a compelling governmental interest and be narrowly tailored to achieve that interest. Laws or regulations involving gender are examined under the lower, intermediate scrutiny standard.

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[40] Ibid.
[41] A Jain and R Mohie Eldin, 'Board Diversity and Career Progression of Women: Evidence from SB 82' (2024) https://ssrn.com/abstract=4787312.
[42] D Greene, V Intintoli and K M Kahle, 'Do board gender quotas affect firm value? Evidence from California Senate Bill 826' (2020) *Journal of Corporate Finance* 60(1015262) 1.
[43] 50/50 Women on Boards, 'Gender Diversity Index Report. Annual Progress Report of Women Corporate Directors by Race & Ethnicity, Company Size, State, and Sector in the U.S.' (2024) https://5050wob.com/wp-content/uploads/pdf/2024-annual-gender-diversity-index-report.pdf.
[44] See *Creighton Meland v. Alex Padilla, Secretary of State of California* (Case No. 2:19-cv-02288-JAM-AC).
[45] Ibid.

Realizing the seriousness of the challenge, the California legislature focused on justifying the measure that was being taken, citing studies pointing to the positive effects of women in companies' board. California law also has a ripple effect as state legislators in New York and New Jersey consider similar mandates. Companies across the country, encouraged by activist investors such as BlackRock, are actively diversifying their boards. However, such legislative regulation requires proper justification of the legitimate aim, and the proportionality of the means used to achieve it in order to have constitutional status. Otherwise, if unconstitutionality would be recognized, the effect may be the opposite. Generally, the introduced quota requirement had a considerable impact in corporate landscape for women.[46] However, the Superior Court of the State of California reversed the Senate Bill 826 in 2022, establishing the violation of the Equal Protection Clause of the California Constitution as lacking legitimation for 'for remedial discrimination.'[47] This judgment also stopped the practice of collecting statistical data regarding women on boards in California.[48]

5.3.2. EU Countries

Regarding EU countries, it worth to consider the legal framework and case-law that exists to address the issue of corporate gender quotas. We do it though the analysis of general *EU legal framework on gender equality, the Directive on Gender Balance in Corporate Boards, and the case-law of CJEU and ECtHR.*

5.3.2.1. EU Legal Framework and the Directive on Gender Balance in Corporate Boards

Equality between women and men is one of the Union's founding values and core aims under Article 2 and Article 3(3) of the Treaty on European Union (TEU) and Article 8 of the Treaty on the Functioning of the European Union (TFEU),.The principle of positive action and its importance for achieving effective equality between women and men in practice are recognised in Article 157(4) TFEU and in Article 23 of the Charter of Fundamental Rights of the European Union ('the Charter'), which provides that equality between women and men must be ensured in all areas and that the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex. However, even though the need to establish gender equality is widely recognized in the EU, the legislation applied to achieve this goal often causes quite serious debate. One of the most debatable tools is the use of mandatory 'women quotas.'

[46] Jain and Mohie (n 41).
[47] A Gibert and A Fedorets, 'Lifting Women Up: Gender Quotas and the Advancement of Women on Corporate Boards' (2024) *Corporate Governance: An International Review* 33(3) 407.
[48] California Secretary of State *Women on Boards. Update* (2022) https://www.sos.ca.gov/business-programs/women-boards.

Frustrated by the slow growth of women's participation in economic decision-making, in 2012, the European Commission proposed a Directive that would establish mandatory quotas for the representation of women in companies' board.[49] Proposed Directive imposed on listed companies which do not have a presence of the under-represented sex of at least 40 per cent of non-executive directors an obligation to make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020 (art. 4 (1)). This preference rule provides that, in the presence of equally qualified candidates of both sexes, priority shall be given to the candidate of the under-represented sex unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex (art. 4 (3)).

In 2022, the Council of the EU adopted a Directive on Gender Balance in Corporate Boards, requiring companies across the European Union to have 40% of non-executive directors or 33% of all board directors from the underrepresented sex by June 2026.[50] Currently, the average percentage of women at companies' boards in EU is 32.2 % and board chairs – 8% percent. Cyprus has very low rates (8%), Estonia, Hungary, Bosnia and Herzegovina, Greece – less than 15%.[51] France (46%), Italy (43%), The Netherlands (43%), and United Kingdom (43%) are leaders in this indicator in Europe.[52]

Overall, 8 EU countries have adopted legislation on the application of quotas for the raising representation of women in company boards.[53] However, after the adoption of a new Directive all member states are required to transpose it by 28 December 2024.[54] In 2018, the four countries, which first introduced binding quotas (BE, DE, FR, IT), had 38 % women on boards, representing a rise of 28 p.p. since 2010.[55] The models implemented by different countries differ—in some quotas apply only to state-owned companies, in some—to all traded on the exchange, in some—only to large ones. Some countries impose tangible sanctions for non-compliance with quotas, some countries impose very conditional sanctions or even dispense with sanctions at first. Belgium, France, Italy, and Norway, penalize firms—with fines,

[49] A Veldman, 'Gender Quota for Corporate Directors: A Task for the European Union? The Revival of the Directive on Gender Balanced Company Boards' (2023) *Utrecht Law Review* 19(3) 44.
[50] See EU Directive 2022/2381 (2022) *On Improving the Gender Balance Among Directors of Listed Companies and Related Measures.*
[51] European Women on Boards *Diversity on European Boards. Gender Balance is Improving – Now Change Must Go Deeper and Wider* (2024) https://europeanwomenonboards.eu/wp-content/uploads/2024/03/EWOB-Toolkit-for-change-Gender-diversity-on-European-boards.pdf.
[52] Ibid.
[53] European Institute for Gender Equality *Gender Equality Index 2023. Towards a green transition in transport and energy* (Publications Office of the European Union, 2023) at 50.
[54] B Otto and R Müller, 'Gender balance quotas: The key to gender equality?' (2023) https://www.ibanet.org/gender-balance-quotas-key-gender-equality.
[55] European Women on Boards and Ethics & Boards *European Gender Diversity Index (GDI)* (2018) europeanwomenonboards.eu.

bans on paying existing directors, and even possible dissolution—that fail to comply with the quotas. Germany, the Netherlands, and Spain set quotas but do not sanction companies that do not meet them, while the United Kingdom only sets guidelines for women representation on boards.[56] Still, statistics reveal that initially equal countries in 2010 in gender percentage at corporate boards like Italy (5%) and Greece (6%) became radically different after Italy has introduced obligatory gender quotas in its law—the percentage has changed to 36% in 2019 in comparison to 9 % in Greece.[57]

The discussions regarding the Directive are due to a claim that the use of mandatory quotas for women's representation in the board of the companies is a threat to the interests of shareholders and the companies themselves. A similar argument is voiced, as we remember, in the United States by supporters of the unconstitutionality of measures taken in California. According to European law, mandatory quotas must be evaluated in terms of the principle of proportionality. The principle of proportionality states that any policy measure needs to be suitable and necessary to achieve its objectives.

To assess the proportionality of the mandatory quotas is important to determine whether the measure is appropriate and necessary to achieve the aim. In addition, the use of mandatory quotas could potentially lead to adverse effects on the functioning of companies. In this case, the proportionality test will also include weighing competing interests—the freedom of the company to conduct entrepreneurial activities, on the one hand, and achieving gender equality in practice, on the other.[58] The application of the proportionality test is widely used by CJEU and ECtHR.

5.3.2.2. Case-law of the European Court of Justice and European Court of Human Rights

In 1995 the European Court of Justice considered the possibility of promoting gender equality by providing a predetermined priority for women in conditions where candidates of both sexes are qualified equally. The *Kalanke* case, the Court had to deal with a more concrete scheme. It examined a law of the German Land of Bremen giving a preference to women in the recruitment for or promotion within the civil service. This preference applied when women and men were equally qualified and when women were under-represented in the relevant sectors (in case of recruitment) or pay brackets (in case of promotion). Under-representation of

[56] The Economist, 'Ten years on from Norway's quota for women on corporate boards' (2018) https://www.economist.com/business/2018/02/17/ten-years-on-from-norways-quota-for-women-on-corporate-boards.
[57] A Latura and A C Weeks, 'Corporate board quotas and gender equality policies in the workplace' (2023) *American Journal of Political Science* 67(3) 606 at 611.
[58] M Leszczynska, 'Mandatory Quotas for Women on Boards of Directors in the European Union: Harmful to or Good for Company Performance?' (2017) *Eur Bus Org Law Rev* 19 35.

women was deemed to exist when they did not make up at least 50% of the staff in the sector, or in the individual pay bracket in question.

The Court distinguished equality of results from equal opportunities and ruled that only the latter is acceptable. The judgment in *Kalanke* case created a lot of controversy, perhaps the biggest in the history of the Court's cases on gender equality. Against the usual trend, the Court limited the reach of a protective clause in an equality Directive. Contrary to their usual approach, the national governments reinforced the protection afforded by the Directive by changing the Treaties. After the outcry caused by the *Kalanke* case, in the next round of revision of the treaties in 1997, all national governments agreed to include a new Treaty provision reinforcing the possibility to adopt positive action measures based on gender.[59]

In November 1997, the Court had another judgment in a landmark case *Hellmut Marschall v Land Nordrhein-Westfalen*. It addressed the issue of compliance with the legislation of one of the lands of Germany with EU law. Under the disputed legislation, if in a particular sector women are less than men, then female candidate is given priority in hiring in the case of equal competence and professional skills, unless the male candidate for this job has the specific qualities that will give him the advantage. The Court acknowledged that this provision was not contrary to EU law. The Court considers that when it comes to promotion, there is a tendency to favor men, not women, if they are equally qualified. This situation is caused by deep-rooted prejudiced attitudes and stereotypes about women's roles and opportunities. That is why the equal qualification of women and men candidates does not mean that they have an equal chance. Therefore, provisions such as the provision in German law help prevent actual inequalities by introducing an additional criterion (status of woman), unless the woman is automatically given preference.

The approach that has emerged in the practice of the European Court of Human Rights, requires to prove that quotas are a necessary and proportional means of promoting gender equality. In other words, the State must answer the question: couldn't it be possible to promote it by other, softer tools (training programs, etc.)? The issue of gender quotas has not been widely considered in the practice of the ECtHR yet. However, two cases—*Evnik and Others v. Slovenia*[60] and *Staatkundig Gereformeerde Partij v. the Netherlands*[61]—illustrate the emerging approach of ECtHR regarding obligatory gender quotas. In both cases regarding introducing obligatory gender quota for political parties the ECtHR held that

> …the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe … and that its institutions consider

[59] L Barmes, 'Navigating Multi-Layered Uncertainty: EU, Member State and Organizational Perspectives on Positive Actio' (2010) *Queen Mary School of Law, Legal Studies Research Paper* https://ssrn.com/abstract=1538522 at 12.

