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Ecosystemic Approaches to Extractive Business and Human Rights Issues

Étienne Roy Grégoire, Marc-André Anzueto, Bonnie Campbell, Mélisande Séguin and Nancy R Tapias Torrado

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Article abstract

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ECOSYSTEMIC APPROACHES TO EXTRACTIVE BUSINESS AND HUMAN RIGHTS ISSUES*

*Étienne Roy Grégoire**, Marc-André Anzueto, Bonnie Campbell, Mélisande Séguin & Nancy R Tapias Torrado****

L'article d'Étienne Roy Grégoire, Marc-André Anzueto, Bonnie Campbell, Mélisande Séguin et Nancy R Tapias Torrado mobilise le concept d'« écosystème normatif extractif » pour rendre compte des interactions entre diverses normes, discours et politiques régissant le rapport entre industries extractives et communautés locales. Il soutient que l'exploitation des ressources naturelles modifie considérablement les relations sociales et exacerbe les risques de violations des droits humains, particulièrement dans le contexte de la mondialisation. L'article critique les approches traditionnelles de la Responsabilité Sociale des Entreprises (RSE) et des Entreprises et Droits Humains (EDH), et souligne la nécessité d'une approche écosystémique pour comprendre les relations complexes entre les différents régimes réglementaires, y compris les lois étatiques, les systèmes juridiques autochtones et le droit international. Le texte est divisé en quatre sections : les implications théoriques du paradigme écosystémique, les développements législatifs récents relatifs à la diligence raisonnable en matière d'entreprises et droits humains en Europe et au Canada, les enjeux de l'application d'une approche écosystémique au secteur extractif, et une conclusion soulignant l'importance de comprendre les défis auxquels sont confrontées les communautés affectées par l'extractivisme.

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Bonnie Campbell is professor emeritus in political economy at the Department of Political Science of the Université du Québec à Montréal (UQAM). Her research has focused on regulatory frameworks, issues of accountability and responsibility in studying the social, economic, environmental and human rights impacts of extractive activities. She is responsible for the publication of fifteen volumes and many scientific articles, is a member of the editorial boards of four international journals, of several research networks including Lagopède and a member of the Royal Society of Canada since 2012.

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Nancy R. Tapias Torrado is a Assistant Professor of Human Rights at United College at the University of Waterloo. She is a doctor in sociology (University of Oxford) and a human rights lawyer (Pontificia Universidad Javeriana, University of Essex). Her main research program focuses on the impact of Indigenous women-led mobilizations defending their dignity, territory and rights from abuses committed in connection to mega-projects in the Americas. She is also a member of Lagopède.

The article by Étienne Roy Grégoire, Marc-André Anzueto, Bonnie Campbell, Mélisande Séguin and Nancy R Tapias Torrado uses the concept of an 'extractive normative ecosystem' to account for the interactions between the various norms, discourses and policies governing the relationship between extractive industries and local communities. It argues that the exploitation of natural resources significantly alters social relations and exacerbates the risks of human rights violations, particularly in the context of globalisation. The article critiques traditional approaches to Corporate Social Responsibility (CSR) and Business and Human Rights (BHR), and highlights the need for an ecosystem approach to understand the complex relationships between different regulatory regimes, including state laws, indigenous legal systems and international law. The text is divided into four sections: the theoretical implications of the ecosystem paradigm, recent legal developments in business and human rights due diligence legislation in Europe and Canada, the potential of applying an ecosystemic approach to the extractive sector, and a conclusion highlighting the challenges faced by communities affected by extractivism.

El artículo de Étienne Roy Grégoire, Marc-André Anzueto, Bonnie Campbell, Mélisande Séguin y Nancy R Tapias Torrado utiliza el concepto de « ecosistema normativo extractivo » para dar cuenta de las interacciones entre las diversas normas, discursos y políticas que rigen la relación entre las industrias extractivas y las comunidades locales. Sostiene que la explotación de los recursos naturales altera considerablemente las relaciones sociales y agrava los riesgos de violación de los derechos humanos, sobre todo en el contexto de la globalización. El artículo critica los enfoques tradicionales de la Responsabilidad Social de las Empresas (RSE) y del enfoque Empresas y Derechos Humanos (EBDH), y subraya la necesidad de un enfoque ecosistémico para comprender las complejas relaciones entre los distintos regímenes normativos, incluidas las leyes estatales, los sistemas jurídicos indígenas y el derecho internacional. El texto se divide en cuatro secciones: las implicaciones teóricas del paradigma ecosistémico, la evolución jurídica reciente de la diligencia debida en materia de empresas y derechos humanos en Europa y Canadá, los retos que plantea la aplicación de un enfoque ecosistémico al sector extractivo, y una conclusión en la que se destaca la importancia de comprender los retos a los que se enfrentan las comunidades afectadas por el extractivismo.

The exploitation of natural resources profoundly reconfigures social relations wherever it occurs. While intrinsically linked to development models specific to colonial and neo-colonial dynamics of appropriation and plunder, the term "extractivism" refers to "those activities which remove large quantities of natural resources that are processed (or processed only to a limited degree), especially for export."[1] Large-scale extractive projects, in particular, deeply impact the myriad of relationships that exist between humans and nature, from local environments to global climate.[2] In fact, the scale of negative impacts associated with extractivism around the world is such that it is considered one of the main contributors to human rights violations associated with the private sector.[3] In Canada, academic research and public policy approaches concerning extractivism and human rights have largely been structured around the concept of "Corporate Social Responsibility" (CSR).[4] On a more global scale, they have been structured around the field of "Business and Human

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[1] As Acosta mentioned, extractivism "is not limited to minerals or oil. Extractivism is also present in farming, forestry and even fishing." In this article, we use extractivism interchangeably with the term large-scale extractive projects. See Alberto Acosta, "Extractivism and Neoextractivism: Two Sides of the Same Curse" in Miriam Lang and Dunia Mokrani, eds, *Beyond Development: Alternative Visions from Latin America* (Amsterdam: Rosa-Luxemburg Foundation, 2013) 61.

[2] See Pascale Hatcher & Etienne Roy Grégoire, "Governance of Extractive Industries" in Wil Hout & Jane Hutchison, eds, *Handbook on Governance and Development* (Cheltenham: Edward Elgar Publishing, 2022) 294; Extractive Industries Review, *Striking a Better Balance. Final Report of the Extractive Industries Review. Volume 1: The World Bank Group and Extractive Industries* (Jakarta and Washington, DC: Extractive Industries Review, 2003); Gavin Bridge, "Contested Terrain: Mining and the Environment" (2004) 29 Annu Rev Environ Resour 205.

[3] Arnim Scheidel et al, "Environmental Conflicts and Defenders: A Global Overview" (2020) 63 Glob Environ Change 1; Leah Temper et al, "The Global Environmental Justice Atlas (EJAtlas): Ecological Distribution Conflicts as Forces for Sustainability" (2018) 13:3 Sustain Sci 573. See also OCDE, *Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives*, OECD Development Policy Tools, (Paris: Éditions OCDE, 2016); *Global Extractivism and Racial Equality. Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UNHRC, 41st Sess, UN Doc A/HRC/41/54 (2019); *Addendum to the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, UNHRC, 8th Sess, UN Doc A/HRC/8/5Add.2 (2008); *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, *Addendum, The Situation of Indigenous Peoples in Canada,* UNHRC, 27th Sess, UN Doc A/HRC/27/52/Add.2 (2014); OHCHR, "Resources extraction fuels rights violations and racial subordination – UN expert" (8 July 2019), online: <www.ohchr.org/en/press-releases/2019/07/resources-extraction-fuels-rights-violations-and-racial-subordination-un>; Business & Human Rights Resource Centre (BHRRC), "Natural resources" (last visited 15 July 2023), online: <business-humanrights.org/en/big-issues/natural-resources/>.

[4] Penelope Simons, "Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses" (2015) Ottawa Faculty of Law, Working Paper No 2015-21; Canada, Department of Foreign Affairs and International Trade, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector* (Ottawa: DFAIT, 2009); Canada, Affaires mondiales Canada, *Le modèle d'affaires canadien. Stratégie améliorée du Canada relative à la responsabilité sociale des entreprises, visant à renforcer les industries extractives du Canada à l'étranger* (Ottawa : Affaires mondiales Canada, 2014), online: <international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=fra>; Global Affairs Canada, *Responsible Business Conduct Abroad* (Ottawa: GAC, 2022), online: <international.gc.ca/trade-commerce/rbc-cre/strategy-2022-strategie.aspx?lang=eng>.

