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Doing Business in Authoritarian States: Tackling Dilemmas While Preserving Integrity

Norwegian Helsinki Committee

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Preface

The Norwegian Helsinki Committee (NHC) is an Oslo-based, internationally oriented human rights organisation. We support local human rights initiatives in the countries where we are engaged, run projects to document and fight impunity for gross violations of human rights and core international crimes, and work with networks of Parliamentarians that promote freedom of religion or belief. We advocate fundamental freedoms, democratic principles, the rule of law, and the importance of business companies adhering to human rights norms in their operations.

The NHC uses a range of methods, such as monitoring human rights violations, observing elections, developing documentation databases, education, and advocating for national governments and international organisations to place human rights first. We provide expert commentary to the media and submit alternative reports to relevant international human rights reviews. Through social media, we increase popular awareness, garner the political will to confront abuse, and increase respect for human rights.

A significant part of our activities is devoted to strengthening human rights organisations and defenders, whistle-blowers, journalists, and lawyers in Central and Eastern Europe and in the five Central Asian republics. We pay particular attention to individuals, groups and networks that are at risk.

Many of our activities take place in authoritarian states, where government policies and legislation restrict freedom of organisation, expression, assembly, religion, or belief, as well as rights to free and fair elections. The judiciary and media outlets in such states are under the control of the government.

Running business operations in authoritarian playing fields or where institutions are weak may create a range of dilemmas for companies that wish to ensure that human rights are respected in their operations and throughout their supply chain. This report presents and discusses such dilemmas in light of prevailing international human rights norms for business companies. Even companies with the best of intentions and policies may find themselves in situations where they face nothing but difficult choices.

This does not mean that companies must categorically stay away from such states. Instead, we argue that they should step up their support for human rights within their spheres of influence and publicly state their values and principles. Companies struggling to be faithful to their values due to government pressure and persecution need to be supported by democratic states, which, *i.a.*, should introduce targeted

sanctions against corrupt and brutal political leaders and their enablers who trample on human rights. In designing sanctions, the role of international companies should be considered.

Instead of companies leaving, they could remain and search for ways to improve the safety and rights of workers and support communities affected by their operations. In some situations, however, upholding respect for human rights can become so difficult that companies must leave to avoid compromising their values.

However, this should only happen after careful consideration of the costs and benefits of the alternatives.

In the report, we present cases of big Norwegian companies struggling to deal with dilemmas arising from precarious human rights situations and a lack of popular trust in the countries where they operate.

Should they leave or should they stay? There were no easy answers. But there may be better ways of doing both.

Berit Lindeman

Secretary General

Summary

The report outlines dilemmas facing international companies that operate in authoritarian states or states with weak institutions and low level of popular trust. They may react to such dilemmas in different ways, either by withdrawing or staying while making efforts to respect human rights as far as possible. If they choose to stay, there is a range of risks such as negative regime reactions, protests from democracy activists who think the company should signal disapproval of the regime's dismal human rights records by leaving or working harder to promote human rights, or dissatisfied staff that either thinks the company is doing too much or too little for human rights.

The report describes the current international consensus on the responsibilities of business companies to respect human rights, based on *the OECD Guidelines for Multinational Enterprises* and *the UN Guiding Principles on Business and Human Rights*. A recent Norwegian law, the Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), is also presented.¹ The Act went into force on 1 July 2022, making it mandatory for larger companies which are resident or pay tax in Norway to conduct due diligence. It also provides a right for any person to have information from enterprises regarding how they address "actual and potential adverse impacts" of their operations.

The report provides examples of dilemmas facing (or previously facing) Norwegian companies operating in authoritarian or otherwise ethically, legally, and politically difficult circumstances, such as Yara in Belarus, Hydro in Brazil, and Telenor in Myanmar.

While business enterprises must respect human rights, states have much broader responsibilities. Under international law, they must respect, protect, and fulfil human rights within their borders. Human rights are of genuine international concern, so they cannot turn a blind eye to systematic, widespread, or gross human rights violations in other countries.

The report, therefore, argues that decisions by companies operating in authoritarian states on how to address moral dilemmas should not be seen in isolation from what international organisations (such as the UN) and individual states or groups of states are doing to strengthen respect for human rights and address human rights issues in authoritarian states.

1. An official English translation of the Act is available at the website of Lovdata (<https://lovdata.no/dokument/NLE/lov/2021-06-18-99>)

It looks at the complex relationship between decisions by the UN, the EU, the US, or groups of like-minded states to pass targeted sanctions against those who are responsible for or perform human rights violations in authoritarian states where Western companies are struggling to find a moral way to conduct business. Human rights sanctions, or Magnitsky sanctions as they are called, may become an essential part of comprehensive approaches to dealing with human rights crises in authoritarian states.²

Such sanctions, if well designed, can work in concert with the efforts of international non-governmental organisations, domestic activists, and the numerous tools at the disposal of democratic governments wishing to influence an unacceptable, repressive, and often violent situation in authoritarian states. Business companies, including Norwegian ones, who are invested in authoritarian states may play essential roles along with such actors within their spheres of influence.

While walking out may send a strong moral message from business companies, leaving a challenging situation may not always be the best option if the goal is to strengthen human rights. Company measures to ensure respect for human rights throughout its sphere of influence accompanied by targeted sanctions by democratic states against those responsible for the same human rights violations the company aims to address may prove more effective than leaving.

Another hindrance to leaving is that some high-demand natural resources tend to be found only in authoritarian states. A Western company leaving may only mean that a non-Western company without a principled approach to human rights will take over. Developing coordinated and comprehensive strategies to enhance human rights and democratic principles by business actors and democratic states may offer practical and realistic new ways of responding to authoritarianism and grave human rights violations.

However, in some circumstances, withdrawing is necessary to avoid compromising the company's principles and adherence to international norms.