[60] See European Court of Human Rights *Evnik and Others v. Slovenia* no. 54893/18 (12 November 2019).

[61] See European Court of Human Rights *Staatkundig Gereformeerde Partij v. the Netherland* no. 58369/10 (10 July 2012).

> the lack of gender balance in politics to be a threat to the legitimacy of democracy and a violation of the right of gender equality…the interference in question pursued the legitimate aim of strengthening the legitimacy of democracy by ensuring a more balanced participation of women and men in political decision-making.[62]
>
> …nowadays the advancement of the equality of the sexes in the member States of the Council of Europe prevents the State from lending its support to views of the man's role as primordial and the woman's as secondary.[63]

These ECtHR's judgments confirm that 'increasing female participation is a legitimate and favorable aim', to achieve which gender quotas can be an effective measure.[64] Further, it can be assumed how events can develop if the 'gender quotas' case falls into the ECtHR. Imagine a hypothetical case, the subject of which is following: the male applicant believes that his right not to be discriminated against (Article 14 of the European Convention on Human Rights and Fundamental Freedoms) has been violated in the context of the right to privacy (Article 8 of the Convention), since the legislative step to introduce gender quotas has limited his ability to self-realization, minimized its impact on his further professional development. The only grounds for refusal of leadership positions in the company' governance was the use mandatory gender quotas by the company.

First, we can expect that the Court will reiterate that

> …Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations. For the purposes of Article 14, a difference of treatment is discriminatory if it 'has no objective and reasonable justification,' that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[65]

Recalling *Emel Boyraz v. Turkey* case, it can be assumed that the Court accepts that the situation in the case is covered by Art. 8, 14 of the Convention. If the Court was rephrased a little, it could have noted in this hypothetical case the following:

> …The Court considers that the issue to be examined in the present case is not whether the applicant had a right to be recruited to the company's board. His submissions under this head concerned the difference in treatment to which he had been subjected on the ground of his sex.

Next, the Court will ask, *whether the applicant was in an analogous or relevantly similar position*. The Court, as a rule, seeks an answer to this question solely in

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[62] See *Evnik and Others v. Slovenia* para 34.
[63] See *Staatkundig Gereformeerde Partij v. the Netherlands* para 73.
[64] J Toplak, 'The ECHR and Gender Quotas in Elections' (2019) https://www.ejiltalk.org/the-echr-and-gender-quotas-in-elections/.
[65] See European Court of Human Rights *Bradshaw and Others v. Malta* no. 37121/15 (23 October 2018) para 76.

formal attributes: did the man and woman aspire to the same position. It can be assumed that the answer will be yes. Although it is possible that at this stage the state will be able to prove that women and men applying for a managerial position in the company are not in a similar position due to the existing indirect discrimination. The ECtHR (and CJEU as well) considers statistics an effective means of proving indirect discrimination.

But let's assume that the Court proceeds to the next question: *Whether the difference in treatment was objectively justified?* Based on the previous practice of the ECtHR, it can be assumed the answer to this question

> …where a difference of treatment is based on sex, the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances.

Approximately the same reasoning algorithm can be expected in a hypothetical case in which the firm itself can act as the applicant and appeal the violation of Article 1 Protocol 1 of the European Convention on human rights and fundamental freedom in connection with a disproportionate interference in the governance of the company. It is not excluded that the Court, for example, will refer to the fact that 'social life is regulated not only by the law but also by different types of social rules. In many fields social self-regulation may yield better results than legal rules',[66] and it will take the position that gender diversity in company governance is a sphere of self-regulation, and the maximum that the state can do in this regard is to conduct information campaigns to create appropriate knowledge and interest in companies. Or it can held that 'positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves;'[67] or that 'a difference in treatment that is aimed at ensuring substantive equality may be justified under Article 14 of the Convention.'[68]

5.3.3. Ukraine

No country in the Eastern European region has adopted quotas for the representation of women in company boards. The first thing to note is the lack of official statistics or other centralized mechanisms for collecting information on the representation of women in company management, based on which the states of the region could formulate their policies on this issue. This is a common symptom for countries in the region. According to a report from the European Commission on the situation in the region, gender stereotypes and discrimination against women hinder their greater

[66] See Dissenting Opinion of Judges Pejchal and Wojtyczek European Court of Human Rights *X. v. The Former Yugoslav Republic of Macedonia* no. 29683/16 (17 January 2019) para 9.
[67] See European Court of Human Rights *Beizaras and Levickas v. Lithuania* no. 41288/15 (14 January 2020) para 110.
[68] See European Court of Human Rights *Ecis v. Latvia* no. 12879/09 (10 January 2019) para 86.

inclusion in the labor market and cause additional barriers to women's entrepreneurship. The document also states that women are employed mostly in services and government institutions with a much lower level of wages than in those areas where men dominate. Gender wage gap remains significant and varies from 18.6% In Ukraine[69] to 34% 50%, as in Kazakhstan and Azerbaijan accordingly.[70]

According to the British Council in Ukraine, in the countries of the Eastern Partnership (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine – all countries of the former USSR), women are underrepresented in economically responsible positions. In 2015, there were 9% of women on the boards of central banks, 15% in the leadership of trade unions, 10% in the leadership of associations of employers, less than 15% in the boards of companies listed on stock exchange quotes.[71] The UN Development Program carried out a special project in Ukraine, an analysis of open information in state registers, which shows the names of managers (but not sex), to determine the percentage of women in company management.[72] While the general percentage of women in leadership positions increased to 40.48% during 2017-2020 and the rise of female entrepreneurship in Ukraine,[73] the rate of women in corporate boards remains the same 30% in 2024.[74] However, there is another significant feature: women are predominantly managing in areas that conform to the stereotypes of traditionally female household and community activities: education and childcare, social assistance (as well as trade union activities), hotels, restaurants, food retailing and clothing, tailoring, beauty salons, tourism, arts and leisure, accounting and auditing. Thus, Ukrainian legislation on women's employment 'is gender-blind rather than gender-sensitive, as it does not

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69 Ministry of Economy of Ukraine, *Reducing the gender pay gap from 18.6% to 13.6% and launching the national campaign 'Sure You Can' - how is Ukraine moving towards women's economic empowerment in times of great war* (2024) https://www.kmu.gov.ua/en/news/skorochennia-hendernoho-rozryvu-v-oplati-pratsi-z-186-do-136-ta-start-natsionalnoi-kampanii-zvisno-zmozhesh-iak-ukraina-rukhaietsia-do-ekonomichnoho-upovnovazhennia-zhinok-u-chasy-velykoi-viiny.

70 United Nations Development Programme *The Status of the Implementation of the UNGPs on Business and Human Rights in Europe and Central Asia* (UNDP, 2023) at 95.

71 British Council, 'Стан та просування рівних можливостей для жінок та чоловіків у культурних та креативних індустріях в Азербайджані, Вірменії, Грузії та Україні' ['Stan ta prosuvannya rivnykh mozhlyvostey dlya zhinok ta cholovikiv u kulturnykh ta kreatyvnykh industriyakh v Azerbaydzhani, Virmeniyi, Hruziyi ta Ukrayini'] (2018) http://www.britishcouncil.org.ua/sites/default/files/gender-equality-and-empowerment-ukr_0.pdf.

72 United Nations Development Programme, 'Жінки та чоловіки на керівних посадах в Україні' ['Zhinky ta choloviky na kerivnykh posadakh v Ukrayini'] (2017) https://platforma-msb.org/wp-content/uploads/2017/11/ZHinky-ta-choloviky-na-kerivnyh-posadah-v-Ukrayini-.pdf.

73 V Tokar, O Vinska, N Novak and L Sierova, 'Clustering EU Member-States and Ukraine by Female Empowerment in Business' in H Hamdan, A Buallay, P Arora and H Alsabatin (eds) *From Industry 4.0 to Industry 5.0: Mapping the Transitions* (Springer Nature Switzerland, 2023) 89.

74 Forbes Ukraine (2024) Дуже мало компаній доросли до корпоративного управління». Як проходить велика корпоратизація українського бізнесу? Дослідження UCGA [Forbes Ukraine (2024) Duzhe malo kompanii dorosly do korporatyvnoho upravlinnia». Yak prokhodyt velyka korporatyzatsiia ukrainskoho biznesu? Doslidzhennia UCGA, in Ukrainian]. https://forbes.ua/money/duzhe-malo-kompaniy-dorosli-do-korporativnogo-upravlinnya-yak-prokhodit-velika-korporatizatsiya-ukrainskogo-biznesu-doslidzhennya-gradus-10072024-22219.

address existing imbalances and women's underrepresentation in certain economic areas.'[75]

In Ukraine, there was an attempt to introduce gender quotas (40%) for the representation of women in company board: a draft of the law was submitted to the parliament in 2019 and 2020.[76] However, it provided the quota's application to supervisory boards only (it was not about executive directors) and just to state companies and state banks. To justify the law, the authors of the draft repeated almost completely the arguments contained in the California Law. But the draft of the law was not further considered by parliament. The Law of Ukraine 'On Equal Rights and Opportunities for Women and Men' provides that 'employers can take positive actions to achieve a balanced ratio of women and men in different fields of work, as well as among different categories of workers.'[77]

The Action Plan for 2019 on the Implementation of the Poverty Reduction Strategy, approved by the Decree of the Cabinet of Ministers of Ukraine in 2019, consisted of a measure of 'introducing gender quotas at state-owned enterprises.'[78] However, it was not implemented. Furthermore, the Strategy of Human Development, which was issued by the President of Ukraine in 2021 and is planned to achieve its objectives by 2025, does not mention the introduction of gender quotas and only refers to the need of 'formation of an effective mechanism for achieving a balanced representation of women and men in the field of politics and public administration, taking into account the categories of civil servants.'[79] Simultaneously, the National Strategy for Closing the Gender Pay Gap until 2030 and approved an Action Plan for 2023-2025 calls for incentives to push employers to introduction of gender quotas in management bodies and in managerial positions.[80] Similarly, the State Strategy for Ensuring Equal Rights and Opportunities of Women and Men for the period up to 2030 and its Operative Plan operationalizes the need for using gender quotas as one of the mechanisms to achieve the balanced representation of women and men in companies decision-making through the implementation of positive

[75] NIRAS, 'Country Gender Profile: Ukraine' (2023) https://euneighbourseast.eu/wp-content/uploads/2023/09/eu4genderhelpdesk_ukrainegenderprofile_2023-cgp_v3.pdf at 36.
[76] See Draft Law *On Amendments to Certain Legislative Acts on Ensuring Equal Rights and Opportunities for Citizens from Representation in Supervisory Boards and Governing Bodies of State Unitary Enterprises, Economic Societies, and State Bank* 3939-IX (3 September 2024).
[77] See The Law of Ukraine *On Equal Rights and Opportunities for Women and Men* 2866-IV (8 September 2005) Article 17.
[78] See Action Plan for 2019 *On the Implementation of the Poverty Reduction Strategy* № 86-p (20 February 2019) para 25.
[79] See The Strategy of Human Development, approved by the Decree of the President of Ukraine № 225/2021 (2 June 2021) the operative aim 5.2.
[80] See Operational Plan Concerning Measures for the Implementation in 2023-2025 of the National Strategy to Overcome the Gender Pay Gap for the Period up to 2030 № 815-p (15 September 2023) the strategic aim 2.

actions.[81] However, none of these provisions was implemented in state or corporate level regulations, policies, or practices.