Rights" (BHR).[5] Broadly speaking, policy prescriptions emanating from both arenas tend to focus on the tension between the teleological imperative of human rights and a sense that globalization undermines States' authority. While some advocate for stronger extraterritorial jurisdiction, others promote CSR as a palliative for what they perceive as the inherent limitations of law.[6] Indeed, the argument suggesting that the voluntary nature of CSR is incompatible with the imperative nature of human rights[7] is increasingly challenged by a common assumption that both can converge.[8] This more pragmatic and optimistic approach argues that CSR regimes establish synergistic relationships with legal rights protection regimes.[9] However, this hypothesis remains controversial. Though some empirical research indeed suggests relations of synergy,[10] other contributions emphasize that the relationship between CSR and legal human rights regimes can also be characterized by interference or contradiction.[11] The problem is compounded by the fact that contemporary governance of the extractive sector is characterized by an entanglement of normative regimes of very different types. This includes State, Indigenous, and international legal regimes[12]; private CSR regimes,

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5 *Protéger, respecter et réparer : un cadre pour les entreprises et les droits de l'homme. Rapport du Représentant spécial du Secrétaire général chargé de la question des droits de l'homme et des sociétés transnationales et autres entreprises, M. John Ruggie*, UNHRC, 8th Sess, UN Doc A/HRC/8/5 (2008); BHRRC, "Human Rights Defenders & Civic Freedoms Programme; Attacks against Human Rights Defenders Database" (nd), online: <business-humanrights.org/en/from-us/human-rights-defenders-database/>; EC, *Study on Due Diligence Requirements through the Supply Chain*, DS-01-20-017-EN-N, Brussels: EC 2020); IACHR, *Business and Human Rights: Inter-American Standards*, OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19 (2019).

6 Michael Stohl & Cynthia Stohl, "Human Rights and Corporate Social Responsibility: Parallel Processes and Global Opportunities for States, Corporations, and NGOs" (2010) 1:1 Sustain Account Manag Policy J 51; see Thomas Berns, "L'efficacité comme norme" (2011) 4 Dissensus 150.

7 Florian Wettstein, "Beyond Voluntariness, Beyond CSR: Making a Case for Human Rights and Justice" (2009) 114:1 Bus Soc Rev 125.

8 Anita Ramasatry, "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability" (2015) 14 J Hum Rights 237. See also Robert C Bird, Daniel R Cahoy & Jamie Darin Prenkert, eds, *Law, Business and Human Rights: Bridging the Gap* (Cheltenham: Edward Elgar, 2014); Alexandra R Harrington, "Don't Mind the Gap: The Rise of Individual Complaint Mechanisms within International Human Rights Treaties" (2012) 22:2 Duke J Comp Int Law 153; Emmanuelle Mazuyer, "La responsabilité sociale de l'entreprise et ses relations avec le système juridique" (2011) 26:1 Can J Law Soc 177.

9 James Harrison, "Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment" (2013) 31:2 Impact Assess Proj Apprais 107.

10 Nigel Wilson, "Corporate Social Responsibility, the Business Judgment Rule and Human Rights in Australia - Warm Inner Glow or Warming the Globe?" (2012) 38:3 Monash Univ Law Rev 148.

11 John R Owen & Deanna Kemp, "A Return to Responsibility: A Critique of the Single Actor Strategic Model of CSR" (2023) 341 J Environ Manage 118024 at 3; Etienne Roy Grégoire & Luz Marina Monzón, "Institutionalising CSR in Colombia's Extractive Sector: Disciplining Society, Destabilising Enforcement?" (2017) 38:2 Can J Dev 253; Catherine Coumans, "Do No Harm? Mining Industry Responses to the Responsibility to Respect Human Rights" (2017) 38:2 Can J Dev Stud 272; Florian Wettstein, "Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights" (2021) 6:2 Bus Hum Rights J 312.

12 David Szablowski, *Transnational Law and Local Struggles: Mining Communities and the World Bank* (Oxford: Hart Publishing, 2007).

standards, certification schemes and algorithms[13]; knowledge systems circulating through networks of "global cities" and academic institutions[14]; and metadiscourses articulating different moral economies around the notions of "progress," "development," "*buen vivir*," "sovereignty," "self-determination," "reconciliation" and so on.[15] For these reasons, greater attention needs to be paid to the complex relationships among these regimes regarding, for example, the protection of human rights, including Indigenous peoples' right to self-determination (in extractive contexts). We find heuristic value in conceptualizing this complex web of relationships as a "normative ecosystem." In this article, we define the "extractive normative ecosystem" as the result of the interaction between any norm, discourse, or policy that determines the outcome of extractive encounters with local communities. The ecosystemic perspective, in our view, allows for a better assessment of the constant evolution of CSR and BHR because it analyses the interaction between rules and norms according to their use and potential effects rather than their stated purpose or finality. How can we better assess the latest changes in Canada and Europe regarding business-related human-rights harm? We suggest that an ecosystemic approach de-reifies codified rules and norms while simultaneously recognizing the importance of norms that are often overlooked when it comes to CSR and BHR, such as Indigenous legal regimes. It allows researchers and policymakers to understand normative practices currently used in the extractive sector.[16] The article has four main sections. The first outlines the theoretical implications of the ecosystemic paradigm within the critical socio-legal field. The second analyses recent developments in the field of Mandatory Human Rights Due Diligence (mHRDD) legislation in France and the Netherlands, and at the European Parliament and European Commission. This section shows that these normative developments already adopt an ecosystemic paradigm. The third section explores the challenges of operationalizing an ecosystemic approach to the extractive sector's normativity and discusses how positivist applications of BHR norms may limit Canada's action in this field. We conclude by underlining the relevance of an ecosystemic perspective for better understanding the actual challenges individuals and communities negatively affected by extractivism face, for example in relation to the environment, and opportunities for preventing these negative impacts.

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13 François Ost & Michel van de Kerchove, *De la pyramide au réseau. Pour une théorie dialectique du droit* (Bruxelles: Faculté Universitaire Saint-Louis, 2002); François Ost, "De l'internormativité à la concurrence des normativités : quels sont le rôle et la place du droit ?" (2018) 59:1 Cah Droit 7.

14 Saskia Sassen, "Nouvelle géographie politique" (2000) 3:3 Multitudes 79; Stuart Tannock, "Learning to Plunder: Global Education, Global Inequality and the Global City" (2010) 8:1 Policy Futur Educ 82; Karen Hamilton, "Les dons de l'industrie minière aux universités canadiennes: les enjeux de la philanthropie" (2012) RQDI 129.

15 Daviken Studnicki-Gizbert, *The Three Deaths of Cerro de San Pedro: Four Centuries of Extractivism in a Small Mexican Mining Town* (Chapel Hill: University of North Carolina Press, 2022).

16 Charles Taylor, "Understanding and Explanation in The Geisteswissenschaften" in Steven H Holtzman & Christopher M Leich, eds, *Wittgenstein: To Follow a Rule* (Boston: Routledge, 1981) 191.

I. Theoretical Implications of the Ecosystemic Approach

Globalization has upset the relationship between norms and power, calling into question the political hegemony modernity bestowed on States and law. This is not an original observation; however, it opens up a myriad of socio-legal questions. Putting methodological nationalism aside[17] calls into question the grounds for authority and legitimacy and makes it necessary to consider different conceptions of freedom and to interrogate the correspondence between norms and political communities in a multitude of social configurations.[18] The political function commonly assigned to law is the first thing to be called into question. In a paradigm where the State dominates, the image of the pyramid imposes a political imperative of coherence and hierarchization on the normative sphere.[19] In contemporary constitutionalism, coherence is intrinsically linked to societies' democratic aspirations: it is through law that a society intends to determine itself. As for hierarchization, its purpose is precisely to place the fundamental values used to measure the legitimacy of all other norms at the top of the pyramid. The establishment of human dignity as a teleological imperative, for example, is reflected in the development of the human rights corpus.[20] Extrapolating from a domestic law perspective, the "protection of human dignity" might also, following Anghie, be "considered the ultimate goal of international law."[21] Like other critical socio-legal approaches, we problematize the pyramid model on the basis of two complementary premises. The first is that the relationship between politics and law is intrinsically ambiguous.[22] Law is a means by which society can govern itself and be a democratic political community, a means by which constituted power can be held to its word and a tool to resist the arbitrary exercise of authority. But law is also the language of "Reason of State" and, as such, an "anti-political" tool.[23] Whether the "rule of law" plays an emancipatory role or serves as an anti-political tool in a given context is thus an empirical question, for both uses of the "rule of law" can coexist in the same society.[24] This ambiguous political function of the law has been widely explored and discussed in the field of International Law, particularly by Third World Approaches to International Law (TWAIL) scholars. We share TWAIL's ontological sensitivity about

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[17] Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton and Oxford: Princeton University Press, 2006).