2. For an account of key Magnitsky concepts and how Magnitsky listing can be used better to fight impunity for serious violations of human rights, see: Norwegian Helsinki Committee 16 November 2021 Policy Brief: "Establishing a European Magnitsky Commission" (<https://bit.ly/3sDFnyA>) and Geoffrey Robertson, *Bad People and How to Be Rid of Them: A Plan B for Human Rights*, Biteback Publishing Ltd, London 2021.

1. Introduction: Dilemmas connected with doing business in authoritarian playing fields

There is a wide range of measures that business companies may implement to comply with international human rights norms when doing business in authoritarian states. The prevailing international consensus is that business companies must respect such norms in their operations and ensure they are respected throughout their supply chains. Simply ignoring the norms is not an option.

At the one end of the spectre, companies may cancel contracts, sell out assets, and leave based on forecasts that it will prove impossible to comply with human rights norms given the parameters of the authoritarian playing field. As part of that process, they can officially state their reasons for leaving, such as company principles to refrain from doing business with actors that abuse employees and/or support government repression and to refrain from being part of highly corrupt business practices.

At the other end of the spectre is a range of measures that can be implemented while maintaining business relationships. The companies can publicly criticise human rights violations and defend the rights of the employees of their business partners. They can provide support to improve safety and other vital conditions for employees, including the right to organise and not to be laid off because of exercising civil and political rights. Supporting democratic forces, including civil society actors, independent media, and human rights defenders, outside their strict business sphere are also measures that companies can initiate. They can engage in public deliberation and contribute to self-regulation and public goods provision, as expected by political corporate social responsibility (CSR).³

Initiating such measures in authoritarian contexts, however, are never straightforward. First, they come with risks of negative regime reactions. In the end, a company making efforts to respect human rights in its sphere of influence risks being blacklisted by the regime and even told to leave. Such reactions may depend on how important the regime perceives the company to be in terms of market share, technology, and role in the national economy.

Secondly, even those who may be benefitting from a foreign company's measures to support human rights may be convinced that it is better if it leaves. Doing so will send a strong message to the regime of criticism and protest appalling human rights violations and disrespect for democratic values. In the eyes of an oppressed opposition,

3. On the prospects for successful political CSR in authoritarian contexts, see Anna-Lena Maier, "Political corporate social responsibility in authoritarian contexts", in *Journal of International Business Policy* (2021) 4, 476-495. The article is available at the website of Springer Link (<https://bit.ly/3lemBCH>).

struggling civil society organisations harassed journalists and persecuted civilians, such a message from respected foreign companies may be precisely what is needed to weaken the regime and pave the way for democratic transition in the future.

Finally, internally, within governing structures and among staff, enacting measures that may be seen as controversial and “too activist” may create complex controversies about the proper delimitations of the company’s role. After all, a company’s presence or business relationships cannot be primarily motivated by supporting human rights and democracy. If so, the company would cease being a business actor and become something else. So how to define the balance?

The report does not aspire to give authoritative answers to such questions. Instead, it aims to describe dilemmas inherent in conducting business operations in what could be called ‘authoritarian playing fields’ and discuss the arguments for the chosen direction.

There are no simple answers in such situations, only more or less well-founded strategies to navigate difficult waters.

Entering the fields

Authoritarianism may be defined as a “principle of blind submission to authority, as opposed to individual freedom of thought and action”.⁴ In government, authoritarianism denotes any political system or governance that concentrates power in the hands of a leader or a small elite not under constitutional constraints or responsible to the people. *Authoritarian leaders* often exercise power arbitrarily and without regard to national or international law. They usually cannot be replaced by citizens choosing freely among competing candidates in free and fair elections. The freedom to create opposition political parties or alternative political movements to compete for power is limited or non-existent.

Such rule stands in fundamental contrast to full-fledged democracy but also differs from *totalitarianism* since authoritarian governments usually have no highly developed ideology, tolerate some pluralism in media, civil society, and the political sphere, and lack the power to mobilise the entire population in pursuit of national goals. They exercise power within relatively predictable limits, often motivated by a strong will to remain in power and to ensure that their supporters remain loyal.

4. The quotation and the characterization of authoritarianism are from *Encyclopaedia Britannica*, “Authoritarianism”, accessible on the Britannica website (www.britannica.com).

In general, authoritarian rule suppresses human rights, particularly civil and political rights. Persons or groups exercising freedom of expression, organisation, assembly, or belief outside government control are often perceived as threats to their power by the regimes. Therefore, they often experience that their rights are curtailed and that politically motivated criminal or administrative cases are used in efforts to pacify them. Minority groups, including ethnic and religious groups, LGBTI+ people, and often women, may experience that their rights are restricted and that the regime targets them as scapegoats. Control and surveillance of the population go hand in hand with media censorship and state control over resources.⁵

Participation of opposition candidates and parties in the political competition is obstructed by various measures, such as discrediting them in media and social media campaigns, filing politically motivated cases against them, or by threats, harassment, and physical attacks.⁶

Authoritarian regimes may also restrict, control, and abuse for political purposes the operations of business actors in ways not seen in democratic states. Corruption is often widespread and systemic, while the regime exercises control over the market to ensure that only the political elite benefits from business.⁷ Venezuela's nationalised oil industry and Kremlin's control over Russia's oil and gas resources illustrate how authoritarian regimes take over and use the country's most valuable economic sectors to sustain power and channel benefits to regime supporters.⁸

Workers in state-owned companies are often pressured to vote for the incumbent.⁹ Participation in independent trade unions may be restricted and/or trade unions may be pressured to abide by regime orders. In sum, these measures amount to violations of the political and civil rights of the workers, particularly if they are accompanied by threats of losing their job if they are not abiding by orders.

5. David Hutchins, "Authoritarian Leadership", in: Global Risk Intelligence, *Top Global Risks 2020*, Washington, DC, London, Singapore, Dubai, March 5, 2020 (<https://bit.ly/2P5sBYq>).

