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To cite this article: Tamara Horbachevska, Josephine van Zeben & Nadia Bernaz (01 Dec 2024): A capability approach to the sustainable development goals: towards positive corporate human rights obligations, Transnational Legal Theory, DOI: [10.1080/20414005.2024.2434383](https://doi.org/10.1080/20414005.2024.2434383)

To link to this article: <https://doi.org/10.1080/20414005.2024.2434383>



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Published online: 01 Dec 2024.



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A capability approach to the sustainable development goals: towards positive corporate human rights obligations

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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.

ARTICLE HISTORY Received 1 February 2024; Accepted 18 November 2024

KEYWORDS Sustainable development goals; capability approach; UN guiding principles on business and human rights; business and human rights; positive corporate human rights obligations

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 Palestine²

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

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).

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

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

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%A9-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.

¹⁰ UN, *Transforming our world: the 2030 Agenda for Sustainable Development* (Doc no A/RES/70/1, 2015) (The 2030 Agenda).

¹¹ *Ibid.*

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 operationalise 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 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

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 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) 443–65.

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.

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 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

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 & Politics* 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.

²⁹ Wettstein (n 19) 28.

³⁰ I Robeyns, ‘The Capability Approach’ In G Berik and 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) 23(2) *Management Revue* 191.

³¹ I Robeyns, *Wellbeing, Freedom and Social Justice: The Capability Approach Re-examined* (Open Book Publishers, 2017) 36.

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, recognising 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 ie, 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 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. 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

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 and others, ‘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.

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).

2.1. 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 emphasises 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 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

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) 3(2) *Innovations: Technology| Governance| Globalization* 189 at 191, 199; J Ruggie, R Caroline, and R Davis, ‘Ten Years After: From UN Guiding Principles to Multi-fiduciary Obligations’ (2021) 6(2) *Business and Human Rights Journal* 179–97 at 191.

⁴¹ *Ibid*, 199.

⁴² *Ibid*, 190.

⁴³ Ruggie (n 40) 189.

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 (*ie, 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 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

⁴⁴ S Aaronson and I Higham, ‘“Re-righting business”: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms’ (2013) 35(2) *Human Rights Quarterly* 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 Human Rights: 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) 22(1) *Business Ethics Quarterly* 37–61 at 42.

⁴⁸ Ratner (n 24) 443.

⁴⁹ West (n 47).

⁵⁰ Kolstad (n 24) 278.

⁵¹ Wettstein (n 47) 56.

⁵² Mares (n 45) 6, 1, 9–10, 14–19, 56, 47.

⁵³ Ruggie (n 40) 194.

⁵⁴ *Ibid.*, 201.

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, realising 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 recognised in international human rights law as a duty to protect.⁵⁸ More generally, Danwood Chirwa and Nojeem Amodu argue that commonly recognised dichotomies in the BHR sphere between the responsibility to protect by the state and the responsibility to respect 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

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 Bonnitich and R McCorquodale 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899–919 at 901.

⁵⁸ *Ibid.*, 916.

⁵⁹ D Chirwa and N Amodu, 'Economic, Social and Cultural Rights, Sustainable Development Goals, and Duties of Corporations: Rejecting the False Dichotomies' (2021) 6(1) *Business and Human Rights Journal* 22.

⁶⁰ *Ibid.*, 31–36.

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 fulfilment of human rights.⁶¹ This is especially noticeable in the sustainability discourse which poses the question of whether business actors can be fully recognised 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. 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 realisation of human rights.⁶⁵ While the responsibility to respect is typically framed 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

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.

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.

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 Sjøfjell 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 perception that minimum compliance with (insufficient) legal requirements is adequate’.⁷⁴ In other work, Beate Sjøfjell 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

⁶⁹ UN Working Group on Business and Human Rights, *The Gender Dimensions of the United Nations Guiding Principles on Business and Human Rights* (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) 440–41.

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 Karp (n 25) 138.

⁷⁴ B Sjøfjell and S Cornell, ‘What the Actual ... ? Tensions in the Science-business-policy Interface for Global Sustainability’ (2024) *Under review with European Law Open*.

⁷⁵ B Sjøfjell, ‘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).

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

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 enshrined in the SDGs—the globally recognised, 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

⁷⁶ B Sjäffell, '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) 122 *Journal of business ethics* 307–20; 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) 176–85.

⁸⁰ *Ibid*, 185–90.