[18] Fiona MacDonald, "Indigenous Peoples and Neoliberal 'Privatization' in Canada: Opportunities, Cautions and Constraints" (2011) 44:2 Can J Polit Sci 257; André-Jean Arnaud, *Entre modernité et mondialisation. Leçons d'histoire et de philosophie du droit et de l'État*, 2nd ed, Série Droit (Paris: Librairie générale de droit et de jurisprudence, 2004); Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

[19] Hans Kelsen, *Principles of International Law*, 2nd ed revised by Robert W Tucker, (New York: Holt, Rinehart and Winston, 1966); Christophe Bouriau et al, *Le droit international selon Hans Kelsen: Criminalités, responsabilités, normativités* (Lyon: ENS Éditions, 2018).

[20] Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2012); Stephen Gardbaum, "Human Rights as International Constitutional Rights" (2008) 19:4 Eur J Int Law 749.

[21] Antony Anghie, "Rethinking International Law: A TWAIL Retrospective" (2023) 34:1 EJIL 83.

[22] Liora Israël, *L'arme du droit*, (Paris: Presses de Science Po, 2009).

[23] Julieta Lemaitre, "Legal Fetishism at Home and Abroad" (2007) 3 Unbound 6.

[24] See for example Marc-André Anzueto, Etienne Roy Grégoire & Philippe Dufort, "Beyond the 'Weakness of the State': Canada's Intervention in Post-Agreement Colombia" (2022) 77:2 Int J 248.

"the colonial origins and legacies of international law"[25] and the seriousness with which they factor in systems of oppression affecting the Global South, such as "historically marginalized communities, race and political economy."[26] We also share Eslava and Pahuja's methodological proposal to think "ethnographically about the many […] sites in which international law operates today."[27] According to these authors:

> Once we consider this plethora of spaces – new 'jurisdictions' – in which international law is being materialized today, it becomes clear that we should not confine our interrogations to only those sites that present themselves as 'international'. The increasing number of jurisdictional forms that are now being created or recreated, in the name of good governance, sustainability or economic competitiveness deserve detailed attention - one capable of linking the existence and operation of these spaces to the ways in which the current global order is unfolding in the everyday lives of people across the world.[28]

Considering the constant evolution of CSR and BHR initiatives, the different power relationship between the numerous actors involved in the extractive business and human rights field and the entanglement of normative regimes in Canada and elsewhere, we believe that "the linguistic openness of rights discourse leads to policy being determinative of particular interpretive outcomes."[29] In this context, Koskenniemi insists on the fact that human rights, "like any legal vocabulary, is intrinsically open-ended[.] What gets read into it (or out of it) is a matter of subtle interpretative strategy."[30] Without pretending to "speak for the subaltern,"[31] our ecosystemic perspective shares common objectives with Critical Legal Studies and TWAIL because it "provides opportunities for productive sociological analyses of the relational politics, structures and impacts of transnational human rights law, practice and discourse."[32] The second premise is inspired by "pragmatic" approaches to global law[33] and uses the image of the ecosystem as a heuristic tool to analyze how different normative regimes interact with each other, regardless of their respective sources or formal status, and seeks to identify synergies or interferences between these systems.[34] The aim is therefore to see how "different norms or other normative instruments, whether public or private, fit together, complement (or counteract) each other, in a concerted or unconcerted, voluntary or incidental way, in order to produce regulatory

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[25] Arnulf Becker Lorca, "After TWAIL's Success, What Next? Afterword to the Foreword by Antony Anghie" (2023) 34:4 Eur J Int Law 780.

[26] Antony Anghie, "Rethinking International Law: A TWAIL Retrospective" (2023) 34:1 Eur J Int Law 111.

[27] *Ibid*, 126-27.

[28] *Ibid*, 127.

[29] Martti Koskenniemi, *The Politics of International Law* (Oxford: Bloomsbury Publishing, 2011) 147.

[30] Martti Koskenniemi, "The Politics of International Law–20 Years Later" (2009) 20:1 Eur J of Int Law 9.

[31] See Naz Khatoon Modirzadeh, "'Let Us All Agree to Die a Little': TWAIL's Unfulfilled Promise" (2024) 65:1 Harvard Int Law J 102.

[32] Sylvia Bawa & Obiora Chinedu Okafor, "Canada-AU Human Rights Engagements: A TWAIL Perspective" (2022) 56:3 Can J Af Stud 482-483; Kishanthi Parella, "Hard and Soft Law Preferences in Business and Human Rights" (2020) 114 AJIL Unbound 168 at 168.

[33] Benoît Frydman, "Comment penser le droit global?" in Benoît Frydman & Jean-Yves Chérot, eds, *La science du droit dans la globalisation* (Bruxelles: Bruylant, 2012) at 17.

[34] See Etienne Roy Grégoire, "Gouvernementalité extractive et autodétermination au Canada. Écosystèmes normatifs et charge critique de l'inter-normativité" (2020) 35:3 Rev Can Droit Société 455.

effects."[35] From an ecosystemic perspective, rather than being valued in terms of their respect for jurisdictional limits, institutions are called upon to act as "points of control." Their actions can be valued on the basis of how they compensate for asymmetries between actors in the ecosystem, for example, or if they attach enforceable consequences to soft CSR instruments.[36] Indeed, looking for coherence in the normative tangle governing the global extractive sector would be futile: new justifications – outside of coherence and distinct from the values put forward by each normative instrument – must thus be outlined. While it is beyond the scope of this article to develop this aspect of our theoretical argument, it is useful to mention that our approach's normative horizon is to examine the impact of different inter-normative configurations on the structuring of political communities. It therefore becomes important "to extend the spatial scope of studies of the international" by including "the small places, where international work is actually – materially – done"[37] such as extractive sites in Canada and sites Canadian companies operate elsewhere. This is an important point since, as radical legal pluralism scholars have argued, these political communities have no reason to be predetermined by jurisdictional frontiers.[38] Extraterritorial considerations are thus inherent to our ecosystemic perspective. It must be stressed, however that this does not imply that political institutions – States, for example – should not be held to account. Rather, as Frydman has argued, the political dimension of ostensibly apolitical forces is brought into focus:

> By detaching the rule from its source and its order, we will undoubtedly be criticized for obscuring or even denying the link between the law and the power that imposes it, thereby [...] insidiously uncoupling law and politics. In reality, the opposite is true. […] [It perhaps gives] us a better idea of the forces, not only political, but economic and technical, that impose their hold on reality through the intermediary of norms.[39]

We aim to contribute to making such forces visible, outlining alignments of interests and identifying suppressed voices that an exclusively positivist approach would miss.

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35 Benoît Frydman, "Stratégies de responsabilisation des entreprises à l'ère de la mondialisation" in Thomas Berns et al, eds, *Entreprises responsables et corégulation* (Bruxelles: Bruylant, 2007) 1 at 45.

36 Benoît Frydman, "Coregulation: A Possible Model for Global Governance" in B De Shutter & J Pas, eds, *About Globalization: Views on the Trajectory of Mondialisation* (Brussels: Brussels University Press, 2004) 227.

37 Luis Eslava & Sundhya Pahuja, "Between Resistance and Reform: TWAIL and the Universality of International Law" (2011) 3:1 Trade L & Dev 127.

38 Martha-Marie Kleinhans & Roderick Macdonald, "What Is a Critical Legal Pluralism?" (1997) 12:2 Can J Law Soc Can Droit Société 25–46; Jacques Vanderlinden, "Les pluralismes juridiques" in Edwidge Rude-Antoine & Geneviève Chrétien-Vernicos, eds, *Anthropologies et droits. État des savoirs et orientations contemporaines* (Paris: Dalloz, 2009) 25; Jeremy Webber et al, "Sally Engle Merry, Legal Pluralism, and the Radicalization of Comparative Law" (2020) 54:4 Law Soc Rev 846–57.