6. For more information on election related issues in authoritarian states, see *i.a.* reporting on elections in Belarus, Russia, Georgia, Armenia, Azerbaijan, Ukraine, Moldova, and several other East European Countries by the European Platform for Democratic Elections (EPDE) (<http://bit.ly/2HfFTLg>). The Norwegian Helsinki Committee is a member of the platform. See also extensive and high-quality reporting on elections by the OSCE ODIHR (available on the OSCE website, www.osce.org).

7. In Transparency International's Corruption Perception Index 2020, Russia and Azerbaijan are both ranked 129, while Belarus is ranked 63. In general, authoritarian countries perform much worse than democratic countries when it comes to eradicating corruption (<https://bit.ly/3gzZSq7>).

8. *Ibid.* For compelling documentation of how former KGB cadres became both politically powerful and extremely rich in Vladimir Putin's Russia, see: Catherine Belton: *Putin's People: How the KGB Took Back Russia and Then Took on the West*, William Collins, London 2020.

9. For a description of how this may work, see the news report: "Russian State Companies Force Employees to Vote in Presidential Election", March 13, 2018, website of Mikhail B. Khodorkovsky. (<https://bit.ly/3gjkWAV>)

There may be several other complicating features of authoritarian playing fields. Since authoritarian regimes do not abide by laws or enact laws or decrees that may change the rules of the game overnight, the risk for business actors if they fall out with the regime is considerable. They cannot rely on independent judges to correct wrongdoing against their interests.

The arbitrariness and/or reliance on personal contacts to succeed may also explain why authoritarianism fosters limited economic growth compared with democracies. According to the World Bank's *Ease of Doing Business Rankings*, democracies, and free and partly free countries that respect the rule of law, perform much better than authoritarian states. The top 10 countries are all in this category, while those at the bottom are either authoritarian, dictatorships, or suffering from armed conflicts or political unrest.¹⁰

China and some other authoritarian states achieved high economic growth over protracted periods. However, the risk of political unrest, political crackdowns, security crises, and persecution tends to make life hard for businesses and “place employees, supply chains, and investments at risk. Foreign companies that remain involved in such environments risk suffering from reputational and legal challenges.”¹¹

Western fashion brands buying cotton from factories using forced labour in Xinjiang, China, may testify about reputational and legal risks associated with their business practices. They are “under pressure to renounce cotton harvested in a Chinese region marked by gruesome repression [of the Muslim Uyghur population]”. If they do, however, they face a backlash from nationalist Chinese consumers.¹² If they decide to stay, they will be subject to campaigns for consumer boycotts in the West.¹³

While in some situations, the assessment may be fairly easy – business operations and relationships in an authoritarian state are found to achieve nothing in terms of supporting human rights and a better future for those affected – in other situations, it is not. Boycott and leaving may seem correct, judged from a principled human rights perspective focusing more on sending strong messages than deeming actions based on consequential and utilitarian perspectives. An important question is whether we should look beyond the symbolic perspectives and start weighing consequences for involved persons or communities when making decisions. This report points to the need to merge different perspectives to guide actions.

10. World Bank, *Doing Business: Measuring Business Regulations* (<https://bit.ly/3sxLIbh>).

11. David Hutchins, *Op. Cit.*, page 13.

12. Peter S. Goodman, Vivian Wang and Elizabeth Paton, “Global Brands Find It Hard to Untangle Themselves From Xinjiang Cotton”, New York Times, April 6, 2021 (<https://nyti.ms/3edMogJ>).

13. See for example the campaign, “Zara: Stop using Uyghur Forced Labor” (<https://bit.ly/2QiV5OK>).

One thing is sure, however. When entering authoritarian playing fields – *i.a.*, building factories and assembly lines, buying products, or taking over ownership of local companies – foreign companies that want to uphold moral principles and international human rights norms must be well prepared. Dilemmas will sooner or later arise.

One of the most fundamental questions company executives and boards must address today echoes the 1982 hit by British punk band The Clash: “Should I stay or should I go now? If I stay, there will be trouble, if I leave, there will be double”.

As soon as that question has been answered, many other complex issues must be sorted out.

2. The prevailing international consensus on business and human rights

Several international and national standards on business and human rights exist, as well as sector-specific standards. What most of them have in common is that they are voluntary. In general, they provide norms for responsible businesses to ensure that operations respect the human rights of employees and affected communities.

The two most authoritative international standards are the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights (UNGPs).¹⁴ These documents constitute the framework for legislative work at the national and EU levels to make it obligatory for companies to do human rights due diligence and adhere to human rights norms.

The aim of this chapter is not to provide a complete account of these ground-breaking international documents. It is instead to present their main implications for enterprises that engage in business activities in authoritarian states and to prepare for the discussions in the following chapters on how to conduct business in such environments without compromising on the duty to respect human rights.

OECD Guidelines for Multinational Enterprises

In 1976 the Organisation for Economic Co-operation and Development (OECD) adopted the OECD Guidelines for Multinational Enterprises. Since then, the Guidelines have been updated five times and translated into more than 15 languages.

The Guidelines provide recommendations on responsible business conduct addressed by governments to multinational enterprises operating in or from the 50 adhering countries. While the Guidelines are not legally binding on companies, they are binding on signatory governments which are obliged to ensure that they are implemented.¹⁵

The recommendations cover all significant sustainability risks: human rights, labour rights, and the environment, information disclosure, bribery, consumer interests, science and technology, competition, and taxation.

14. The OECD Guidelines for Multinational Enterprises is available on the OECD website (<https://bit.ly/3BgjaZH>). The UN Guiding Principles on Business and Human Rights is available on the website of the UN Commissioner for Human Rights (<https://bit.ly/3JfCbhy>).

15. Cf. Preface, para. 1 of the Guidelines: “The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. However, the countries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises.”