While the main positive point is that the relevant discussions are underway,[82] a key negative tendency is the fact that even supporters of the using of quotas pay little attention to the issue of a legitimate aim, justification for the using quotas. Most often, the need to comply with European practices is called as the main argument, and the justification itself does not go beyond copying arguments presented by colleagues from the United States and EU countries. Despite a very different history, statistics show that the situation with the representation of women in the leadership of companies in the USA, EU countries and post-Soviet countries is approximately the same. There are various explanations for the low representation of women: social stereotypes, gender stereotypes regarding competence and leadership, as well as the lack of interest on the part of women, and the primary responsibility of women for children and other family members who need of care. Studies show that standards of behavior are heavily dependent on standards of conduct of the previous generation.[83] It explains, among other things, the similarity of the situation in the three regions which are subjects of the attention: social norms that determine the vulnerable position of women in certain areas of activity are so ingrained in societies that changing the situation will be possible just by positive measures. The next section elaborates how such measures can normatively ground in the concept of personal autonomy.

5.4. Discussion

5.4.1. Legitimate Aim: A Protection of a Personal Autonomy

The equity argument for gender quotas in leadership is based first on achieving higher female representation at the highest positions, which is of symbolic importance, but which only directly affects a small number of women. The argument is also often also based on a notion that female leaders will help other women – either directly, through mentorship or advocacy in their organizations, or indirectly, through inspiration and role model effects.[84] However, the question remains: should the arguments be based on economic effect work in principle? Do they have the opposite, negative, effect? If we make the achievement of gender equality dependent on its positive economic impact on the quality of governance, will then the absence of such a positive effect justify gender inequality? The point is that the legitimate aim should be sufficient to justify the interference of state in the sphere of freedom

[81] See State Strategy on Ensuring Equal Rights and Opportunities for Women and Men for the Period up to 2030 № 752-p (12 August 2022) the operative aim 1.2.
[82] A Sabovchyk, 'Gender balance in the board of directors' (2023) *Uzhhorod National University Herald Series: Law* 76(2) 257.
[83] L Farrø and F Vella, 'The intergenerational transmission of gender role attitudes and its implications for female labour force participation' (2013) *Economica* 80(318) 219 at 220.
[84] A R Miller, 'Women and Leadership' in S Averett, L Argys and S Hoffman (eds) *Oxford Handbook on Women and the Economy* (Oxford University Press, 2018) 539.

of entrepreneurship. In this regard, the arguments that are based on respect for human rights themselves as an independent value are much more relevant as gender quotas are needed to: prevent current direct discrimination and address stereotyping; compensate the past discrimination; provide identity and recognition for women; ensure diversity and social cohesion. According to A. A. Dhir

> state-based intervention is essential to shifting existing norms, but should be based on a combination of factors related to organizational governance and decision making, and the goals of democratizing power and equitably distributing access to opportunities.[85]

However, each of these arguments is based on respect for personal autonomy, which implies the possibility of realizing one's life project. We approach the issue of gender quotas from the point of view of the principle of personal autonomy as a normative requirement, which should be addressed to each entity – public or private – that significantly affects the possibility of a person realizing their life project. The value of autonomy is explained by its origin from the idea of human dignity.[86] Pico Della Mirandola, an Italian thinker of the Renaissance, in the work 'Speech on Human Dignity' (published in 1496) states that 'human dignity is that it itself is the creator of its essence. A person can be who she or he wants to be; she or he makes herself/hisself the one she/he chooses'.[87] This aspect of human dignity is embodied in the idea of personal autonomy, which in its simplest definition is understood as self-regulation (*self-rule, self-legislation*) and *self-government*, when the emphasis is on the possibility of self-direction, free from external forces, or, in the figurative words of J. Raz, *self-authorship*, which has its roots in the Mill's romantic liberalism, who insisted on a variety of 'experiments in life' to find the 'free development of individuality.'[88]

The idea of personal autonomy is made extremely attractive by its obligatory connection with freedom, its understanding as the right not to be interfered with by the state ('to keep it at arm's length')[89] or other actors, except cases when such intervention is justified by a legitimate aim. Personal autonomy is impossible in a situation of paternalistic regulation. But it is also impossible in a situation when a party who is clearly weaker than another party is placed in conditions equal to the last one.

Personal autonomy is closely related to the concepts of agency and capability that all together refer to what a person can freely do in line with their perception of

[85] Dhir (n 3) at 5.
[86] J Griffin, *On Human Rights* (Oxford University Press, 2008) at 151.
[87] J Pico Della Mirandola, *On the Dignity of Man* (Gateway Editions, 1996).
[88] R S Taylor, 'Kantian Personal Autonomy' (2005) *Political Theory* 33(5) 602.
[89] P Alldridge and Ch Brants, *Personal Autonomy, the Private Sphere and the Criminal Law* (Hart Publishing, 2001) at 8.

good.[90] In this regard Francesco Laruffa argues that 'at the collective level, social policy should not be assessed in terms of its economic benefits but in terms of its contribution to democracy—the collective dimension of autonomy.'[91] Lorella Terzi argues that autonomy is itself a human capability 'since it is constitutive of agency, and it is situated at the nexus of the freedom to pursue well-being and the freedom to pursue agency goals, while also relating to process freedom.'[92] Personal autonomy as a part of agency views a person as 'an agent broadly capable of considering the various choices available and evaluating their potential outcomes, while bringing about their realization.'[93] Other scholars like Marta Nussbaum present personal autonomy in a political form as by 'creating and protecting spaces in which they can live according to their own views.'[94] Agency as autonomy implies deliberation and realization of 'one's values and goals and the means to achieve them successfully.'[95]

The collective dimension of personal autonomy of women proposes 'gendered autonomy' to address issues of gender equality.[96] Gendered autonomy entails the possibility of an individual women identifying herself as a part of certain gender group in society, to act freely in different social spheres and not being afraid of becoming underprivileged because of belonging to a certain gender group. Corporate gender quota as a positive measure internalizes the possibility to represent different genders in a decision-making, thus broadly providing the equal space for autonomy to different gender groups, especially to those groups which were previously underrepresented at corporate boards. As rightly underscored by Laruffa,

> autonomy at work involves not only the choice of the means to achieve given goals—as often assumed in the sociology of work—but also the possibility to participate at the determination of the ends of production.[97]

Collective dimension of gendered autonomy, where identifying own gender is related to certain gender group in society, is influenced by the 'cultural, economic, social, political and environmental factors on people's desires and visions of the "good life."'[98] This arguably means that such factors incline what capabilities as a

[90] I Latkovskis, 'Capabilities, autonomy, and education: a comprehensive anti-perfectionist capability approach to justice' (PhD thesis. University of Glasgow, 2021) at 62; F Laruffa, 'What is a capability-enhancing social policy? Individual autonomy, democratic citizenship and the insufficiency of the employment-focused paradigm' (2020) *Journal of Human Development and Capabilities* 21(1) 1 at 3.
[91] Ibid.
[92] T L Terzi, 'Autonomy and Capability' in B Colburn (eds) *The Routledge Handbook of Autonomy* (Routledge, 2022) 324 at 331.
[93] Ibid, 327.
[94] Ibid, refference to Nussbaum at 330.
[95] Ibid, 331.
[96] K Sredl, 'Gendered Market Subjectivity: Autonomy, Privilege, and Emotional Subjectivity in Normalizing Post-socialist Neoliberal Ideology' (2018) *Consumption Markets & Culture* 21(6) 532.
[97] Laruffa (n 90) at 5.
[98] J M Bonvin and F Laruffa, 'Transforming Social Policies and Institutions in a Capability Perspective: Agency, Voice and the Capability to Aspire' (2024) *Journal of Human Development and Capabilities* 25(4) 575 at 578.

group women get when operating in certain society. As a result, in areas where women are still perceived as a weak sex, 'less agentic, that is, assertive, active, and strong, and more communal, that is, understanding, supportive, and caring, than men… and are, therefore, less likely to emerge as leaders'.[99] This perception illustrates women as is does not intend to hold leadership position, this vision forms adaptive preferences of women as belonging to the group which is not supposed to have leadership positions. Adaptive preferences are defined as

> preferences that you hold more because your option set is bad or limited than because of the good-making features of the objects you prefer… you want what you do because it was the best option available to you, and you would have wanted something else instead if you'd had a better or larger set of options.[100]

Being affected by adaptive preferences means that an 'individuals' ability to initiate transformative changes in their environment'[101] does not always constitute independent agency and agency. For instance, the refuse of a women to participate in a decision-making when can be prescribed not by her own will but by circumstances that exist in society.[102] As a result, such adaptive preferences prevent women from realizing their personal autonomy in the decision-making and corporate leadership.

To ensure the flourishing of personal autonomy, an economic system should be reformed as 'a capability-oriented social policy should thus aim at expanding human agency both within and beyond work, enhancing simultaneously the "freedom *from* work" and the "freedom *within* work."'[103] The concept of 'gendered autonomy' provides an insight for women at corporate boards accordingly.

5.4.2. BHR Model of Regulation as based on Personal Autonomy Approach

We propose a BHR model of ensuring women's participation in a decision-making at the workplace is based on equality enhanced by the principle of personal autonomy, 'gendered autonomy.'[104] We envision a BHR model that centers the responsibility to recognize and respect human dignity. The BHR model of regulation creates guarantees of personal autonomy because it presumes that a state could not regulate all relations, and some spaces of regulation should be the sphere of the business's responsibility, without any state regulation (protection from paternalism). At the same time, the BHR model considers business as a human rights duty bearer

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[99] S Mölders, P Brosi, M Bekk, M Spörrle and I M Welpe, 'Support for quotas for women in leadership: The influence of gender stereotypes' (2018) *Human Resource Management* 57(4) 869 at 871-872; Comi, Grasseni,Origo and Pagani (n 30) at 773.