39 Frydman, *supra* note 33 at 26–7.

II. Mandatory Human Rights and Environmental Due Diligence Legislation: an Ecosystemic Perspective

Following the UN Guiding Principles on Business and Human Rights (UNGPs), governments have introduced legislative regimes to encourage or require companies to carry out human rights due diligence.[40] Indeed, the regulatory landscape for BHR "is growing increasingly complex as more countries introduce new laws and business actors evaluate soft law options. States, business organizations, NGOs, and other actors differ concerning which of these options they may prefer."[41] According to Enneking these legislative initiatives fall into one of three categories:

1) Mandatory disclosure legislation[42]

2) Mandatory due diligence legislation[43]

3) Duty of care legislation[44]

This emerging body of law, often referred to as Mandatory Human Rights and Environmental Due Diligence (mHREDD) legislation, illustrates the heuristic potential of the ecosystemic approach, as we will see with the following key examples.

A. France's Law on the Corporate Duty of Vigilance

France's Law on the Corporate Duty of Vigilance obliges French companies of a certain size to establish, publish and implement a vigilance plan that contains reasonable measures to identify the risks and prevent serious human rights violations and harm to the environment resulting from the activities of the company and in the whole value chain.[45] At the time of its enactment in 2017, it was the only law to

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40 United Nations Human Rights Office of the High Commissioner, "Mandatory human rights due diligence (mHRDD)" (last visited 15 July 2023), online: <www.ohchr.org/en/special-procedures/wg-business/mandatory-human-rights-due-diligence-mhrdd>.

41 Parella, *supra* note 32 at 173.

42 The first category comprises legislation that requires companies to disclose information regarding their human rights and/or environmental impacts and/or the policies they have in place to deal with those impacts. An example is the 2015 UK Modern Slavery Act. See Liesbeth FH Enneking, "Putting the Dutch Child Labour Due Diligence Act into Perspective. An Assessment of the CLDD Act's Legal and Policy Relevance in the Netherlands and Beyond" (2019) 12 Erasmus Rev 20 at 29-30.

43 The second category comprises legislation imposing a requirement for companies to conduct due diligence with respect to their human rights and/or environmental impacts, including those that occur in their global value chains. For instance, the Dutch CLDD Act, or the EU Timber Regulation and the EU Conflict Minerals Regulation. *Ibid* at 30.

44 The third category comprises legislation imposing mandatory due diligence with civil liability in case of violation of the due diligence standard, such as the 2017 French Duty of Vigilance and the future EU directive on corporate due diligence and corporate accountability. *Ibid.*

45 Article 1 of the *French Law* specifies that it applies to: "Toute société qui emploie, à la clôture de deux exercices consécutifs, au moins cinq mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français, ou au moins dix mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français ou à l'étranger, établit et met en œuvre de manière effective un plan de vigilance". *Loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, JO (28 March

incorporate corporate due diligence into domestic law.[46] According to Delalieux and Doquet, the logic behind *France's Law* is clearly ecosystemic as it seeks "to harden existing corporate social responsibility (CSR) soft law mechanisms, considered as too weak" on their own.[47] The obligations set out in the *Vigilance Law* require companies to:

1) Establish a vigilance plan;

2) Effectively implement it; and

3) Make a plan to effectively report to the public.[48]

Specifically, the "vigilance plan" must include:

1) A risk map;

2) Regular evaluation procedures regarding the situations of relevant subsidiaries, subcontractors and suppliers;

3) Adequate actions to mitigate risks or prevent severe impacts on areas covered by core humanitarian principles;

4) An alert mechanism regarding the existence or materialization of risks, established in consultation with the trade unions considered to be representative within the company; and

5) A system monitoring the measures implemented and evaluating their effectiveness.[49]

The *Vigilance Law* envisages three sanctions in the event of a breach of obligations:

1) A monetary fine or a possible periodic penalty payment as a result of an injunction;

2) Civil liability; and

3) The publication of the court's decision on civil liability.[50]

There have been several evaluations of the law's scope and the challenges

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2017), online: <legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>. Earlier translations of the *Vigilance Law* have used the term "duty of care". However, there is now a relative consensus in France among stakeholders on the use of the term "vigilance." See Elsa Savourey, "France Country Report" in European Commission, *Study on Due Diligence Requirements through the Supply Chain, Part III: Country Reports* (2000), online: <op.europa.eu/s/oblF> 56 at 57.

46 Elsa Savourey & Stéphane Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges since its Adoption" (2021) 6:1 Bus Hum Rights J 141.

47 Guillaume Delalieux & Anne-Catherine Moquet (2020) "French Law on CSR Due Diligence Paradox: The Institutionalization of Soft Law Mechanisms through the Law" 15:2 Soc Bus Rev 125. Emphasis added.

48 Savourey, *supra* note 45 at 57.

49 Christophe Clerc, "The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains" (2021) ETUI Policy Brief, European Economic, Employment and Social Policy, No 1 at 3.

50 *Ibid*.

related to enforcement since its entry into force in 2017. Experts and NGOs regret that the law only applies to a limited number of companies (between 150 and 300 according to various estimates).[51] The law focuses on large companies under the rationale that they are the only entities with enough resources and leverage to implement the duty of vigilance.[52] Experts also point out that "many companies are still in a learning phase" and that a "number of companies still approach the vigilance plan as a tick-box exercise."[53] With respect to enforcement, the alert system has been triggered seven times and three cases have reached the courts since 2019. It was hoped that the court's first decisions would provide indications on the effectiveness of law's enforcement mechanism[54] but these decisions have not yet clarified the way in which the courts will treat such claims. However, the decisions highlight the "imprecise, vague and flexible" character of the notion of "reasonableness" imposed on companies and the importance of engagement with stakeholders in the elaboration and actualization of the due diligence plans to be implemented.[55] These decisions would seem to confirm critics' concerns that asymmetries in actors' capacity will undermine the law's stated objective. While it seeks to harden corporate instruments, it also relies on civil regulation[56] for its implementation:

> Most of the enforcement actions have been initiated by NGOs and trade unions. Playing that role is challenging, as these entities often have limited financial and operational capacity. Besides, this process can generate risks for human rights and environmental defenders. Several NGOs have been asking for the creation of an independent monitoring body to ensure the effective implementation of the Law. The General Council of Economy also noted […] the weaknesses in monitoring the Law's implementation and

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51 There are three criteria which a company must fulfil to enter within the scope of the Law. The company must (1) be registered in France (this includes French subsidiaries of foreign groups), (2) be under a prescribed corporate form, and (3) have a number of employees above certain thresholds. Company information is not always public or easily identifiable. Additionally, experience has shown that the evolution of corporate entities and groups after events such as mergers, acquisitions, and other restructuring efforts further complicates the identification of relevant companies. Savourey, *supra* note 45 at 142. French NGOs have created a web page that demonstrates the complexity of identifying companies falling within the scope of this law. See CCFD-Terre Solidaire and Sherpa, "Duty of Vigilance Radar" (last visited 27 February 2023), online: <vigilance-plan.org/>. See also Savourey, *supra* note 45 at 56.

52 Clerc, *supra* note 49 at 3.

53 Savourey and Brabant, *supra* note 46 at 147.

54 *Ibid* at 149.

55 In a 28 February 2023 decision, the First Vice-President of Paris' Judicial Tribunal declared two complaints against Total Energies asking to suspend work on two of its projects in Uganda inadmissible. See Gide Loyrette Nouel, "Loi sur le devoir de vigilance : l'apport des deux premières décisions rendues par le Premier Vice-Président du Tribunal judiciaire de Paris" (3 March 2023), online: <gide.com/fr/actualites/loi-sur-le-devoir-de-vigilance-lapport-des-deux-premieres-decisions-rendues-par-le>.

56 Trebeck uses the term "civil regulation" to refer to the pressures that civil society and collective mobilization can exert on a company's behaviour. See Katherine Trebeck, "Corporate Social Responsibility and Democratisation. Opportunities and Obstacles" in Ciaran O'Faircheallaigh & Saleem Ali, eds, *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility* (Sheffield: Greenleaf Publishing, 2008) 8.

> suggested that a body of the French administration get access to confidential information centralized by the administration in order to promote compliance with the Vigilance Obligations.[57]

Despite these limitations, experts note that the *Vigilance Law* "has been integrated into domestic 'hard law'[58] and has contributed to awareness raising within companies about the necessity of integrating human rights and environmental concerns within business activities and their supply chain."[59] The *French Law* has served as a useful reference for an EU directive currently under discussion,[60] as we will explain below. First, however, we will highlight some initiatives from the Netherlands regarding mHREDD legislation. This will also help illustrate one of the dynamics of adaptation to an evolving normative ecosystem best captured by an ecosystemic approach.