⁸¹ S Wood, 'An Argument for Leverage-Based Business Responsibility for Human Rights' (2011) *EUI Working Paper RSCAS* 2011/48 1.

⁸² A Bertrand, 'Virtue ethics in Business and the Capabilities Approach' (2009) 84 *Journal of Business Ethics* 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 Sjäffell, 'Solidarity, Sustainability and the Role of Business' in C Bailliet (ed), *Research Handbook on International Solidarity and the Law* (Edward Elgar Publishing, 2024) 203–22 at 218–19.

⁸⁵ Cantón (n 30) 212.

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, ie, 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). Martha 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 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

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 and others (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) 661–74.

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) 709–18.

⁹⁴ A Mahadi, 'Adopting the Capabilities Approach in Developing a global Framework for measuring Sustainable Development' (2012) *Examensarbete i Hållbar Utveckling* 31.

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 restraints 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 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

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) 118–47.

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.

¹⁰³ P Burger and M Christen, ‘Towards a Capability Approach of Sustainability’ (2011) 19(8) *Journal of Cleaner Production* 791–92.

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).

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 objective of sustainable development.¹⁰⁷ The SDGs speak of the necessity of creating such level

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.

¹⁰⁷ Rauschmayer and others (n 33) 75 at 86, 91, 95.

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 Brundtlandt report and the Millennium Development Goals (MDGs),¹¹⁰ the SDGs take the importance of human capabilities as their starting point,¹¹¹ emphasising 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 interconnected and if one is insufficient this creates a negative impact on the fulfilment of the others.¹¹⁷

¹⁰⁸ L Voegt-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.

¹¹⁷ Ndubuka and Rey-Marmonier (n 100) 7.

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 [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

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.

¹²⁶ EU Parliament, Directive No 2014/95/EU 2014.

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 taking into account the interests of future generations).¹³⁵

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.

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 Planet' (2013) 495(7441) *Nature* 305; Pope Francis *Encyclical on Climate Change and Inequality: On Care for Our Common Home* (Melville House, 2015).

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 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

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 and others ‘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, 7438–72 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 and others (n 140) 4–5.

¹⁴³ *Ibid*, 15.

rights.¹⁴⁴ In the next sub-section we set out how sustainability justice—which underpins the CA—provides this normative foundation.

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 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

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 and others (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.

¹⁵¹ L Miles, ‘The Capabilities Approach and Worker Wellbeing’ (2014) 50(8) *The Journal of Development Studies* 1043.

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 realise 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 realisation as agents ‘who do things’. This principle extends to business actors who can influence the human rights and 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*

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) 675–91 at 685.

¹⁵⁶ Renouard and Ezvan (n 6) 146–47.

¹⁵⁷ D Garcia-Marzá, ‘Business Contribution to Human Development from the Capabilities Approach Standpoint’ in C Luetge (ed), *Handbook of the Philosophical Foundations of Business Ethics* (Springer, 2013) 719–29 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.

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.’

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, ie, 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. Recognising 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).

3.3. Limitations to the capability 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

¹⁶³ Bilchitz (n 69) 1–3.

¹⁶⁴ *Ibid.*, 4.

¹⁶⁵ *Ibid.*

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 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.

¹⁶⁶ The 2030 Agenda (n 10) SDG 17.

¹⁶⁷ Robeyns (n 30) 157–59. See conversely, M Ulriksen and S Plagerson, ‘Social Protection: Rethinking Rights and Duties’ (2014) 64 *World Development* 755–65 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) 118–47.

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 287–88; 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) 160(4) *Journal of Business Ethics* 865–79.

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) 209–22 at 218.

4. Implications of the capability 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 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.

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).

¹⁷⁸ EU Parliament and Council Directive No 2024/1760 /EU 2024 (Corporate Sustainability Due Diligence Directive).

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 development¹⁸⁰ 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 emphasises 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 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

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.

¹⁸⁶ Corporate Sustainability Due Diligence Directive (n 178) para 45 of the preamble.

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 prioritisation 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 emphasises 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

Business actors can enhance human rights capabilities and, more generally—increase the well-being of present and future generations—through

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 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.

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 realised a 'bAgile' programme 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 realised 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

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.

activities engages systematically with bringing positive and sustainable opportunities for present generations.

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 an 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.

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-기 획 제 정 제3차(2023년 11월 13일) 2023 'Human Rights and Environmental Protection for Sustainable Business Management' (HREDD Bill); Macchi and Bright (n 210) 218–47.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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