[100] R Terlazzo, 'Adaptive Preferences as Autonomy Deficits' in B Colburn (eds) *The Routledge Handbook of Autonomy* (Routledge, 2022) 270.

[101] A Donald, G Koolwal, J Annan, K Falb and M Goldstein, 'Measuring Women's Agency' (2020) *Feminist Economics* 26(3) 200 at 204.

[102] Ibid.

[103] Laruffa (n 90) at 6-7.

[104] P S Anderson, 'Autonomy, vulnerability and gender' (2003) *Feminist Theory* 4(2) 149.

through the prism of responsible business conduct—there is a business duty to respect human rights. In the context of women's rights, Pillar requires that the state applies measures to protect women's rights. Wherever they operate, corporations are part of social fabric, they influence politics, economics, legal, social and cultural rules and practices. Culture can influence gender equality. Having such power, businesses are vested with an obligation to ensure, at the least, that human rights are not harmed, not to engage in direct or indirect discrimination, including on the grounds of sex, etc. It is not enough merely to declare one's commitment to human rights, and it would be odd to deny one's obvious impact on human rights, especially those of vulnerable individuals. Corporate policies and practices 'must fully integrate gender-responsive practices within each area of their business operations.'[105]

Today, corporate observance of human rights requires more than formal compliance with the law. Companies must implement due diligence mechanisms in the field of human rights, prevent risks of human rights violations in their operation, promote human rights values, such as gender equality and non-discrimination. Businesses need to abandon the 'do no harm' approach and to go beyond it. In other words, not only should they, among other things, prevent and mitigate the negative impact of their activities on women's rights, but also actively advance women's rights through gender-transformative measures, i.e., measures that change the underlying power structures and relationships in the form of affirmative actions to promote gender equality and women's rights.

Such affirmative actions can lie in the introduction of corporate gender quotas as to impact adaptive preferences, formed in patriarchal societies for women's role in them. Formed in patriarchal societies the perception of women as not capable to hold leadership position should be reformed with the positive measures such as gender quotas. Therefore, such adaptive preferences should be deconstructed by transformative institutions to ensure different groups can 'develop own aspirations and use their voice to support them and translate them into collective claims and action.'[106]

5.5. Conclusion

In this article, we compared the situation in three different regions of the world, which, however, are united by the fact that they all relate to the Western tradition of law, which recognizes the fundamental, priority, universal nature of human rights and personal human autonomy. The legislative requirement to ensure the representation of women on the board of companies is a good example of how law aims to influence existing barriers in practice in providing opportunities for personal autonomy.

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[105] J Bourke Martignoni and E Umlas, 'Gender responsive due diligence for business actors: human rights-based approaches' (2018) *Geneva Academy of International Humanitarian Law and Human Rights* at 8.
[106] Bonvin and Laruffa (n 98) at 3-4.

The basis of legal regulation in the countries of the Eastern European region still lacks attention to a principle of personal autonomy. Many countries in the region have tried to move away from the state-oriented model of legal regulation, some more, some less successfully. But they still have not come to recognize personal autonomy, particularly, gendered autonomy as a constitutive principle of state regulations and corporate policies. The Eastern-European countries they mainly do not recognize the problem, and therefore in most cases they will not perceive the introduction of quotas to solve it. Keeping in their legal order many manifestations of the paternalistic approach, countries of the region often do not take positive actions to overcome structural discrimination, because they are afraid of being accused of the 'post-Soviet syndrome.' Hence, the perception of measures to ensure gender equality as benefits granted by the state to women is predominant.

EU and US models of legal regulation, on the contrary, are based on the recognition of personal autonomy. Measures to ensure gender equality in these legal systems perform the function of eliminating the barriers that women face in the implementation of their life project and are therefore in a more vulnerable position than men who implement the same life project without such barriers. Because these barriers can exist in both the public and private space, and measures of gender equality ensuring can be implemented in both areas. However, the difference between EU and US experience, in turn, is since the US implements a liberal concept of legal regulation, and in matters of ensuring gender equality, law inevitably encounters another fundamental thesis about the minimal presence of the state, especially when it comes to private entities and their freedoms.

Both the USA and the EU initially did not recognize the possibility of applying gender quotas, especially in private relations. However, over time, the situation has changed, though the government politics and practices on introducing obligatory gender quotas remain complicated. The main challenge facing these states today is the justification of the legitimacy of quotas. Such a challenge is determined by an established model of behavior in society and certain stereotypes of thinking.

In this paper we have argued that the concept of gendered autonomy can be an effective normative ground to reshape such established model of corporate behavior that undermines the role of women in corporate decision-making. As such, gendered autonomy for the decision-making at corporate boards allows to form as 'a capability-oriented' corporate systems that expand human agency both within and beyond work. This concept further allows to change the perception of women as not capable to hold leadership position should be reformed with the positive measures such as gender quotas. The significant improvement of women's representations in corporate boards in countries that introduced obligatory corporate gender quotas proves that such measure is effective in achieving the goal of gender equality, enhanced women agency and expanded gender autonomy. Such experience can also be a platform for developing analogical legislation in countries of Eastern Europe.

Chapter 6

Conclusion

6. Conclusion

6.1. Conclusion

The opening chapter of this thesis provided a background on the role of business actors in safeguarding the capabilities of both present and future generations. Thoroughly analyzing two key regulatory frameworks – the United Nations Guiding Principles on Business and Human Rights, and the Sustainable Development Goals – within the context of business activities in Ukraine, I emphasized the need to revisit the role business actors play in society. The reality of business operations in Ukraine and current legislative developments, such as introducing binding legislation on business responsibilities and obligations to respect human rights, induced the question of the potential scope of business responsibilities in the human rights sphere if they are interpreted through the lens of the SDGs. Throughout both theoretical analysis based on the capability approach framework and empirical investigation of the reality of corporate human rights commitments implementation in Ukraine my research objective was to articulate the role of the business sector in implementing the SDGs (especially SDG 5 Gender Equality; SDG 8 Decent work and economic growth; SDG 10 Reduced inequalities; SDG 17 Global Partnership for Sustainable Development) in Ukraine, taking the examples of gender equality and freedom of religion or belief.

In this concluding chapter, each sub-research question is addressed by providing an overview of the findings of the earlier chapters (Sub-section 2). Then, I answer the main research question by synthesizing previous conclusions (Sub-section 3). Ultimately, to indicate how the results of this PhD thesis might be used, I consider its implications for future study as well as for legislation, policy, and practice (Sub-section 4).

6.2. Answering the Sub-Research Questions

6.2.1. Sub-question 1: What is the relationship between human capabilities and the SDGs in strengthening human rights protection responsibilities for businesses? (Chapter 2)

Answer: A sufficient level of human rights respect and protection within business activities can be achieved only by going beyond 'do no harm.' One of the aims of the SDGs is to encourage companies to respect, protect, and fulfill human rights more actively. Yet, while it is clear that corporate involvement is essential to the SDGs implementation and achievement, the SDGs do not articulate an explicit normative foundation on which to build a positive corporate responsibility to protect human rights. However, the creation of the SDGs was implicitly underpinned by the capability approach. This underpinning should be made explicit, not only in the

SDGs' interpretation, but also in their implementation. The capability approach as an explicit normative basis for the SDGs provides an opportunity to design business and human rights (BHR) tools to establish corporate human rights protection responsibilities with the core aim of sustaining human capabilities, which can potentially become binding legal obligations.

Chapter 2 of this thesis provides a normative framework for greater business responsibilities in the human rights field. This was done through a capability approach reading of the SDGs. The proposed interpretation assists in redefining the role of business actors in the human rights sphere. This role goes beyond mere negative responsibility to respect human rights to positive responsibility to protect and fulfill human rights.

Grounded in the SDGs, human capabilities cannot be ensured by merely avoiding harm. They require additional conditions to create more equal opportunities for individuals and groups affected by business activities. The capability approach interpretation of the SDGs places on businesses the responsibility not only to respect, but also to protect and fulfill human rights. This responsibility can solidify into a legal obligation. Eventually, human rights due diligence can be applied not only for risk but also for opportunity assessment, i.e., to assess where businesses can effectively contribute to sustainable development by creating additional safeguards to affected individuals, groups, and communities. In this way, the capability approach connects both the SDGs and the UNGPs, which strengthens the existing legal and policy frameworks and leads to businesses' greater human rights protection responsibilities and obligations.

The normative ground for stronger corporate human rights responsibilities is not only theoretical, but is also evidenced practically. Within Chapter 3 of this Thesis, the empirical results of in-depth interviews with business representatives, which I conducted in Ukraine, illustrated how active engagement of corporate actors into respecting, protecting, fulfilling, and even promoting human rights can not only resolve conflicts between FoRB and freedom from discrimination based on SOGI at the corporate level, but considerably contribute to changing attitudes towards certain human rights at the community level. Hence, the active position of companies operating in Ukraine on the need to provide sufficient level of respect towards freedom from discrimination based on SOGI not only avoids harm to this right, but also promotes creating additional safeguards to protect and fulfil such right.

6.2.2. Sub-question 2: How do businesses in Ukraine understand the need to guarantee gender equality and freedom of religion or belief within their activities? (Chapter 3)

Answer: The existing reality of business activities already dictates the practical necessity of companies to act in a manner not only to avoid harm, but also to protect, fulfil, and sometimes even promote human rights – to be able to contribute to the achievement of the SDGs. An active engagement strategy, which is applied by some companies operating in Ukraine, illustrates how businesses can effectively resolve possible clashes of certain rights like FoRB and freedom from discrimination based on SOGI, which can contribute to the enhancement and de-marginalizing of these rights not only at the corporate, but also at the community level. More generally, companies actively engaging with human rights protection also have the potential to impact a change in legal, ideological, and religious discourse on the need to protect the rights of the LGBT+ community.

Within this chapter, the concept of social expectations was explored to understand whether businesses should be neutral actors in society, or whether they could or should more actively engage in providing respect for human rights, both at the corporate and community levels. The corporate responsibility to respect human rights cannot be separated from social expectations. The idea of social expectations can be situated in different discourses. Within the BHR scholarship, social expectations entail that businesses have to respect human rights within their activities. Contrastively, in certain societies the expectations regarding respect for certain rights dictate differently how business actors should respect, protect, and fulfil particular human rights. Social expectations can put higher or lower pressure on companies, and they can be mutually reinforcing or conflicting. In Ukraine, social expectations regarding respecting human rights such as FoRB and freedom from discrimination based on SOGI often conflict. Such conflict occurs between conservative social groups that resist the integration of 'gender' into national legislation, and liberal groups that orient towards the universal value of human rights in respecting individual identities.