B. The Netherlands: *Dutch Child Labour Due Diligence Act*

The debates on BHR in the Netherlands date back to the late 1990s. In 2014, the Dutch Social and Economic Council (SER) drafted nine covenants on International Responsible Business Conduct (IRBC-covenants) that were later concluded with different sectors.[61] According to Enneking:

> One of the consequences of the Dutch government's focus in its IRBC policy on concluding sector agreements – a regulatory instrument that is, in essence, consensus driven – has been that it has effectively held off concrete debate on the introduction of more binding measures in this context.[62]

As was the case in France, mHREDD legislation in the Netherlands was introduced under the logic of "hardening" these soft law mechanisms. In March 2021, the *Bill for Responsible and Sustainable International Business Conduct* was submitted

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57 Savourey and Brabant, *supra* note 46 at 150-51.

58 Savourey, *supra* note 45 at 89.

59 See also A Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?" (2021) 22 Hum Rights Rev 109, online: <doi.org/10.1007/s12142-020-00607-9>.

60 Juliette Camy, "The French Law on the Duty of Vigilance: The Challenges of the Preventive Approach" (29 June 2023), online (blog): <cambridge.org/core/blog/2023/06/29/the-french-law-on-the-duty-of-vigilance-the-challenges-of-the-preventive-approach/>.

61 Jacqueline Cramer, "The Netherlands: Redefining Positions in Society" in Andre Hibisch et al, eds, *Corporate Social Responsibility across Europe* (New York: Springer, 2005) 87. The Dutch government has concluded agreements on responsible business conduct (RBC) with Dutch sectors and civil society organizations such as the Dutch Agreement on Sustainable Garments and Textile, Dutch Banking Sector Agreement, Agreement to Promote Sustainable Forestry, Responsible Gold Agreement, Agreement for the Food Products Sector, Agreement for international responsible investment in the insurance sector, Agreement for the Pension Funds, RBC TruStone Initiative, and RBC Agreement for the Metals Sector. See Government of the Netherlands, "Responsible Business Conduct (RBC) Agreements" (last visited 27 February 2023), online: <government.nl/topics/responsible-business-conduct-rbc>. See also Liesbeth FH Enneking, "The Netherlands Country Report" in European Commission, *Study on Due Diligence Requirements through the Supply Chain, Part III: Country Reports* (2000), online: <op.europa.eu/s/oblF> at 170.

62 Enneking, *supra* note 42 at 21.

to the Dutch Parliament; in December of the same year, the Minister of Foreign Trade and Development announced the government's intention to develop binding national mHREDD legislation. In November 2022, the *Bill for Responsible and Sustainable International Business Conduct* was re-submitted to the Dutch Parliament, after a review by the constitutional advisory council.[63] The proposed Dutch *Bill for Responsible and Sustainable International Business Conduct* falls into Enneking's categories of mandatory due diligence legislation and duty of care legislation. Indeed, according to the unofficial English translation, section 1.2 of the Dutch *Bill on the duty of care for every undertaking* stipulates:

> 1. Any undertaking that knows or should reasonably suspect that its own activities or those of its business relationships may have adverse impacts on human rights or the environment in countries outside the Netherlands must:
>
> a. take all measures that may be reasonably required of it to prevent such impacts;
>
> b. to the extent that such impacts cannot be prevented: mitigate or reverse them to the extent possible and, where necessary, enable remediation;
>
> c. if such impacts cannot be sufficiently mitigated: refrain from the relevant activity or terminate the relationship in so far as that may reasonably be expected from the undertaking.[64]

This new legislation would replace a 2019 law that mandated companies importing goods or services to the Dutch market to conduct due diligence "with respect to the use of child labour in their supply chains."[65] In comparison to the *French Law*, the *2019 Child Labour Due Diligence (CLDD) Act* covers companies of all sizes from all sectors:

> [t]he ambit of the CLDD Act's main obligation to conduct due diligence is not limited to the activities of a defined range of companies; by consequence, it extends, in principle, to all business operations within the value chain […] The Duty of Vigilance Law has a more circumscribed ambit with regard to business operations to be covered in the vigilance plan that companies falling within its personal scope are required to draw up.[66]

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[63] See Business & Human Rights Resource Centre, "Netherlands: Six Political Parties Submit Bill on Mandatory Due Diligence to Parliament" (26 June 2020), online: <business-humanrights.org/en/latest-news/netherlands-momentum-builds-towards-mandatory-due-diligence-regulation/>.

[64] The second point of that section on duty of care specifies that "Human rights or the environment are in any event adversely impacted if the following are used or present in the value chain: a. restriction of the freedom of association and collective bargaining; b. discrimination; c. forced labour; d. child labour; e. climate change; f. environmental damage; g. unsafe working conditions; h. violation of animal welfare regulations; i. slavery; or j. exploitation." See MVO platform, "English Translation of the Bill for Responsible and Sustainable International Business Conduct" (1 November 2022), online: <mvoplatform.nl/en/wp-content/uploads/sites/6/2022/11/English-translation-of-the-Bill-for-Responsible-and-Sustainable-International-Business-Conduct-MVO-Platform.pdf>.

[65] *Ibid* at Section 4.3, Repeal of the *Child Labour Duty of Care Act*.

[66] Enneking, *supra* note 42 at 32. It must be noted, however, that certain categories of companies can be exempted by Council order, for instance, small and medium-sized companies (SMEs) or companies from low-risk sectors.

In contrast with the French *Duty of Vigilance Law*, however, the *CLDD Act* does not contain any provisions relating to access to remedy for victims of child labour.

C. MHREDD at the European Parliament and European Commission

Making access to markets conditional on proper human rights due diligence can have extraterritorial impacts and modify the normative global ecosystem. Since 2020, the European Union's (EU) commitment to introducing legally binding corporate human rights and environmental due diligence norms has generated great interest outside of Europe, and notably in Canada.[67] In 2020, following the European Commission Action Plan on Financing Sustainable Growth in 2018,[68] an important report on due diligence requirements through the supply chain was published that outlined different regulatory options at the EU level.[69] In February 2021, the European Parliament's Committee on Legal Affairs adopted the legislative initiative report with recommendations to the Commission on corporate due diligence and corporate accountability.[70] In March 2021, the European Parliament issued a resolution to inspire the European Commission's crafting of a mandatory due diligence and corporate accountability framework. Regarding the subject matter and objective, Article 1 of the European Parliament resolution mentions:

> 1. This Directive is aimed at ensuring that undertakings under its scope operating in the internal market fulfil their duty to respect human rights, the environment and good governance and do not cause or contribute to potential

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[67] For instance, a 2020 policy brief by the Canadian Ombudsman for Responsible Enterprise (CORE) states that "[t]he EU's adoption of this proposal (2–3 years from now) should address concerns from the Canadian private sector about competitiveness, given that it would apply to millions of businesses registered in the EU". Government of Canada, Canadian Ombudsperson for Responsible Enterprise*, Government of Canada: European Union Commitment to Introduce Legally Binding Corporate Human Rights and Environmental Due Diligence: Implications for Canada – Policy Brief* (Ottawa: GC, 2020), online: <core-ombuds.canada.ca/core_ombuds-ocre_ombuds/eu_policy_brief-ue_document_orientation.aspx?lang=eng>.

[68] See Action 10 in the "Action Plan: Financing Sustainable Growth". Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, "Action Plan: Financing Sustainable Growth", COM/2018/097 final, 8 March 2018.

[69] As stated in the report, "[t]he concept of due diligence relevant to this study, to 'identify, prevent, mitigate and account for' adverse corporate impacts on human rights and the environment, was introduced by the UN Guiding Principles on Business and Human Rights ('UNGPs'), and incorporated into the OECD Guidelines for Multinational Enterprises ('OECD Guidelines') to extend to other areas of responsible business conduct such as the environment and climate change, conflict, labour rights, bribery and corruption, disclosure and consumer interests, as well as in the ILO Tripartite declaration of principles concerning multinational enterprises and social policy ('MNE Declaration'). It is also the foundation for the French Duty of Vigilance Law, which requires 'reasonable vigilance measures' as a standard of care for human rights and environmental harms, and which the European Parliament report states should be the basis for the 'pan-European framework.'"; European Commission, *Final Report: Study on Due Diligence Requirements through the Supply Chain: Final Report* (2020), online: <op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> at 15.