In addition to setting standards, the Guidelines require governments to establish a grievance mechanism in the form of National Contact Points (NCPs).¹⁶ The NCPs promote the Guidelines and handle complaints against companies allegedly failing to adhere to the standards. This non-judicial grievance mechanism usually handles complaints through mediation or conciliatory practices that seek to help parties reach mutual agreement on past acts and future goals. In this way, the NCPs support access to remedy on a global scale.

Since the mediation procedure was invented in 2000, more than 450 cases have been handled covering employment and industrial relations, environment, human rights, and disclosure of information.¹⁷

In 2018 the *OECD Due Diligence Guidance for Responsible Business* was adopted. It provides practical explanations on how to conduct due diligence, a central recommendation of the Guidelines.¹⁸

The updated Guidelines include a chapter on human rights, consistent with the UN Guiding Principles, implementing *the UN Protect, Respect and Remedy Framework*.

Generally, the Guidelines require multinational enterprises to comply with domestic laws and regulations in the countries where they operate. Enterprises should take into account, prevent, and mitigate negative impacts regarding human rights, workers' rights, the environment, and corruption. Notably, the Guidelines concern both enterprises' operations and supply chain operations.

While governments must *protect* internationally recognised human rights, which are rights that apply equally to all people, multinational enterprises shall *respect* the same rights. They are also expected to find ways to prevent and mitigate negative impacts on human rights and to take corrective action in the case of negative impacts that have already occurred. They shall carry out risk-based due diligence "to identify, prevent and mitigate actual and potential adverse impacts" of their activities.

The Guidelines require enterprises to respect the rights of their workers, including the right to join trade unions. They shall combat discrimination, child labour and forced and compulsory labour. And they shall publish information on their business activities and financial performance regularly and transparently.

16. An overview of adhering countries and National Contact Points is available on the website of the OECD (<https://bit.ly/3rE6uZr>).

17. An overview of cases is available on the website of the OECD (<https://mneguidelines.oecd.org/database/>).

18. The Guidance is available on the website of the OECD (<https://bit.ly/3dVVK0Z>). There is also due diligence guidance by sector (<https://bit.ly/3BePuvX>).

Finally, the Guidelines contain recommendations to prevent and mitigate negative impacts on the environment, fight corruption and bribery, ensure that products and services are safe and of high quality, comply with competition laws, promote economic growth and innovation, and pay taxes promptly and appropriately.

The Guidelines include several recommendations that may be particularly relevant for enterprises operating in authoritarian contexts.

First, “[i]n countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law” (I. Concepts and Principles, par. 2). The Guidelines may thus be interpreted to limit the responsibility of enterprises in situations where domestic laws are not in compliance with international human rights law, by not requiring that they play an *activist* or *civil disobedient* role, placing human rights over domestic law. They should, nevertheless, seek to abide by the Guidelines *as far as possible*.

Second, while the Guidelines primarily address multinational enterprises (*i.e.*, “companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways”), “domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant” to them (par. 5). Small and medium-sized companies, as well as suppliers and sub-contractors, shall be encouraged to follow the Guidelines (Concepts and Principles, par. 6, and General Principles, par. 13).

By broadening the addressees in this way and including suppliers and sub-contractors, the expectations of the multinational enterprises are considerably heightened. They must ensure that not only their activities but also their business partners comply with human rights. In authoritarian contexts, where state-owned or state-directed business companies often neglect the rights of their workers, adhere to corrupt practices, and put restrictions on the right to join trade unions, this may not be easy. Enterprises should nevertheless make efforts in this regard.

Third, enterprises are encouraged to communicate not only their financial results but also to state their values and standards of business conduct and to report on their performance in this regard (III. Disclosure, par. 3). Following this line, a growing number of firms have issued “voluntary codes of corporate conduct”, which express commitments to the environment, human rights, labour standards, consumer protection, or taxation. In authoritarian contexts, such statements and reporting may be interpreted by authorities as provocative since it starkly contrasts with the authorities’ neglect of or breach of such values.

Fourth, enterprises are expected to respect human rights both by not “infringing on the human rights of others” and by addressing “adverse human rights impacts with which they are involved” (IV. Human Rights, par. 1). A state’s failure to uphold its human rights obligations does not diminish the expectation that enterprises respect human rights. In other words, entering authoritarian playing fields where authorities systematically fail to respect human rights should not lead to enterprises lowering their human rights standards. They should, as noted above, seek to uphold such standards as far as possible.

The OECD Due Diligence Guidance for Responsible Business outlines the steps inherent in *addressing and preventing adverse impacts*, including human rights. While it acknowledges and encourages “the positive contributions that business can make to economic, environmental and social progress”, it also recognises that “business activities may result in adverse impacts related to corporate governance, workers, human rights, the environment, bribery, and consumers.”

“Due diligence is the process enterprises should carry out to identify, prevent, mitigate, and account for how they address these actual and potential adverse impacts in their own operations, their supply chain and other business relationships, as recommended in the OECD Guidelines for MNEs [multinational enterprises]. Effective due diligence should be supported by efforts to embed RBC [responsible business conduct] into policies and management systems and aims to enable enterprises to remediate adverse impacts that they cause or to which they contribute.”²⁰

In other words, due diligence refers to *identifying risks* of adverse impacts (human rights, environment, bribery and corruption, disclosure, and consumer interests) and *addressing* actual adverse impacts. While the Guidance does not explicitly address the risk of adverse impacts when operating in authoritarian states, it recognises that the likelihood of adverse impacts increases if “the circumstances associated with their supply chains or business relationships are not consistent with the recommendations in the OECD Guidelines for MNEs” (page 15).