It is also important to mention that the identities of a person, such as gender, sexuality, or religion are not only individual characteristics. How the company approaches different personal identities might express cultural, legal, and ideological paradigms of the community the business operates within. Therefore, gender identity, sexual orientation, and religious identity are no longer private matters. Instead, 'personal is thus implicitly political inasmuch as it is conditioned by shared social structures.'[1] These aspects of personal identity are deeply rooted in

[1] J Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) *Theatre Journal* Vol. 40 No. 4 at 522-523.

the society a person lives in and are related to the theory of the capability approach, which is a theoretical framework for this PhD thesis. This approach identifies concepts of conversion factors (social, cultural, economic constraints) and adaptive preferences, which, affected by conversion factors, predict personal choices that can negatively affect life, but are inescapable because of the society around them. Hence, perceptions of our identity and belonging cannot be purely unrelated to the community we live in. Put in this way, individual and communal dimensions reflect situated knowledges 'about communities not about isolated individuals'.[2] Therefore, within the Ukrainian context, freedom from discrimination based on SOGI is more a politically contested concept than a sufficiently protected human right. This situation creates a dilemma for businesses: follow the generally accepted narrative of underestimating the importance of SOGI or insist on its full protection following internationally recognized human rights principles. This duality results in different strategies businesses may use to resolve potential clashes between FoRB and freedom from discrimination based on SOGI at the corporate and community levels.

The results of the empirical research revealed differences in how companies operating in Ukraine formulate human rights commitments to respect FoRB and SOGI. I identified three strategies businesses have adopted regarding FoRB and SOGI–neutrality, ignoring, and active engagement. The empirical findings also revealed that while national companies mostly use neutrality or ignoring strategies when providing respect to FoRB and freedom from discrimination based on SOGI, international companies or national companies with international branches more actively engage in resolving issues between FoRB and freedom from discrimination based on SOGI. When deciding whether to ignore, pretend to be neutral, or actively engage in resolving such conflicts, businesses may be led by fear of losing their neutral corporate image, or contradicting societal expectations. Thus, ignoring or neutrality strategies are not able to resolve or contribute to resolving conflicts that exist at the corporate or community levels regarding freedom from discrimination based on FoRB and SOGI.

Conversely, the active engagement strategy can contribute to the creation of a more consistent policy of de-marginalization and recognition of freedom from discrimination based on SOGI, where FoRB is a non-clashing and mutually reinforcing human right. As a result, by using active engagement strategies, businesses can not only respect, protect and fulfil human rights, but even promote their protection at the community level. Active positioning in the public sphere in support of the LGBT+ community can reshape a communal perception of certain rights such as right to freely decide on one's religious or gender identity, or sexuality.

[2] D Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) *Feminist Studies* Vol. 14 No. 3 at 590.

Active engagement, which I identify as the most promising strategy for businesses, can contribute to human rights protection and sustainable development. Similarly, this strategy can be also effective in the context of heightened human rights risks, such as those created by the war in Ukraine. Within this context, an active engagement strategy requires heightened human rights due diligence. However, as I argue in Chapter 4 of this Thesis, heightened human rights due diligence should consist not only the tools for the risks assessment as to avoid human rights abuses. The same procedural tools can be applied to the so-called 'opportunities assessment,' i.e., capability mapping for realizing certain spheres of human rights protection a certain company can actively engage and contribute in to secure human capabilities. I use the example of women's deteriorated capabilities due to multiple responsibility burdens that war brings to conflict affected communities.

6.2.3. Sub-question 3: In the context of war, how can businesses in Ukraine implement gender equality as a human capability? (Chapter 4)

Answer: The existing frameworks of war and post-war recovery in Ukraine do not coherently explain how businesses should integrate the gender dimension in their activities during war and post-war recovery. The capability approach provides a list of specific women's capabilities that should be sustained through gender-responsive assessments, gender-transformative measures, and gender-transformative remedies. This list should be integrated into well-designed methodologies enhanced by the capability approach, which can significantly improve women's livelihood capabilities by expanding their opportunities and refining the returns on their labour efforts.

Within this Chapter, I argue that existing BHR frameworks are ill-suited to address issues of gender equality during wartime. During the war, women have multiple overlapping responsibilities and burdens as they simultaneously act as care providers, volunteers, entrepreneurs, warriors, internally displaced, or wounded persons. This list of roles is almost infinite. As a result, these burdens collapse into mere functioning, as caregiving becomes an obligatory task for women, an unpaid task with little to no freedom to choose otherwise. In this context, businesses may perceive some additional burdens imposed by the war as normal, thus creating adverse conversion factors for women that limit their capabilities. Such conversion factors are accepted as an inescapable reality that creates adaptive preferences, which internalize these multiple burdens as a normal part of wartime life. As a result, women's multiple responsibilities are disregarded and rendered invisible. The mere fact that women are working (functionally) does not imply that they are truly capable of doing so in a sustainable manner or without compromising other vital facets of life, such as their health or the well-being of their families. Thus, the extent of existing challenges women face in wartime is so significant that they cannot be covered by existing BHR frameworks such as the UNGPs, the CSDDD, or the

OECD guidelines. Such a situation requires a reconceptualization of the role of business in war and post-war recovery.

Situating this need for perceiving businesses as not mere economic actors, but as active societal actors in the context of multiple responsibility burdens, I argued that the capability approach can enhance existing BHR frameworks by allowing them to better handle increased gender-specific human rights risks during serious crises like war. Furthermore, ensuring a gender-transformative approach within corporate activities during war and post-war recovery requires addressing women's multiple responsibilities and burdens within the heightened due diligence process. Assessing such burdens within the hHRDD process requires a robust methodology that recognizes women's deteriorated capabilities and incorporates them into corporate human rights assessments. This methodology should include particular demands for respecting, protecting, and fulfilling women's capabilities during wartime. Such demands can shape criteria for the hHRDD process based on already established sets of human capabilities in the capability approach such as, for instance, Ingrid Robeyn's a list of capabilities 'at the ideal level.'[3] These capabilities are: physical and mental well-being, bodily integrity and safety; social relations, political empowerment, education and knowledge; balance between domestic work, non-market care, paid work and other projects; shelter and environment, mobility, leisure activities, time autonomy, respect, and religion.[4]

I connected a list of capabilities 'at the ideal level' to the existing World Benchmarking Alliance Gender Benchmark (Benchmark) indicators. The Benchmark is a methodology that was created by the World Benchmarking Alliance in 2021 to assess and compare how businesses ensure and promote gender equality and women's empowerment within their value chains. The current Benchmark comprises 6 pillars and 31 indicators to implement the gender perspective in business activities through a holistic approach. Measurement areas include governance and strategy, representation, compensation and benefits, health and well-being, violence and harassment, and marketplace and community. This methodology is promising as it provides a clear background to assess and compare how businesses respect, protect, and fulfil women's rights. I argued that it can also extend into the hHRDD process to ensure sufficient corporate assessment of the multiple responsibility burdens women face during war and post-war recovery with the assistance of the capability approach.

It should be reiterated that the capability approach interpretation of the human rights responsibilities of business actors that I propose in this PhD does not mean such responsibilities are equal to those of States. Capability mapping entails a scrutinized

[3] I Robeyns, *Wellbeing, freedom and social justice: The capability approach re-examined* (Open Book Publishers, 2017) 29.
[4] Ibid.

assessment of the scope of *certain* human rights capabilities that *certain* businesses have the leverage and power to positively influence in *certain* environments. This marks a clear difference with state obligations, which cover the need to respect, protect and fulfil *all* human rights. Contrastively, the obligation for businesses to protect and fulfil may be only establish regarding those rights they have direct impact on. The example of deteriorated women's capabilities during wartime highlights how this specific capability mapping can be practically achieved. The established rights and capabilities (such as life and physical health, mental well-being, bodily integrity and safety, social relations, political empowerment, education and knowledge, domestic work and non-market care, paid work and other projects, shelter and environment, mobility, leisure activities, time autonomy, respect, religion serve as a basis for business actors to assess where they can enhance certain women capabilities.

These results lead to a final research sub-question focusing on what businesses in Ukraine can do differently to more effectively protect gender equality as a human capability. Interpreted through the notion of 'gendered autonomy' as a human capability, I argue that positive actions such as gender quotas in corporate boards can significantly contribute to the enhancement of women's agency and flourishing of autonomy as a realised human capability (functioning).

6.2.4. Sub-question 4: What could businesses in Ukraine do differently, both in terms of policies and practices, to more effectively ensure human capabilities such as gender equality? (Chapter 5)

Answer: To ensure the implementation of gender equality as a human capability within sustainable development, businesses must proactively act to enhance gender autonomy, which is a precondition of substantive protection of gender equality. To do this, business actors can, for example, introduce obligatory gender quotas in the corporate boards, which can serve as one of the ways for achieving intra- and inter-generational justice as aimed by the SDGs.

In chapter 5 of this thesis, I compared women's representation in corporate boards in three different contexts – American, European, and Eastern European (USA, EU states, and Ukraine). Introducing obligatory gender quotas in the private sector provides a vivid example of how legal regulation can impact the practice of enhancing personal autonomy. The notion of personal autonomy is still not given enough consideration in Ukrainian law. With varying degrees of success, there were attempts to depart from the state-oriented model of legal governance. However, Ukrainian legislation has yet to accept personal autonomy—specifically, gendered autonomy—as a constitutive principle of governmental laws and business policies. Similarly to most Eastern European states, Ukraine does not recognize the issue, so they are unlikely to see the implementation of quotas as a solution. The countries in

the region frequently do not take proactive steps to combat systemic discrimination and avoid active involvement in enhancing women's representation in corporate boards due to fear of being accused of a 'post-Soviet syndrome', i.e., over-paternalistic legal regulation.

Measures to guarantee gender equality in these legal systems serve to remove the obstacles that women encounter when implementing their life project, as women are perceived as more vulnerable than men. Since these obstacles may be found in both public and private settings, gender equality policies can be put into place in both. Although the governmental implementation of mandatory gender quotas continues to be a complex matter, the situation has evolved over time. This is where the EU and US experiences diverge, as the EU legal systems are more inclined towards social protection. As the US supports a neo-liberal approach to legal regulation, and in order to ensure gender equality, the law invariably runs into another fundamental principle regarding the minimal presence of the state, particularly with regard to private entities and their freedoms. The neo-liberal approach is actively implemented in the US, though it is widely criticized for its artificial and exploitative use of the human rights as mere declarations to create an impression of ethical behavior, while ignoring substantive change in addressing underlying problems and merely aiming for continuous economic growth. Nancy Fraser perceives neo-liberalism as

> the assault on social security, which was glossed by a veneer of emancipatory charisma, borrowed from the new social movements. Throughout the years when manufacturing cratered, the country buzzed with talk of 'diversity,' 'empowerment,' and 'non-discrimination.' Identifying 'progress' with meritocracy instead of equality, these terms equated 'emancipation' with the rise of a small elite of 'talented' women, minorities, and gays in the winner-takes-all corporate hierarchy instead of with the latter's abolition.[5]

This approach is still leading in the US economy, resulting in a reversal of the stronger participation of the state in corporate governance through abolishing state provisions on obligatory gender quotas in corporate boards.