[70] EU, *Resolution 2020/2019 of the European Parliament and of the recommendations of the Commission of 10 March 2021 on corporate due diligence and corporate accountability*, [2021] OJ, C 474.

> or actual adverse impacts on human rights, the environment and good governance through their own activities or those directly linked to their operations, products or services by a business relationship or in their value chains, and that they prevent and mitigate those adverse impacts.[71]

The European Parliament's 2021 resolution adopted an ecosystemic perspective to highlight accountability and monitoring, stipulating that each: "Member State should designate one or more national competent authorities to monitor the application of the Directive and to disseminate best practice on due diligence."[72] Following this resolution, on 23 February 2022, the European Commission adopted a Directive proposal on corporate sustainability due diligence with the aim of

> foster[ing] sustainable and responsible corporate behaviour and [anchoring] human rights and environmental considerations in companies' operations and corporate governance. The new rules will ensure that businesses address adverse impacts of their actions, including in their value chains inside and outside Europe.[73]

Regarding market access, the EU directive outlines objectives with regards to externalities, innovation, unfair competition, and loyalty.[74] Among the beneficiaries of these new rules, the European Commission mentions citizens, companies, and developing countries. For European companies and third country companies active in the EU, the Commission lists the following benefits: a harmonized legal framework in the EU, creating legal certainty and a level playing field; greater customer trust and employee commitment; better awareness of companies' negative environmental and human rights impacts; better risk management and adaptability; increased attractiveness for talent, sustainability-oriented investors and public procurers; higher

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71 Moreover, paragraphs 1 and 2 of Article 4 of the resolution address due diligence strategy within a context-specific perspective: "1. Member States shall lay down rules to ensure that undertakings carry out effective due diligence with respect to potential or actual adverse impacts on human rights, the environment and good governance in their operations and business relationships. 2. Undertakings shall in an ongoing manner make all efforts within their means to identify and assess, by means of a risk based monitoring methodology that takes into account the likelihood, severity and urgency of potential or actual impacts on human rights, the environment or good governance, the nature and context of their operations, including geographic, and whether their operations and business relationships cause or contribute to or are directly linked to any of those potential or actual adverse impact." EU, *Resolution 2020/2129(INL) of the European Parliament of March 10, 2021, containing recommendations to the Commission on due diligence and corporate accountability*, [2021] OJ C 474/11.

72 More specifically it mentions that each Member State "should designate one or more national competent authorities to monitor the application of the Directive and to disseminate best practice on due diligence. The designated national competent authorities should be independent and have the necessary human, technical and financial resources, premises and infrastructure, and expertise to carry out their duties effectively." *Ibid*.

73 EU, European Commission, "Corporate Sustainability Due Diligence. Fostering Sustainability in Corporate Governance and Management Systems" (last visited 15 July 2023), online: <commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due diligence_en>. According to the EU a directive "is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to each country to create their own laws on how to reach these goals". See EU, "Types of legislation" (last visited 21 August 2024), online: <european-union.europa.eu/institutions-law-budget/law/types-legislation_en>.

74 *Clerc*, *supra* note 49 at 2.

attention to innovation; and better access to finance.[75] On 1 June 2023, the European Parliament adopted amendments to the text the European Commission had proposed concerning the proposal for a *EU Directive on Corporate Sustainability Due Diligence* and the *Directive* will now enter into a round of negotiation with Member States.[76] This is relevant for other countries, including Canada, because the *EU Directive* "identifies, targets, and seeks to address important challenges associated with current efforts to enhance due diligence," namely by applying the *Directive* to the entire supply chain. The *Directive* also emphasizes the need for remedies oriented towards those affected, as well as "the need for oversight bodies to monitor compliance that are empowered to directly apply enforcement measures."[77] On July 25, 2024, *EU Directive (2024/1760) on corporate sustainability due diligence* entered into force.[78] Member States will now have to transpose the *Directive* into national law and communicate the relevant texts to the Commission before the end of July 2026. The rules will start applying to a first group of companies one year later, with full implementation planned for mid-2029.[79] Several European countries (e.g., Germany, Austria, Belgium and Norway) are already discussing relevant laws.[80] The above examples of mHREDD legislation illustrate the evolution of norms in this key area and, more specifically, how the adoption of an ecosystemic perspective allows for a better assessment of the constant evolution of CSR and BHR in specific institutional settings by focusing concretely on the use and potential effects of legislative initiatives.

D. Proposed MHREDD Legislation in Canada

Discussing and advancing mHREDD is not limited to Europe. In Canada, the Canadian Network on Corporate Accountability (CNCA),[81] a coalition of civil society organizations, has drafted a model mHREDD legislation. Although it does not target specific sectors, there is no doubt that the Canadian extractive sector's global human rights record is an important reference. Canada plays a key role in the extractive sector. For decades, companies listed on Canadian stock exchanges (TSX and TSXV) have

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[75] European Commission*, supra* note 73.

[76] EU, *Amendments 2019/1937 of the Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 (COM(2022)0071-C9-0050/2022-2022/0051 (COD)* (2023) *supra* note 57.

[77] Government of Canada, *supra* note 67.

[78] EU, *Directive 2024/1760 of the European Commission of 25 July 2024 on corporate sustainability due diligence. Fostering sustainable and responsible corporate behaviour for a just transition towards a sustainable economy*, [2024] OJ, L 2024/1760.

[79] *Ibid.*

[80] UE, European Coalition for Corporate Justice, *Corporate Due Diligence Laws and Legislative Proposals in Europe - Comparative Table* (Brussels: ECCJ, 2022), online: <corporatejustice.org/wp-content/uploads/2022/03/Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-March-2022.pdf>.

[81] Since 2005, this network has brought "together 40 environmental, human rights, religious, labour and solidarity groups from across Canada." According to their website, the network has one simple mission: "to ensure that Canadian companies respect human rights and the environment when working abroad". Canada, Canadian Network on Corporate Accountability, "CNCA-RCRCE" (Ottawa: CNCA, 2023), online: <cnca-rcrce.ca/>.

been raising between a third and a half of all mining capital worldwide, and a large proportion of the world's publicly-traded mining companies are listed in Canada.[82] Since the 1990s, Canada has also generated normative innovations that explicitly focus on the governance of the extractive sector and its relationship to the law. These innovations come as much from the private sector[83] as from public action.[84] It is important to underline that the Canadian extractive sector has been "very successful at preventing the introduction of hard law measures to regulate its overseas conduct that may violate human rights."[85] Canada has recently updated its BHR policy.[86] Review of this policy finds that despite some improvements, it remains "entrenched in a soft approach to ensuring that Canadian extractive companies respect human rights abroad."[87] Even with the introduction of the 2022 Responsible business conduct (RBC) strategy, we still observe "the government's current intransigence in moving beyond a voluntary self-regulation regime on HRDD."[88] One example of this is the refusal to provide the Canadian Ombudsman for Responsible Enterprise (CORE) with the

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82 Canada, Ressources naturelles Canada, "Le Canada : un environnement propice à l'investissement minier" *Bulletin d'information* (Ottawa: RNCAN, 2014). According to data published in 2023, 48% of all global mining financing and 36% of all global mining equity capital in the previous five years had been raised on the TSX and the TSXV, which list 40% of the world's mining companies. Ontario, Toronto Stock Exchange, "~40% of the world's public mining companies are listed on TSXV and TSXV" (Ontario: TSX, 2023), online: <tsx.com/listings/listing-with-us/sector-and-product-profiles/mining>.

83 Eric Engle, "Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?" (2004) 40:1 Willamette Law Rev 103; Ann Mayer, "Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories" (2009) 88:4 J Bus Ethics 561; Viviane Weitzner, "Indigenous Participation in Multipartite Dialogues on Extractives: What Lessons Can Canada and Others Share?" (2010) 30:1–2 Can J Dev Stud Can Détudes Dév 87; Simons, *supra* note 4; Prospectors and Developpers Association of Canada, "PDAC's e3 Plus Initiative Plan" (2010) 131:2 Can Min J 22; Hevina Dashwood, "Canadian Mining Companies and the Shaping of Global Norms of Corporate Social Responsibility" (2005) 60:4 Int J 977; Catherine Coumans, Brief on Concerns Related to Project-Level Non-Judicial Grievance Mechanisms. Data Derived from Work by MiningWatch Canada and Partners on the Porgera Joint Venture Mine in Papua New Guinea and the North Mara Gold Mine in Tanzania. Prepared for the Expert Meeting: "Sharing Experiences and Finding Practical Solutions Regarding the Implementation of the UNGP's Effectiveness Criteria" (The Hague: Mining Watch Canada, 2014); Mining Association of Canada, Towards Sustainable Mining Initiative (TSM) (1999).