Even if business operations by themselves may not be “inherently risky”, circumstances such as rule of law issues, lack of enforcement of standards, and the behaviour of business relationships may result in risks of adverse impacts. According to the Guidance, due diligence should help enterprises anticipate and prevent or mitigate these impacts. In some cases, due diligence may help them decide “whether or not to go ahead with or discontinue operations or business relationships as a last resort, because the risk of an adverse impact is too high or because mitigation efforts have not been successful.” (*Ibid.*)

20. OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct, page 15 (<https://bit.ly/3dVVK0Z>).

UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs) has achieved status as the authoritative international standard on business responsibility to respect human rights. They were proposed by UN Special Representative on business and human rights John Ruggie and endorsed by the UN Human Rights Council in June 2011.

The UNGP is a set of guidelines for states and companies to *prevent, address* and *remedy* human rights abuses committed in business operations. The guidelines apply to all states and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership, and structure.

The *UN Working Group on Business and Human Rights* was established at the same time as the UNGP was endorsed. It encourages all states to develop, enact and update a national action plan on business and human rights as part of the state's responsibility to disseminate and implement the UNGP.²¹

The UNGP are built on three pillars: *Protect, Respect, and Remedy*.

Pillar I is about the state's duty to protect human rights and provides recommendations on how states can meet their existing international human rights obligations to protect against business-related human rights violations by creating an environment conducive to business respect for human rights.

Even though a state is not per se responsible for human rights violations committed by private actors, it is obliged to take appropriate steps to prevent, investigate, punish, and redress such abuse.²² It should also set out clearly the expectation that all business enterprises domiciled in its territory and/or jurisdiction "respect human rights throughout their operations", also if these operations take place abroad.

Among the steps states shall take is legislation and enforcing laws requiring businesses to respect human rights. They shall guide and encourage business enterprises to communicate how they address their impact on human rights. Additional steps should be taken against abuse by state-owned or controlled business enterprises.

21. Information about the Working Group is available at the website of the Office of the UN High Commissioner for Human Rights (<https://bit.ly/3ISgbKI>).

22. UNGP, Principle 1.

Privatising service provision does not relinquish states from their international human rights obligations. Through their procurement activities and other commercial transactions with business enterprises, states must promote awareness of and respect for human rights.

“Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses” (Principle 7). Such help can include identifying, preventing, and mitigating human rights-related risks of their activities and business relationships, and denying support to companies that refuse to cooperate on addressing human rights issues.

Finally, states must ensure respect for human rights by their own agencies, in their agreements with other states or business enterprises, and in their involvement with multilateral institutions dealing with business-related issues.

In short, Pillar I underlines states’ central role as primary duty-bearers under international human rights law, while clarifying their roles in ensuring that business enterprises respect human rights through legislation, enforcement, and softer measures of guidance and encouragement.

While referring to conflict situations as particularly challenging, requiring additional supportive and punitive steps by states where business enterprises are domiciled, the UNGP fails to address challenges specific to operating in authoritarian playing fields. The risks of being involved in or affected by gross human rights abuses are heightened in such contexts. They require business enterprises to invest heavily in identifying, preventing and finding ways to mitigate those risks to ensure that they live up to the standards set by the UNGP.

Pillar II is about companies’ duties to respect human rights and provides a guide for enterprises to prevent and address adverse human rights impacts. Companies shall both “avoid infringing on the human rights of others” and shall “address adverse human rights impacts with which they are involved” (Principle 11).

According to the commentary on Principle 11, these duties are not dependent on states’ willingness or ability to abide by their human rights obligations.²³ Companies’ responsibility to respect human rights exists independently of state obligations but does not diminish those obligations. The responsibility of business enterprises to respect human rights “exists over and above compliance with national laws and regulations protecting human rights”.

23. The UNGP as endorsed by the UN Human Rights Council includes both a set of 31 principles and short commentaries to each of them.

In defining human rights, the UNGP refer to the International Bill of Human Rights and the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work (Principle 12). However, certain groups of the population may face heightened risks of abuses, and enterprises may therefore need to consider additional standards. In situations of armed conflict, they must respect international humanitarian law.

Human rights, as defined by the International Bill of Human Rights, are categorised as civil, political, economic, social, and cultural rights.

Civil rights protect life, integrity, personal freedom and security, equality before the law and non-discrimination, private and family life, freedom of expression, religion, assembly, association, movement, the right to seek asylum, and property rights.

Political rights protect the right to participate in government, including voting rights and the right to stand for election. According to Article 21(3) of the Universal Declaration of Human Rights, "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

Economic rights protect the right to work, professional rights and appropriate living standards (health, food, housing). *Social rights* protect the individual's right to support in the event of unemployment, illness, disability, and other conditions that the individual cannot control. *Cultural rights* protect the right to education, to take part in cultural life, and to enjoy science, and copyrights.

Operations by enterprises may influence any internationally recognised human right, although based on circumstances some rights are more likely to be influenced than others. The list of internationally recognised human rights contains at least 35 distinct rights, while the most relevant rights for business enterprises may include the following:²⁴

1. Right to life
2. Right not to be subjected to slavery, servitude or forced labour
3. Right not to be subjected to mistreatment
4. Right to equality before the law and non-discrimination
5. Right to access to effective remedies and to a fair trial
6. Right to privacy

24. For an overview of human rights and the rights most relevant for business enterprises, see Frode Elgesem og Njål Høstmælingen, *Næringsliv og menneskerettigheter* [Business and Human Rights], Oslo 2019, Universitetsforlaget, pages 26-27 and chapter 5.

7. Right to protection for the child
8. Rights to fundamental freedoms, such as freedom of religion or belief, thought, information, expression, assembly, association, and movement
9. Right to enjoy just and favourable conditions of work
10. Right to form and join trade unions and the right to strike
11. Right to an adequate standard of living
12. Right to health
13. Right to education
14. Rights of groups that face heightened risks, such as women, children, indigenous populations, and ethnic or sexual minorities

In authoritarian states, political and civil rights are restricted, and authorities may target anyone who does not abide by such restrictions, including employees of business partners of multinational enterprises. While the primary duty of such enterprises is to “avoid causing or contributing to adverse human rights impacts through their own activities”, they cannot turn a blind eye to employees being sacked, arrested, or even tortured by authorities or state-owned or state-controlled businesses they transact with. Employees being targeted in such ways may be because they exercise their political and civil rights, for instance, by supporting or taking part in activities by peaceful political opposition.