Eventually, I argue that the debate on introducing gender quotas in corporate boards should be grounded in the concept of gender autonomy. This concept introduces 'capability-oriented' corporate structures that enhance human agency in and outside of the workplace. Despite being reversed in some of the countries I cover in the research, women's representation in corporate boards has significantly improved in

[5] N Fraser, 'The End of Progressive Neoliberalism' (2017), https://www.dissentmagazine.org/online_articles/progressive-neoliberalism-reactionary-populism-nancy-fraser/ (accessed 15 June 2025).

states that implemented mandatory corporate gender quotas, demonstrating the effectiveness of such measures in advancing gender equality and women's agency. Such experience can also serve as a foundation for the development of analogous laws in Eastern European countries like Ukraine. Furthermore, obligatory gender quotas can serve as one of the tools businesses can use to achieve intra- and inter-generational justice as aimed by the SDGs. Targets 5.5 and 5.C or SDG 5 'Gender Equality' promote 'women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life,' as well as creation of 'sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.'[6] Changing existing regulation will affect the gender equality of women within the present generations, but will also have a cumulative impact on better ensuring gender equality of future generations.

6.3. Answering the Main Research Question

Main Research Question: Bearing in mind existing (legal) frameworks on human rights and the sustainable development goals, what should businesses in Ukraine do to ensure respect for gender equality and freedom of religion or belief?

This PhD thesis started from the question of what businesses in Ukraine can do differently, considering already existing frameworks on BHR and the SDGs. To address this complex question, I organized this PhD into four elements: 1) a theoretical investigation to design a theoretical framework that can grasp business responsibility in the human rights field as well as in the context sustainability goals; 2) an empirical study of corporate policy commitments of businesses operating in Ukraine and of their representatives' perceptions of the scope of human rights protection within business activities; 3) a discussion of both theoretical and practical findings in the context of the war in Ukraine and 4) a study on the positive actions business actors can take to respect, protect, fulfil and even sometimes – promote human rights, specifically gender equality, taking the example of quotas.

Overall, this PhD has argued that the scope of business responsibilities in implementing human rights as a part of sustainable development should be extended towards positive corporate human rights responsibilities. Such positive responsibilities can potentially be incorporated into binding legal obligations to respect, protect, and fulfill them. This shift in strengthening corporate responsibilities is based on both the normative grounding of the SDGs in the capability approach and the practical reality of businesses that already actively engage in resolving human rights issues. This PhD research revealed that some

[6] UN *Transforming our world: the 2030 Agenda for Sustainable Development* (Doc no A/RES/70/1, 2015).

businesses are not only preventing harm, but also creating opportunities for affected individuals, groups, and communities to lead a valued life. While these practices are still voluntary, they can be extended towards general corporate responsibilities and obligations. Such an overarching approach can be applied to specific matters such as the gender dimension of heightened human rights due diligence during war and post-war recovery, as well as positive actions of introducing gender quotas in corporate boards. Comprehensively, the proposed revision of the corporate role can contribute to reaching greater protection of human rights as a part of sustainable development.

Therefore, the proposed theoretical framework of the capability approach and existing practical examples prove that such strategies as active engagement with human rights protection can and should be incorporated by businesses not on a voluntarily basis as currently envisaged. Instead, they need to be enshrined into binding legislation requiring human rights due diligence not only in assessing possible harms, but also possible opportunities to respect, protect, and fulfill human rights.

6.4. Limitations and Implications for Future Research

This PhD thesis has several limitations that can also inform further theoretical and empirical research. These limitations relate to both the theoretical and empirical parts of the PhD thesis.

6.4.1 Limitations

This PhD thesis has three main limitations: 1) limitations of the capability approach as a proposed theoretical framework for a normative shift in bringing businesses to greater human rights responsibilities; 2) limited scope of empirical data; 3) limitations related to the research's regional focus.

First, while the capability approach provides an extensive framework for analysing human well-being, it does not comprehensively discuss who should be responsible for ensuring a certain level of human well-being. It does not clearly divide the scope of responsibilities in ensuring such well-being between state and non-state actors. In this regard, it is important to mention that the attribution of positive human rights responsibilities to business actors requires careful legitimization. Some scholars argue that it should be conditional, as 'deriving corporate duties from human rights does not entail that corporate duties should simply 'mirror' those of the state.'[7] Nevertheless, while concrete positive duties are prescribed for the responsibility of

[7] I Kolstad, 'Human rights and positive corporate duties: the importance of corporate–state interaction' (2012) 21.3 *Business Ethics: A European Review*.

certain actors, it is crucial to realize 'what should happen if an agent assigned the duty for performing a particular task in the division of moral labor, should default on that duty.'[8] This PhD thesis offers an initial exploration of how the capability approach could serve as a normative foundation for stronger corporate human rights responsibilities and obligations. The results of this PhD thesis do not call for the blind imposition of the protect and fulfil responsibilities on companies with the same scope that the states bear. Instead, a careful guideline should be developed in future studies to provide practical rules on effective and context-specific use of HRDD and hHRDD, specifying the human rights responsibilities business actors should have in certain contexts.

Second, this PhD could have relied on more extensive empirical research. The data gathered for identifying strategies businesses use for resolving conflicts between rights through desk-based research on businesses' corporate policy commitments (e.g., human rights policies of companies, non-human rights policies, reports, etc.) and in-depth interviews with business representatives are limited. They cover a limited number of available commitments in the public space as well as a relatively small number of participants who agreed to participate in the interviews. 44 out of 100 selected businesses for the research do not have publicly available human rights policies, which limited the scope of the desk-based investigation to 56 companies. Further, few individuals responded to my invitation for interview, which resulted in a relatively small sample: only 12 business representatives agreed to participate in in-depth interviews out of 50 invitations that were sent to the companies with publicly available corporate human rights commitments. Finally, the research could have been enriched by interviews with employees, and affected communities, to discuss deteriorated women's capabilities during wartime and gender quotas in the corporate boards. To cover these aspects, I used secondary sources such as already published interviews with affected individuals, as well as reports of governmental and non-governmental institutions regarding specific challenges women bear in wartime or concerning the consequences of the introduction of obligatory gender quota requirements in corporate boards. The preparation of this PhD thesis coincided almost entirely with russia's full-scale invasion of Ukraine, which significantly limited the possibility of a safe and comprehensive field research in affected communities, where businesses operate.

Third, most of this PhD research is focused on Ukraine and cannot cover all the contextual nuances regarding business responsibilities in the human rights field in other regions of the world or other conflicts. Those would require separate investigations. However, the case of Ukraine provides a critical example of challenges to human rights protection across conflict and war zones that have

[8] Ibid, 279.

commonalities in different parts of the world regarding the scope of business responsibilities and obligations.

These limitations do not undermine the contribution of this PhD research. Rather, they are meant to encourage for further theoretical and empirical investigations.

6.4.2 Further Research

This PhD research has developed and applied theoretical ideas around corporate responsibilities and obligations in the human rights field to explore how the current global aim of sustainable development and specific contextual developments affect the scope of these responsibilities and potential obligations. In this section, I discuss my work's implications for future research covering theory, methodology, and practice

With respect to theory, research is needed to further develop theoretical and normative groundings for stronger corporate human rights responsibilities and obligations. Capability mapping, presented and initially described in Chapter 2 of this PhD thesis, still needs a more detailed framework for its application into practice. Therefore, additional theoretical research is needed to develop the capability approach as a thorough normative foundation for human rights due diligence. Specifically, how certain human capabilities, achieved functionings, and such elements of this approach as conversion factors and adaptive preferences can be integrated into identifying, preventing, mitigating, and accounting for potential and actual adverse human rights impacts across corporate operations and value chains. Furthermore, there is a need in theoretical advancing of the capability approach potential to define the duties of various state and non-state actors in respecting, protecting, and fulfiling human rights as a part of sustainable development.

From a methodological perspective, it is necessary to develop effective strategies for addressing human rights, such as FoRB or GE, in business activities during wartime. The proposed capability approach-informed reading of the World Benchmarking Alliance Gender Benchmark is a first step. However, it needs to be further investigated to provide an explicit, nuanced, and comprehensive methodological guidance for businesses to consistently apply and practice a capability mapping. For instance, they should be more consultations with employees, contractors and customers on how they personally relate each category of the Benchmark with a certain human capability. Such investigation may require using methods such as focus groups, questionnaires, in-depth and semi-structured interviews etc. This stronger engagement with stakeholders can enhance the proposed methodology by incorporating insights on the real-world challenges people face within business activities regarding FoRB or GE. Furthermore, in addition to the World Benchmarking Alliance Gender Benchmark analysed in

Chapter 4 of this thesis, there should be further methodological investigations on other appropriate instruments that could be effectively used to incorporate human rights into corporate human rights responsibilities and potential obligations to respect, protect, and fulfil human rights.

Empirically, additional investigations of different local contexts would enrich the theoretical and normative grounding for creating stronger human rights responsibilities and obligations of business actors. Specifically, more in-depth interviews with business representatives would allow for the creation of more general conclusions about businesses' motivation when choosing certain strategies to deal with human rights issues within their activities. Similarly, focus groups and other types of primary data collection concerning affected individuals, groups, and communities would provide a strengthened understanding of perceptions regarding human rights and capabilities stakeholders have in a certain community. In addition to the social groups studied in this PhD such as women, LGBT+ communities, religious individuals, further research should not be limited to these groups and explore the other affected groups and communities in regard to respecting, protecting and fulfilling their capabilities. Further empirical testing is also needed to study whether capability mapping can serve as a working practical tool (similar to due diligence) to assess how human capabilities in business can contribute to reaching sustainable development.

6.5. Policy recommendations

This section proposes recommendations based on the findings of this PhD thesis. As theoretical and empirical studies in this research illustrated, key actors in human rights and sustainability are the state, the private sector, affected communities, individuals, and non-governmental institutions. Considering the focus of this PhD, its results and recommendations will be helpful for businesses themselves and state institutions operating in Ukraine.