84 Canada, Department of Foreign Affairs and International Trade, *L'exploitation minière dans les pays en développement et la responsabilité sociale des entreprises - Réponse du gouvernement au Quatorzième rapport du comité permanent des Affaires étrangères et du Commerce international* (Ottawa : DFAIT, 2005); Université du Québec à Montréal, Rapport du Groupe Consultatif, *Tables rondes nationales sur la responsabilité sociale et l'industrie extractive minière dans les pays en développement* (2007), online: <cooperation.uqam.ca/IMG/pdf/CSR_reportFR.pdf>; Canada, Department of Foreign Affairs and International Trade, *supra* note 4; Canada, Affaires Mondiales Canada, *supra* note 4; Global Affairs Canada, *supra* note 4; Canada, Office of Canadian Ombudsperson for Responsible Enterprise, "Mandate of the Canadian Ombudsperson for Responsible Enterprise" (Ottawa: CORE, 2023), online: <core-ombuds.canada.ca/core_ombuds-ocre_ombuds/mandate-mandat.aspx?lang=eng>.

85 Penelope Simons, "Developments in Canada on Business and Human Rights: One Step Forward Two Steps Back" (2023) 36:2 Leiden J Int Law 363-88.

86 Canada, Government of Canada, "Responsible Business Conduct Abroad Canada's Strategy for the Future", (Ottawa: GC, 2022), online: <international.gc.ca/trade-commerce/assets/pdfs/rbc-cre/strategy-2021-strategie-1-eng.pdf>.

87 Simons, *supra* note 85.

88 *Ibid*.

investigative powers necessary to compel documents and testimony from companies.[89] In 2024, the CORE made, for the first time, a determination that a Canadian extractive company was responsible for human rights violations committed abroad and recommended that official support for the company to be withdrawn. CORE also reiterated its demand that it be granted the above powers.[90] The Canadian government has yet to respond to these recommendations at the time of this publication. The CNCA argues that Canada's long-standing promotion of voluntary CSR instruments fails to regulate Canadian companies' behaviour abroad and that this constitutes a breach of Canada's human rights obligations.[91] Its model legislation seeks to establish a corporate duty for companies that are incorporated, have a place of business or sell goods or services in Canada, and have a physical presence or otherwise carry out business in Canada to prevent human rights abuse and environmental harms. It requires companies to conduct due diligence and publicly report on the steps taken to prevent human rights and environmental harms and legislates significant consequences for companies that cause harm or fail to conduct due diligence.[92] The model legislation was introduced as a private member's bill in Canada's House of Commons in 2022 but did not reach a second reading.[93] It remains to be seen if this initiative will be taken up again.

In sum, several countries are moving towards stronger mHREDD norms and measures that will enhance standards and affect the terrain on which Canadian companies operate. Similarly, civil society groups will continue to push for necessary changes. There is a need to better understand what these normative developments may mean for local communities affected by the diverse actors involved in extractive projects. It is therefore important to decentralize the analysis of the current dynamics articulating international law and development[94] as they intersect with Canadian diplomacy and its promotion of CSR and BHR "solutions." Exploring the operationalization of an ecosystemic approach to normativity going beyond mHREDD could be useful.

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89 Canada Network on Corporate Accountability, *Canadian Ombudsperson for Responsible Enterprise (CORE), Approach with Caution* (Ottawa: CANCA, 2020).

90 Canada, Office of the Canadian Ombudsperson for Responsible Enterprise, *Final Report: Investigation for a Complaint Filed by a Coalition of 28 Organizations about the Activities of Dynasty Gold Corporation* (Ottawa: CORE, 2024) Last Modified: 2024-04-17.

91 Canada Network on Corporate Accountability, "Human Rights and Accountability: Non-negotiable Campaign" (Ottawa: CNCA, 2022), online: <cnca-rcrce.ca/wp-content/uploads/2022/04/Human-Rights-and-Accountability-Non-negotiable-Campaign-Media-backgrounder-E-.pdf >. For example, Bill s-211 "An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff", adopted in 2023, merely imposes reporting obligations on "steps taken to assess and manage" the risk of forced or child labour in their supply chains. See Fighting Against Forced Labour and Child Labour in Supply Chains Act SC 2021 c 9.

92 Canada Network on Corporate Accountability, *supra* note 71. The model legislation can be consulted at: <cnca-rcrce.ca/site/wp-content/uploads/2021/05/The-Corporate-Respect-for-Human-Rights-and-the-Environment-Abroad-Act-May-31-2021.pdf>.

93 See Corporate Responsibility to Protect Human Rights Act SC 2022 (First Reading).

94 See Luis Eslava, *Local Space, Global Life* (Cambridge University Press, 2015).

III. The Potential of an Ecosystemic Approach to Normativity Beyond MHREDD

In such an exploration of the operationalization of an ecosystemic approach, pertinent areas of concern and intervention might include areas such as those described below.

A. Supporting Grassroots Legal Practices

The fragmented way in which BHR norms are enshrined in different documents – some binding and others voluntary – has led to an apparent opposition between companies' interests and States' human rights obligations. In this context, affected communities' grievances are primarily addressed by the project proponents' CSR instruments, which are explicitly framed around the operators' interests (however enlightened they may be) rather than furthering human dignity and rights.[95] Different forms of oppression affect communities opposing extractive projects and different factors shape their actions.[96] Understanding local movements' actions, as well as their political underpinnings, is essential to supporting affected communities better.[97] It will also help enrich international and State law by incorporating legal practices that emerge from grassroots movements.[98]

B. Re-aligning Professional Ethics with Human Dignity and Rights in the Diplomatic Service

Addressing different institutions' behaviour from an ecosystemic approach broadens analyses of extractive legal and political infrastructures, and requires studying them in practice and in the context of the development and application of norms. Among the actors and institutions that can have a significant impact on corporate behaviour and accountability are those involved in economic diplomacy, as they also

[95] Etienne Roy Grégoire & Pascale Hatcher, "Global Extractivism and Inequality" in Kearrin Sims et al, eds, *Routledge Handbook of Global Development* (New York: Routledge, 2022) 341 at 345.

[96] Nancy R Tapias Torrado, "Overcoming Silencing Practices: Indigenous Women Defending Human Rights from Abuses Committed in Connection to Mega-Projects: A Case in Colombia" (2022) 7:1 Bus Hum Rights J 29 at 33; and Nancy R Tapias Torrado, "Wet'suwet'en women leading the defence of rivers and water from abuses committed in connection with megaprojects. The persistent legacies of the past. Canada" in Tatiana Acevedo, Margreet Zwarteveen et al (eds), *Gender and Water Governance Routledge Handbook*, 1st ed (London: Routledge, 2024), online: <bit.ly/4h5JDxG>.

[97] *Ibid* at 44. Nancy R Tapias Torrado, "Honduras: *¡Berta vive, la lucha sigue!* Corporate Accountability for Attacks against Human Rights Defenders" in Leigh Payne, Gabriel Pereira & Laura Bernal-Bermúdez, eds, *Economic Actors and the Limits of Transitional Justice: Truth and Justice for Past Business Complicity in Human Rights* (Oxford: Oxford University Press, 2022) 214.