When state authorities systematically violate certain human rights, multinational enterprises with stated policies to respect human rights may end up in situations where they are challenged to provide some sort of *protection* or *defence* against these violations. In this way, authoritarian playing fields may challenge the fundamental boundaries of enterprises’ duty to respect human rights as prescribed by the UNGP. The problem they face is not *weak* governments that cannot fulfil or protect rights. They instead find themselves in situations where they, aligned with the UN, other international organisations, and democratic governments, must determine their role in addressing human rights violations committed by business partners and *national authorities*.

In preparing for conducting business in line with the duty to respect human rights, enterprises are expected to express “a policy commitment to meet their responsibility to respect human rights”, conduct due diligence to “identify, prevent, mitigate and account for how they address their impacts on human rights”, and invest in processes to remedy “any adverse human rights impact they cause or to which they contribute” (Principles 15-22).

Where business enterprises have large numbers of entities in their value chains, it may be “unreasonably difficult to conduct due diligence for adverse human rights impacts across them all”. In such circumstances, they should identify where “the risk of adverse

human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritise these for human rights due diligence."²⁵

The purpose of conducting due diligence is to understand "the specific impacts on specific people, given a specific context of operations". It will often entail analysing the human rights situation before engagement, identifying who may be affected by business operations, cataloguing relevant human rights standards, and anticipating how business activities will impact those identified. In situations where positively influencing the human rights situation of specific individuals or groups is difficult, enterprises shall nevertheless use their "leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm."²⁶

Notably, the UNGP anticipates that there may be situations where business enterprises lack the leverage to positively impact a situation where a business partner violates human rights.

"There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.

Where the relationship is "crucial" to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise's business, and for which no reasonable alternative source exists. Here the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial, or legal – of the continuing connection."²⁸

25. UNGP, commentary to Principle 17.

26. UNGP, commentary to Principle 19.

28. Ibid.

The UNGP also underlines that in dealing with such situations, enterprises should consult with experts and civil society organisations and be prepared to communicate externally on how they deal with human rights issues. Communication can take many forms, “including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports.”²⁹

If business enterprises identify that they have “caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”.³⁰ In contexts where it is impossible “to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognised human rights to *the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard*.”³¹

In such complex contexts, including in conflict-affected areas, enterprises must consider the risks of being complicit in human rights violations or core international crimes as “a legal compliance issue”. Such complicity may result in criminal investigations and indictments.

In general, it seems like a good reading that the UNGP go a step further than the OECD Guidelines in prescribing that enterprises respect human rights even if this may conflict with national laws. At least, *the UNGP emphasises the independent role of enterprises regarding human rights*.

Pillar III is about access to justice for victims of business-related human rights violations through effective judicial and non-judicial grievance mechanisms. The state must ensure effective legal remedies supplemented with non-judicial mechanisms – state and non-state. There are also specific criteria for effective complaint mechanisms that apply to state and non-state complaint mechanisms.

Other international standards

Other important international standards are the UN Global Compact and the Voluntary Principles on Security and Human Rights.

29. UNGP, commentary to Principle 21.

30. UNGP, Principle 22.

31. UNGP, commentary to Principle 23 (emphasis added).

In 2000 the *UN Global Compact* was launched at UN headquarters in New York. It was a special initiative of the UN Secretary-General calling companies everywhere to align their operations and strategies with ten stated human rights, labour, environment, and anti-corruption principles. It has become the world's largest initiative on corporate sustainability, with more than 15 000 corporate participants.³²

The Global Compact is not a regulatory instrument but a forum for discussion and a network for communication where companies are brought together with UN agencies, labour groups and civil society organisations. It has two main objectives: 1) To mainstream the ten principles in business activities around the world; and 2) to encourage business enterprises to support broader UN goals, such as the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs).

A resolution by the UN General Assembly adopted on 21 December 2021 reaffirmed UN Member States' support for the mandate of the Global Compact, "to engage the private sector in advancing the Sustainable Development Goals".³³

The *Voluntary Principles on Security and Human Rights* (VPs) were also launched in 2000 and is a multi-stakeholder initiative involving governments, companies in the extractive and energy sectors, and civil society organisations.

The VPs primary purpose is to guide companies doing business in risk-exposed areas, relying on private and/or public security providers to maintain their operations' safety and security and ensure respect for human rights and fundamental freedoms. They are non-binding and offer companies guidance on how to do human rights risk assessment as part of their engagement with security providers and put forward a set of principles to which their private security actors must adhere. The VPs recommend that companies include the principles in their contracts with security providers and ensure adequate training of their security personnel.³⁴

Following the endorsement of the UNGP in 2011, human rights due diligence was established as the preeminent standard by which companies approach adverse human rights impacts resulting from their activities. Until recently companies carrying out due diligence have done so voluntarily. Now there is, however, a growing push at different levels towards making it mandatory.

32. More information is available at the website of the UN Global Compact (<https://www.unglobalcompact.org/>)

33. More information about the resolution and a link to its text is available at the website of the UN Global Compact (<https://bit.ly/3zmt5Mz>). The Sustainable Development Goals (SDGs) were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity (<https://bit.ly/3FRtRUa>).