Law and policymakers in Ukraine working on human rights, sustainability, as well as war and post-war recovery, can enshrine the capability approach interpretation of the SDGs to advance human capabilities as a core part of sustainable development in new laws and policies. Chapters 2 and 3 of this thesis explain in detail why and in which ways focusing on human capabilities in challenging environments would considerably enhance human well-being and, as a result, inter- and intra-generational justice. Both the state and the private sector are key actors in this process. They should integrate the capability approach into existing national BHR and SDG frameworks to address human rights issues within business activities sustainably.

From the state institutions' side, it is critical to design comprehensive legislation regarding business obligations regarding human rights protection, sustainable

development, and war and post-war recovery. The fragmentation of the Ukrainian law regarding BHR issues, explained in the Introduction, is unable to provide businesses with clear guidance on action to ensure meeting human rights and sustainability demands. For instance, Ukraine should introduce legislation on obligatory human rights due diligence. This will both provide initial guidance for businesses operating in Ukraine on how to conduct due diligence to ensure respect for human rights and contribute to Ukraine's accession to the EU. Ukrainian legislators should also integrate detailed provisions on the business role in sustainable development instead of merely mentioning businesses as important actors in reaching sustainability. For instance, the Declaration on Responsible Investment for Ukraine's Sustainable Recovery, announced at the International Conference 'Responsible Business Conduct for the Recovery of Ukraine: A Path to Sustainable Investments and European Integration' on 16 October 2025, calls for Conducting consultations with local communities and other stakeholders, conducting proper environmental impact assessments and implementing mitigation measures, ensuring maximum transparency of investment projects to ensure sustainable investment into Ukraine's recovery from the war.[9]

Furthermore, Ukraine should develop separate detailed sections in the National Action Plans or even separate action plans covering the required steps the private sector must take to ensure their contribution to human rights protection and sustainable development. Revised action plans can utilize capability approach criteria as proposed in Chapter 4 of this PhD thesis regarding women's capabilities in the war and post-war recovery. This should be done instead of merely calling for studying best business practices in the human rights protection as was solely mentioned in the National Action Plan on the implementation of the National Human Rights Strategy in 2021. Additionally, the government can create a system of criteria for businesses to be eligible to participate in the economic recovery. Such criteria should include an obligatory requirement to implement hHRDD, which must be not only related to assessing risks but also to capability mapping.

As to the private sector, the results of this PhD research revealed that businesses in Ukraine face similar challenges in the human rights field as businesses in other regions of the world. They lack transparency, and undermine respect for certain human rights under the pressure of the societies they operate in. Additionally, businesses tend to follow only binding legislation, and often use voluntary human rights commitments only as declarations. Therefore, the following recommendations for the private sector derive from this thesis:

Transparency – all corporate actors should publicly share their human rights commitments. Such commitments should be placed on the websites and other

[9] Ministry of Economy, Environment and Agriculture *The Declaration on Responsible Investment for Ukraine's Sustainable Recovery* (2025) https://me.gov.ua/download/ce1cf9ba-2f76-4c5a-982e-598eae981def/file.pdf.

official channels of communications of business actors to ensure open access to such documents. As is revealed in Chapter 3 of this thesis, only 56 out of the 100 largest businesses in Ukraine share their commitments publicly. Absence of public communication regarding corporate human rights and sustainability commitments is against the requirements of the corporate responsibility to respect human rights enshrined in the UNGPs and EU binding legislation, which Ukraine strives to introduce within its national legal system as an EU candidate state. As envisaged in the SDG 16, effective, accountable and transparent institutions at all levels should be developed to promote peaceful and inclusive societies for sustainable development.

Social Expectations on Human Rights – businesses should prioritize human rights requirements over social expectations. In doing so, business actors ensure rights implementation at the corporate level but also affect human rights protection within the community. As called for in the UNDP Standards of Conduct for Business 'Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People' businesses should 'do everything legally possible to 'question, challenge, delay, and resist implementing government orders that might lead to human rights violations.'[10]

Capability Mapping – To contribute to sustainable development in the context of war and post-war recovery in Ukraine, businesses should integrate capability mapping, i.e., assessing opportunities to enhance human capabilities in certain environments, in their own human rights practices as proposed in Chapter 4 of this PhD thesis. Such mapping should consist of four elements of assessment: what resources are available for businesses to enhance human capabilities in certain environments; how realized human capabilities (functionings) will influence social, economic, and environmental systems; how these systems will change from achieved functionings; how such changed systems may impact the capabilities of the present and future generations.[11] The set of capabilities should depend on the specific context, circumstances, and environment where businesses operate. As explained in Chapter 4 of this thesis, this mapping can cover a very specific context of war where concrete guidance, like the proposed capability approach-informed Benchmark guidance, would assist businesses in mapping their abilities to enhance certain human capabilities. Alternatively, businesses can base their capability mapping on generally recognized capability sets as proposed in Chapter 2 of this

[10] T Horbachevska, O Uvarova, and D Vovk, 'Freedom of Religion and Non-discrimination Based on Gender Identity and Sexual Orientation in Ukraine: Corporate Policy Commitments in Situations of Conflicting Social Expectations' 2024) *Human Rights Review*, 205-301 at 212.
[11] T Horbachevska, 'Fighting for peace, justice and sustainability: the role of business actors in war and post-war Ukraine' In B K Sjåfjell and C Liao (eds) *Sustainability and Corporate Accountability* (2026). Forthcoming.

thesis. A result of such mapping can be the incorporation of such positive actions as gender quotas at corporate boards, discussed in Chapter 5 of this PhD thesis.

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Summary

The reality of business operations in Ukraine and current legislative developments, such as introducing binding legislation on business responsibilities and obligations to respect human rights under corporate sustainability due diligence, induces the question of the potential scope of business responsibilities in human rights protection and contribution to the achievement of sustainable development. Throughout both theoretical analysis based on the capability approach framework and empirical investigation of the reality of corporate human rights commitments implementation in Ukraine, this PhD thesis conceptualizes the role of the business sector in implementing the SDGs (especially SDG 5 Gender Equality; SDG 8 Decent work and economic growth; SDG 10 Reduced inequalities; SDG 17 Global Partnership for Sustainable Development) in Ukraine, taking the examples of Gender Equality and Freedom of Religion or Belief.

Given such complex social and legislative environment as a research focus, this PhD thesis is framed into three dimensions: 1) theoretical investigation of what can be a proper theoretical framework to grasp the scope of business responsibility in the human rights field of current global order to achieve sustainability; 2) empirical study of corporate policy commitments of businesses operating in Ukraine and gathering their representatives' perceptions of the human rights protection scope within business activities; 3) integration of both theoretical and practical findings further into Ukrainian context of war and concluding with the general study of possible positive actions business actors can apply to respect, protect, fulfil and even sometimes – promote human rights. This framing allows to respond to the main research question of this PhD project: *Bearing in mind existing (legal) frameworks on human rights and sustainable development goals, what should businesses in Ukraine do to ensure respect for gender equality and freedom of religion or belief as basic human capabilities?* Four research sub-questions are used to approach this goal. Each sub-question corresponds to a scientific article that is discussed in Chapters 2-5 of this thesis, while Chapter 6 summarizes the results.

Chapter 2 of this thesis*, 'A Capability Approach to the Sustainable Development Goals: Towards Positive Corporate Human Rights Obligations,' introduces* the capability approach as the theoretical framework, its implications for corporate responsibility to respect, protect, and fulfil human rights, and its correlation with human rights and SDGs frameworks. It further explains why the capability approach could justify placing greater human rights responsibilities on business actors, which can further extend towards positive human rights obligations. The chapter argues that adopting the capability approach as an explicit normative basis of the SDGs allows for extension of the interpretation and design of business and human rights (BHR) instruments to align corporate human rights protection responsibilities with the core aim of sustaining human capabilities, leading towards the establishment of human rights protection obligations of businesses. The chapter ends with the

proposal to move towards a broader positive corporate human rights obligation through establishing human rights due diligence process not only to assess the possible harm, but also to identify possible opportunities to enhance human capabilities.

Chapter 3, *'Freedom of Religion and Non-discrimination based on Gender Identity and Sexual Orientation in Ukraine: Corporate Policy Commitments in Situations of Conflicting Social Expectations,'* presents the results of *desk-based research and 100 biggest business actors' corporate policy commitments in Ukraine and in-depth interviews with business representatives, which* revealed three strategies to address conflicting social expectations to protect FoRB and SOGI – neutrality, ignoring, and active engagement – as main among businesses operating in Ukraine. While national companies mostly use the neutrality or ignoring strategies when providing respect to FoRB and freedom from discrimination based on SOGI, international companies or national companies with international branches more actively engage in resolving issues between FoRB and freedom from discrimination based on SOGI. In this regard the chapter argues that *companies who actively engage in providing respect for freedom from discrimination based on SOGI and FoRB, are capable to contribute to the change of mindset of the employees, customers or contractors, or other affected communities in addressing their personal religious, gender, and sexual identities, and more generally – it has prospects to impact the change of legal, ideological and religious discourse to a reduction of LGBT+ radicalization at the community level. The chapter concludes with the statement that the reality of business activities in Ukraine reveals that the private sector can actively engage in providing respect, protection, and fulfilment, and even promote human rights, and contribute to reaching the SDGs.*

Chapter 4, *'Reimagining Heightened Human Rights Due Diligence: A Capability Approach Informed by Women's Experiences in Wartime Ukraine,'* illustrates how the capability approach can enhance existing BHR frameworks by enabling them to more effectively address heightened gender-specific human rights risks during severe crises such as war. It examines existing legal frameworks (obligatory and soft law regulation) to address the gender dimension of heightened human rights due diligence during the war and post-war recovery in Ukraine. The chapter argues that *existing frameworks of war and post-war recovery in Ukraine include a component of gender equality and corporate actors, but do not coherently guide how businesses should integrate the gender dimension in their activities during war and post-war recovery. In turn, the capability approach can provide a definite list of women's capabilities that should be sustained within the gender-responsive assessments, gender-transformative measures, and gender-transformative remedies. The chapter ends with proposing a replicable methodology that equips businesses to conduct more meaningful, gender-responsive due diligence, ensuring that women's rights and empowerment are central to corporate conduct during conflict and recovery.*

Chapter 5, '*Women in Corporate Boards: American, European and Ukrainian Experience to Use Gender Quotas,*' extends the assumptions in the framework

developed in Chapter 2 to understand how the corporate positive actions not only to respect but protect and fulfill gender equality can be implemented into practice. The chapter elaborates on gender quotas as an example of positive actions to more actively protect human rights that not merely refrain from human rights abuses but actively protect and fulfil them. The chapter presents a comparison of American, European, and Ukrainian legal systems regarding introducing such affirmative actions like gender quotas at corporate boards. It argues that using positive affirmative actions like gender quotas could significantly contribute to reaching substantive gender equality by business actors. This assumption is demonstrated by proposing to look at the BHR agenda through the concept of personal autonomy, namely, the principle of 'gendered autonomy,' which allows to form 'capability-oriented' corporate systems that expand human agency both within and beyond work. This chapter concludes with the argument that t*o ensure the implementation of gender equality as a human capability within sustainable development, businesses must proactively act to enhance gender autonomy through the introduction of obligatory gender quotas at corporate boards, which can serve as one of the ways for achieving intra- and inter-generational justice as aimed by the SDGs.*

Chapter 6 synthesizes previous findings to answer the main research question on how, bearing in mind existing (legal) frameworks on human rights and sustainable development goals, businesses in Ukraine should operate to ensure respect for gender equality and freedom of religion or belief as basic human capabilities. This chapter also discusses the general implications for future research extensions as well as the consequences for law, policy, and practices in building greater corporate human rights responsibilities and potential legal obligations.