[98] Sally Engle Merry, "Legal Pluralism and Legal Culture" in Brian Z Tamanaha, Caroline Sage & Michael Woolcock, eds, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge: Cambridge University Press, 2012) 66; Nora Götzmann et al, "From Formalism to Feminism: Gender, Business and Human Rights" (2022) 7:1 Bus Hum Rights J 1 at 9; Leigh Payne, Gabriel Pereira & Laura Bernal-Bermúdez, *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes' Lever* (Cambridge: Cambridge University Press, 2020).

shape foreign jurisdictions. In the case of Canada, for example, Canadian-listed companies have regularly benefitted from Canadian embassies' diplomatic support. However, at times, this support ignores or contradicts human rights imperatives and related foreign policy objectives. Through access to information (ATI) requests,[99] a growing body of research suggests, as Szablowski noted, that Canadian "embassy staff tend to prioritize the economic interests of Canadian extractive firms and adopt industry perspectives" especially on the "illegitimacy of local concerns and protest."[100] Between 2005 and 2017, for example, Canadian extractive investment in the Marlin gold mine in western Guatemala was met with opposition and resulted in attacks against human rights defenders. In this context, in 2010, the Canadian Embassy in Guatemala developed a political advocacy campaign in support of the Canadian mining company Goldcorp, then owner of the Marlin mine, to ensure that it could continue to operate. This support openly contradicted a legally binding order of the Inter-American Court of Human Rights that had granted protection measures to Indigenous human rights defenders opposing the Marlin mining project.[101] As a result, scholars recommend using the notion of "diplomatic liability" and including it in the "broader concept of home-state responsibility over the conduct of extractive companies" to consider diplomats' institutional and individual responsibility. This would imply holding them accountable if they promote or engage in activities that result in human rights abuses.[102]

C. Transnational Litigation

Transnational civil litigation can bring important changes to the extractive normative ecosystem by enabling transnational fora to receive complaints that would normally have been considered in the host country's national courts.[103] This creates new opportunities for the targets of human rights violations in situations where

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[99] See Caren Weisbart, "Diplomacy at a Canadian Mine Site in Guatemala" (2018) Advanced online version Crit Criminol; Caren Weisbart, Jennifer Moore & Charlotte Connolly, "Qualifying as Canadian: Economic Diplomacy, Mining, and Racism at the Escobal Mine in Guatemala" in David P Thomas & Veldon Coburn, eds, *Capitalism & Dispossession: Corporate Canada at Home and Abroad* (Blackpoint: Fernwood Publishing, 2022).

[100] David Szablowski, "Economic Diplomacy and Home State Responsibility for Human Rights Abuses Involving Extractive Industries Abroad: The Case of Canada" (2024) Bus Hum Rights J 4.

[101] Charlotte Connolly & Charis Kamphuis, *The Two Faces of Canadian Diplomacy: Undermining International Institutions to Support Canadian Mining* (Toronto: Justice & Corporate Accountability Project, 2022) at 31.

[102] Melisha Charles & Philippe Le Billon, "Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects" (2021) 8:1 Extr Ind Soc 467 at 470.

[103] For instance, the Canadian Supreme Court's 2020 decision in *Nevsun Resources v Araya* has "opened the possibility of a novel front for transnational human rights litigation: common law tort claims based on customary international law". See Beatrice A Walton "Nevsun Resources Ltd v Araya" (2021) 115:1 Am J Int Law 107; See also Catherine Coumans, "'Minding the "Governance Gaps': Re-Thinking Conceptualizations of Host State 'Weak Governance' and Re-Focusing on Home State Governance to Prevent and Remedy Harm by Multinational Mining Companies and Their Subsidiaries" (2019) 6:3 Ext Ind Soc 675; Simons, *supra* note 4; Roger P Alford, "Human Rights after Kiobel: Choice of Law and the Rise of Transnational Tort Litigation" (2014) 63:5 Emory Law J 1089.

domestic courts are insufficiently independent of local governments or elites and where law enforcement is often involved in human rights violations related to extractive projects.[104] Transnational litigation has the potential to transform the implications of CSR policies, introducing real responsibility into what was meant as a merely rhetorical exercise. In the case of Canada, for example, transnational litigation has introduced a distinct interpretation of the parent company's duty of care in jurisprudence, creating a propitious context for plaintiffs.[105] In *Choc v Hudbay*, Maya-Q'eqchi' villagers were allegedly shot at by security personnel while protesting the Hudbay mining project in Guatemala. A Maya-Q'eqchi' schoolteacher and activist was killed and many Maya-Q'eqchi' women were raped. Hudbay's motion to dismiss claims rested on the argument that a parent company does not owe a duty of care to those wronged by its subsidiary's actions.[106] The Ontario Supreme Court, however, dismissed Hudbay's motion and concluded that Hudbay Minerals had established a relationship of proximity between the two parties by publicly committing to CSR in Guatemala and by adopting the Voluntary Principles on Security and Human Rights.[107] According to the Court:

> (33) The human rights implications of transnational corporate activity have received the attention of numerous international and intergovernmental organizations over the past few decades and have resulted in a range of voluntary codes of conduct developed in conjunction with multinational corporations. Such codes of conduct include the Voluntary Principles on Security and Human Rights, which were established in 2000 and elaborate norms for corporate conduct in the extractive industry when engaging public and private security forces to protect business interests in areas with a potential for violence or conflict. The Voluntary Principles call for a risk assessment of the human rights impacts of security forces and require corporations to screen and train security personnel and establish clear parameters for their use of force. Hudbay stated that this code guided their corporate conduct.[108]

The initial petition was filed in Canada in 2010. The case is ongoing. While the Canadian court's recognition of a corporate duty of care towards affected communities is a positive step for the victims in *Choc v Hudbay*, this important development took place several years after the case started. Moreover, it only opens an avenue for the victims to continue pursuing justice. This particularly long and persistent struggle for justice is only one of many other struggles worldwide; States like Canada

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[104] Charles & Le Billon, *supra* note 102 at 468.

[105] *Ibid* at 474.

[106] Julianne Hughes Jeannett & Marjun Parcasio, "Corporate Civil Liability for Breaches of Customary International Law: Supreme Court of Canada Opens Door to Common Law Claims in Nevsun V Araya", (29 March 2020), online: <ejiltalk.org/corporate-civil-liability-for-breaches-of-customary-international-law-supreme-court-of-canada-opens-door-to-common-law-claims-in-nevsun-v-araya/>.

[107] Charles & Le Billon, *supra* note 103 at 474. See also JA Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press, 2006). For a full account of transnational civil lawsuits related to Canadian extractive activities overseas, see Above Ground, *Transnational Lawsuits in Canada against Extractive Companies. Development in Civil Litigation* (Vancouver: Above Ground, 2018).

[108] *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414.

should be setting a positive example and advancing standards. The challenge of advancing such standards and effectively applying them to positively transform the adverse realities of so many victims affected by extractivism confirms the relevance of the ecosystemic perspective. It not only helps navigate the entanglement of normative regimes but also helps identify and measure their effectiveness. In such a context, an ecosystemic perspective grounded in the victims' realities helps reveal the actual role of the normative instruments and the institutions in charge of applying them. It also shows how such laws and institutions create conditions that affect victims of corporate abuse, facilitating or worsening their search for justice, and identifies pertinent areas of intervention that could contribute to realizing environmental protections, human dignity and rights. For these reasons, the ecosystemic perspective merits far greater attention.

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An ecosystemic analysis of different mHREDD unmasks the complexity of the norms at play when regulating the extractive sector. As shown with the French and Dutch laws, it is the arrangement of soft and hard rules that allows for the emergence of a normative framework that can enforce mHREDD rules in a more efficient manner. The ecosystemic approach points to the normative language that emerges when States apply regulatory rules to extractive companies. It also offers tools to understand mHREDD with an emphasis on the people who are affected by the extractive companies by placing the effects of these rules in context and in relation to other norms that are present in local contexts. The ecosystemic approach also connects mHREDD with other key issues like development and power dynamics between affected communities and State officials such as diplomats. With the shared objectives of developing more effective systems to protect the environment and human rights in relation to corporate practices, several countries (mainly in Europe) are developing stronger normative frameworks. However, these developments are still preliminary and fragile; some laws that have entered into force have already shown important limitations. Despite these challenges, the European cases are relevant examples to follow in implementing changes to the current Canadian mHREDD that could be beneficial to the populations affected by Canadian companies. Moreover, the growing recognition of Indigenous jurisdiction over ancestral lands in Canada and abroad[109] should push Canada to consider those norms in its BHR policy. Institutions such as the CORE must also adopt an approach that considers Indigenous norms and rights in their investigation of complaints against the extractive sector. In such a context, an ecosystemic perspective grounded in the victims' realities helps reveal the actual role of the normative instruments and the institutions in charge of applying them. It also

[109] *Tsilhqot'in v British Columbia,* (2014) SCC 44 at para 87; Micheal Rios, "Indigenous Community in Ecuador Wins Legal Fight to Reclaim Ancestral Land After More Than 80 Years", CNN (29 November 2023), online: <cnn.com/2023/11/29/americas/indigenous-siekopai-ecuador-court-battle-intl-hnk/index.html>.

shows how such laws and institutions create conditions that affect victims of corporate abuse, facilitating or worsening their search for justice, and identifies pertinent areas of intervention that could contribute to realizing environmental protections, human dignity and rights.