34. More information is available on the website of the Voluntary Principles (<https://www.voluntaryprinciples.org/>).

At the international level, there are ongoing efforts to advance due diligence laws under a proposed legally binding UN Treaty on business and human rights.³⁵

On 29 April 2020, the European Commission announced that it would launch a legislative initiative on mandatory due diligence for companies domiciled in the EU Member States to prevent adverse human rights impacts abroad and in their supply chains.³⁶ On 23 February 2022, the Commission finally launched such an initiative, a draft corporate sustainability due diligence directive. The proposed directive is a critical component of its *sustainable corporate governance initiative*.³⁷

The draft, which is likely to be adopted within a year, requires large EU companies (with 500+ employees and EUR 150 million+ in net turnover worldwide) and some non-European companies doing significant business in Europe to identify, prevent, end, or mitigate adverse impacts of their activities on human rights, such as child labour and exploitation of workers, and on the environment, for example, pollution and biodiversity loss. Companies that fail to conduct effective due diligence or implement preventative or remediation measures face administrative penalties and civil liability.³⁸

While welcoming the proposal as an important first step, Amnesty International and other human rights organisations were critical that the proposed regulation only will cover about 1 % of EU companies. It also “threatens to restrict access to remedy for victims of corporate human rights abuses by allowing companies to shift their responsibilities onto business partners using contractual assurances”.³⁹

A few Member States have already enacted legislation that obliges business enterprises to perform human rights due diligence, covering many European companies.

35. More information on the contents and process of making a treaty on business and human rights is available on the website of the Business and Human Rights Resource Centre (<https://bit.ly/3qHj8oL>).

36. More information on the initiative is available at the Website of the European Parliament Responsible Business Conduct Working Group (<https://bit.ly/3sTjIYU>). Relevant documents and updates on the status of the initiative is available on the website of the European Parliament (<https://bit.ly/34IXzTv>).

37. European Commission, press release 23 February 2022, “Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains” (<https://bit.ly/3IoWuPP> and <https://bit.ly/3wyIp7L>).

38. For further comments on the proposal, see Marti Flacks, “European Union Releases Draft Mandatory Human Rights and Environmental Due Diligence Directive”, Centre for Strategic & International Studies, 11 March 2022 (<https://bit.ly/3G1XX85>).

39. Amnesty International, “EU: Due diligence proposal ‘a missed opportunity’”, 23 February 2022 (<https://bit.ly/3LmQ0vq>).

3. National laws

Despite developments of voluntary standards at the international level, research shows many global companies have a weak implementation of human rights due diligence. The 2020 Corporate Human Rights Benchmark found that of 230 companies across five sectors, only a minority demonstrated willingness and commitment to take human rights seriously. There was often a disconnect between “commitments and processes on the one hand and actual performance and results on the other”.⁴⁰

Amnesty International Norway’s 2019 business rating of Norwegian companies and international companies with subsidiaries in Norway found that only 47 % of them conducted human rights risk assessments and had a human rights policy.⁴¹

The next step should therefore be adopting a UN treaty on business and human rights, making human rights due diligence mandatory. However, even if proposals for such a treaty have been produced, making it into binding international law may take a long time.⁴² As mentioned above, proposals for EU-level regulations have been launched, but reactions to its coverage and effectiveness have been mixed.

Therefore, legislation at the national level that makes human rights due diligence mandatory seems necessary to achieve further results. Several countries have enacted such laws, covering large and, in some instances, medium-sized enterprises, including select rights or the whole human rights catalogue, and with some laws including environmental standards, decent working conditions and other public goods in addition to human rights.

The Norwegian Transparency Act

The Norwegian Act relating to enterprises’ transparency and work on fundamental human rights and decent working conditions was adopted on 14 June 2021 and entered into force on 1 July 2022.⁴³ The Act makes it mandatory for larger enterprises that are resident in Norway and that offer goods and services in or outside Norway and for larger foreign enterprises that offer goods and services and pay tax in Norway to carry out human rights due diligence (Section 4). They shall publish an account of *how*

40. The 2020 Corporate Human Rights Benchmark assesses the human rights disclosures of 230 global companies across five sectors identified as presenting a high risk of negative human rights impacts. These sectors are agricultural products, apparel, extractives, ICT manufacturing and, for the first time, automotive manufacturing. The result of the assessment is presented at the website of the World Benchmark Alliance (<https://bit.ly/34S9ubN>)

41. The rating is presented at the website of Amnesty International Norway (<https://bit.ly/3KeQCEe>). Modul 4 of Amnesty’s Human Rights and Business learning platform for business, was consulted for this chapter (<https://hub-learning.amnesty.no/>).

42. See footnote 34 above.

43. An unofficial English translation of the Act is available at the website of ‘Lovdata’ (<https://bit.ly/3qqRCNk>).

this has been done and the *results* (Section 5).⁴⁴ The report shall describe the enterprise's structure, area of operations, guidelines, and procedures for handling actual and potential adverse impacts on fundamental human rights and decent working conditions.

It shall also inform about risks of adverse impacts that the enterprise has identified, as well as measures or plans to cease actual adverse impacts or mitigate significant risks, and the results or expected results of these measures.

Notably, the Act makes it mandatory for companies to answer, upon written request, any person regarding how the enterprise addresses actual and potential adverse impacts, including both general information and information on specific products or services (Section 6). Companies will have three weeks to answer, which can be extended to two months if the amount or type of information is particularly burdensome. The information shall be adequate and comprehensive (Section 7).

The Act sets up a supervisory regime consisting of the Consumer Authority and the Market Council, the latter handling appeals of decisions made by the former. In addition to monitoring compliance and deciding on breaches, the Consumer Authority shall provide information, advice, and guidance to ensure that they abide by the Act.

In this way, the Consumer Authority shall support companies in their efforts to abide by the law and, if they fail, decide on whether to penalise them (Sections 8-9 and 11-14).

The Act has been a breakthrough for *mandatory* human rights due diligence and transparency.⁴⁵ It obliges companies to carry out due diligence to stop, prevent or limit negative consequences on human rights and working conditions that the companies have either caused, contributed to, or are directly related to their business activities, products or services through supply chains or business partners. Due diligence must be carried out for the enterprise's entire supply chain, and it will be held accountable for all breaches of fundamental human rights and decent working conditions within its supply chain.