In addressing the thesis objective, the conclusions of this PhD underscore that the scope of business responsibilities in implementing human rights as a part of sustainable development should be extended towards positive corporate human rights responsibilities that can be incorporated into binding legal obligations as to respect, protect, and fulfill them. Such a shift is grounded both in the normative grounding of the SDGs in the capability approach and the practical reality of businesses that already apply an active engagement strategy in resolving human rights issues, not only to prevent harm but also to create opportunities for affected individuals, groups, and communities to lead a valued life. This approach is universal and can be applied to specific matters such as the gender dimension of heightened human rights due diligence during war and post-war recovery, as well as positive actions of introducing gender quotas in corporate boards that can contribute to reaching greater protection of human rights as part of sustainable development.

Overall, this PhD thesis advances knowledge on the scope of business responsibilities in implementing human rights as a part of sustainable development both in Ukraine and globally.

About the author

Tamara Horbachevska-Konstankevych is from Ukraine. She started her PhD in 2021 as a fellow of the Sandwich PhD program within a collaboration between the Law Group at Wageningen University & Research in the Netherlands, and the Department of Human Rights and Legal Methodology at Yaroslav Mudryi National Law University in Ukraine. Her PhD focuses on the business role in human rights protection and sustainable development in Ukraine and beyond.

She holds an Honors Bachelor's and Honors Master's Law Degrees, along with a PhD in Law from Yaroslav Mudryi National Law University, where she is also a Lecturer on Human Rights Law at the Department of Human Rights and Legal Methodology. She works on joint projects of the International Lab on Business and Human Rights and the Center for Rule of Law and Religion Studies at the Yaroslav Mudryi National Law University.

She has also been working as a human rights activist, providing legal assistance for victims of the russian war aggression against Ukraine, particularly before the European Court of Human Rights, and has been coordinating advocacy campaigns for the protection of Ukrainian prisoners of war's rights and their release from russian captivity.

Publications

T Horbachevska, J van Zeben, and N Bernaz, 'A capability approach to the sustainable development goals: towards positive corporate human rights obligations' *Transnational Legal Theory* 15.3 (2024) 465.

T Horbachevska, O Uvarova, and D Vovk, 'Freedom of religion and non-discrimination based on gender identity and sexual orientation in Ukraine: corporate policy commitments in situations of conflicting social expectations' *Human rights review* 25.2 (2024) 205.

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Other publications

T Horbachevska, ‘The Need for the Minimum Standard Requirement in the Protection of Freedom of Religion and Belief at the Workplace: The Case of Wabe and Mh Mueller Handels Gmbh v. Mj’ *Law Ukr.: Legal J.* (2022) 162.

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T Horbachevska-Konstankevych, ‘Legal symbolism in wartime: peculiarities of manifestation in legal acts of significant symbolic value’ *Philosophy of law and general theory of law* (2025) Forthcoming (In Ukrainian).

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Authorship statement

Throughout the Introduction (Chapter 1) and Conclusion (Chapter 6) of this PhD thesis, I use the pronoun 'I' as the sole author. In Chapters 2, 3, 4, and 5, which were co-authored with Prof Josephine van Zeben, Prof Nadia Bernaz, Dr Olena Uvarova, and Dr Dmytro Vovk, 'we' refers to the co-authors.

Chapter 1: Introduction. The PhD topic and the general research question were initially suggested by me and was further developed by the whole supervision team: Dr Uvarova, Dr Vovk, Prof Bernaz, and Prof van Zeben. It was further detailed into sub-research questions that formed the focus of four scientific articles (Chapters 2–5). The general research question, sub-research questions, and the topics were amended during this PhD process reflecting developments in theory and practice, while the primary idea remained the same. I prepared the complete version of the Introduction under the guidance of and taking into account comments from Prof Bernaz, Dr Uvarova, and Dr Vovk, specifically on the Background section. I conducted style and reference formatting for this chapter. The final interpretation and substance are entirely my responsibility.

Chapter 2: A Capability Approach to the Sustainable Development Goals: Towards Positive Corporate Human Rights Obligations. I initially formulated the key argument and developed a theoretical framework, with further revision from my promotor, Prof van Zeben, and co-promotor, Prof Bernaz, and comments from my supervisor, Dr Uvarova. I wrote the first draft of the manuscript, which was restructured and polished by Prof van Zeben and Prof Bernaz. I conducted style and reference formatting for this chapter. All co-authors contributed to the improvement of the manuscript during three stages of the peer-review process.

Chapter 3: Freedom of Religion and Non-Discrimination Based on Gender Identity and Sexual Orientation in Ukraine: Corporate Policy Commitments in Situations of Conflicting Social Expectations. I collected the data, conducted the interviews, and initial analysis under the guidance of Dr Uvarova and Dr Vovk. I wrote the first draft of the manuscript, which was further reviewed and edited by Dr Uvarova and Dr Vovk. All authors commented on previous versions of the manuscript. Dr Uvarova and Dr Vovk contributed to scrutinizing the final argument and highlighting the key idea of the article. Prof Bernaz reviewed the final draft of the manuscript for the clarity of the argument, coherence, and grammar check. I conducted style and reference formatting for this chapter. All authors read and approved the final manuscript.

Chapter 4: Reimagining Heightened Human Rights Due Diligence: A Capability Approach Informed by Women's Experiences in Wartime Ukraine. I developed the main idea and the structure of this manuscript under the guidance of Dr Uvarova. I wrote the first draft of the manuscript under the guidance and suggestions from Dr Uvarova. Prof Bernaz reviewed the final draft of the manuscript before for clarity

of the argument, coherence, and grammar check. During the review process, Dr Uvarova has drafted the Methodology and Scope of the Study Section (with my minor edits) and restructured the order of the article. I wrote the Introduction and Conclusion to this manuscript together with Dr Uvarova, while all other sections were prepared by me under Dr Uvarova's guidance and taking into account her comments. I conducted style and reference formatting for this chapter. Both authors edited and approved the final manuscript.

Chapter 5: Women on Corporate Boards: American, European and Ukrainian Experience to Use Gender Quotas. I co-authored this chapter with Dr Uvarova. Dr Uvarova initially drafted the first version of this chapter, contributing to the *Introduction* and *Ukraine as a Country of Both Eastern European and Post-Soviet Region* sections. I wrote a second version of the chapter, particularly contributing to the sections on *Adopting women quotas experiences*, *Discussion,* and *Conclusion*. I conducted style and reference formatting for this chapter. Both authors revised, polished, and approved the final text.

Chapter 6: Conclusion. I wrote this final chapter taking into account comments from my promotor, Prof Bernaz, and supervisors, Dr Uvarova and Dr Vovk. I conducted style and reference formatting for this chapter. The final interpretation and substance are entirely my responsibility.

Education certificate



Tamara Horbachevska-Konstankevych
Wageningen School of Social Sciences (WASS)
Completed Training and Supervision Plan

Name of the learning activity	Department/Institute	Year	ECTS*
A) Project related competences			
A1 Managing a research project			
WASS Introduction Course	WASS	2021	1
Searching and Organising Literature	WUR Library	2021	0.6
Writing the research proposal	Law Group	2021-2022	4
'Business towards sustainability transformation: the example of the transitional economy states'	28th International Sustainable Development Research Society (ISDRS) conference, Sustainable Development and Courage: Culture, Art and Human Rights	2022	0.5
'The role of the business sector in SDGs implementation: Business, Gender equality and Freedom of religion and belief in Ukraine'	LAW PhD day	2023	0.5
'A Capability Approach to the Sustainable Development Goals: Towards Positive Corporate Human Rights Obligations'	Doctoral Workshop on Sustainability and Public Law, Radboud University	2025	0.5

Peer-review for the manuscript titled *'United Nations Guiding Principle on Business and Human Rights and Corporate Law: The Struggle for Human Rights Integration'*	Transnational Legal Theory Journal	2025	1

A2 Integrating research in the corresponding discipline

Business, Human Rights and the Environment, LAW58306	WUR	2021	4
Critical Gender Studies	WASS	2022	4
Research Methodology	WASS	2022	4
Young Scholars Fellowship on Religion and the Rule of Law	International Center for Law and Religion Studies at Brigham Young University	2023	2.5
Scientific Writing	Wageningen in'to Languages	2024	1.8
Daughters of Themis Workshop '*Feminism and Business in Theory and Practice*'	University of Oslo, International Network of Women Business Scholars 'Daughters of Themis'	2024	0.9

B) General research related competences

B1 Placing research in a broader scientific context

Philosophy	Yaroslav Mudryi National Law University, Ukraine	2021	6
Critical Perspectives on Social Theory	WASS	2025	4

B2 Placing research in a societal context

Organizing and Moderating PhD Workshop of the Netherlands Institute for Law & Governance '*Business, Human Rights and the Living Environment*'	Wageningen University & Research and the Netherlands Institute for Law & Governance	2022	1.5

Organizing a series of events titled '*Corporate Sustainability Due Diligence: Pivotal Change in the EU and Its Impact on Business in Ukraine'*	Yaroslav Mudryi National Law University, Ukraine	2024	2
Submission of Input for the 2025 reports of the UN Special Rapporteur on the right to development	International Lab on Business and Human Rights at Yaroslav Mudryi National Law University, Ukraine	2025	2
C) Career related competences/personal development			
C1 Employing transferable skills in different domains/careers			
Teaching and supervising BSc students within the course 'European Convention on the Protection of Human Rights and Fundamental Freedoms and Legal Practice'	Yaroslav Mudryi National Law University, Ukraine	2023-2024	4
Total			**44.8**

*One credit according to ECTS is on average equivalent to 28 hours of study load

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