The Act is mainly in line with demands of a broad Coalition for Responsible Business, consisting of business enterprises, civil society organisations, and trade unions, except for not including environmental standards and information on production sites.⁴⁶ This

44. By 'larger companies' are meant companies which, on the balance sheet date, meet at least two of the following three conditions: 1) they have over 70 million NOK in sales revenue; 2) they have over 35 million NOK in balance sheet total, or 3) they have 50 full-time equivalent average number of employees in the financial year (<https://bit.ly/3K5a329>).

45. See *i.a.*, Amnesty International Norway, "Celebrating human rights law for businesses" (in Norwegian only) (<https://bit.ly/3KdPhNV>) and Norwegian Forum for Development and Environment, "ForUM's reactions to the Norwegian due diligence law" (<https://bit.ly/3Kmd3Ya>).

broad-based coalition played an essential role in promoting the Act. Another critical input came from a government-appointed committee to propose an Act on business transparency on supply chains, duty of knowledge and due diligence assessments.⁴⁷

According to a study of the Act's consequences, while there are more than 540 000 companies in Norway, the combined number of big and middle-sized companies is 8 830. They constitute the so-called 'larger' companies covered by the Act.⁴⁸

Legislation in other countries

Legislation in the UK, Australia, and the Netherlands has a narrower scope than the Norwegian Act, while the French Duty of Vigilance Law includes all human rights and the environment. The French law, however, lacks some of the most forward-leaning provisions of the Norwegian Act, such as the right to information from companies about adverse impacts. A German Act adopted in 2021 on corporate due diligence obligations in the supply chain will gradually enter into effect from 2023.

The Modern Slavery Bill was introduced to the UK Parliament on 10 June 2014 and passed into law on 26 March 2015.⁴⁹ The Act obliges companies to report on what they do to prevent modern slavery in their business and supply chains. Companies face no penalty for not complying with the Act, and paradoxically companies can report having done nothing to prevent modern slavery and still comply with the Act.

The Act has nevertheless contributed to awareness about the responsibilities of business enterprises and encouraged other countries, such as Australia, to introduce legislation that goes further.

The Australian Modern Slavery Act was adopted in 2018 and entered into force on 1 January 2019.⁵⁰ It obliges companies that are Australian or conduct business in Australia with annual consolidated revenue of more than \$100 million to submit an annual modern slavery statement. Unlike previous legislation, the Act includes conduct occurring in the supply chain. The Minister keeps Statements in the Modern Slavery Statements Register, which the public may access.

46. For more information about the coalition, see its website (<https://koalisjonenkan.no/>). The demands of the Coalition are available at the Coalition website (in Norwegian only) (<https://bit.ly/322rXRM>).

47. The report of the Committee is available at the website of the Norwegian government (in Norwegian only) (<https://bit.ly/3qxiE5S>).

48. The study is available at the website of the Norwegian government (<https://bit.ly/3Fy5vhc>). See also footnote 39 above.

49. The Modern Slavery Act 2015 is available at the website of the UK government (<https://bit.ly/3Fy2GwK>).

50. The Modern Slavery Act 2018 is available at the website of the Australian government (<https://bit.ly/351bMWh>).

Like the UK Act, there are no penalties for non-compliance, but the Minister may request a company that has failed to comply with its reporting obligations to explain. If it still fails to comply, the Minister may reveal the company's identity and why he believes it has failed to comply.

The Dutch Child Labour Due Diligence Law was first introduced in 2014 and adopted by the Dutch Senate in May 2019.⁵¹ The Law enters into force only in 2022 to provide companies sufficient time to investigate their supply chain.⁵² It applies to all companies that sell or supply goods or services to Dutch consumers, no matter where the company is based or registered. Companies that fail to exercise child labour due diligence may be subject to financial and legal enforcement actions, including multiple years of imprisonment of the legally responsible director.

Companies covered by the Law must submit a statement to a regulatory body confirming that they have exercised supply chain due diligence to prevent child labour. The regulator will publish the statements in an online public registry.

The obligations to carry out due diligence and to produce an action plan take the Dutch law a step further than the UK and Australian Modern Slavery Acts and bring it more in line with the French Duty of Vigilance Law, which was adopted on 27 March 2017 and entered into force in 2018.

This law is unique because it includes respect for all human rights and the environment.⁵³ For the first time, a national law obliged companies to identify, prevent and address human rights and environmental risks that occur because of their business activities. It covers companies with at least 5,000 employees in France or 10,000 worldwide, including their subsidiaries, suppliers, and subcontractors.

The law requires companies to establish and implement an annual "vigilance plan" regarding the environment and human rights. They can be held accountable for these plans, which are required to be made publicly available. The plans should, *i.a.*, include a risk map intended to identify, analyse, and prioritise risks; procedures to regularly assess the risk assessment situation of subsidiaries, sub-contractors, or suppliers with whom they have a commercial relationship; appropriate actions to mitigate risks and impacts; an early-warning mechanism to alert and collect reports relating to the existence or realisation of risks; and a system to monitor the measures implemented and evaluate their effectiveness.

51. The Law is available in Dutch only in the Official Gazette of the Kingdom of the Netherlands (<https://bit.ly/3I9UODk>).

52. Elizabeth Forster, "Dutch Child Labour Due Diligence Law adds to growing global body of corporate human rights legislation", 22 July 2019, Freshfields Bruckhaus Deringer (<https://bit.ly/324MYvj>).

53. The Duty of Vigilance Law (LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre) is available on the website of the French government (<https://bit.ly/33iojUM>).

The enforcement of the law relies exclusively on the courts, as any interested person may request the court to order a company to comply with its obligations or to compensate for the damage caused by its lack of vigilance. There has, however, been extensive criticism that French companies so far have failed to abide fully by the law and that there are few cases brought against them. There is, therefore, a need for more vigorous enforcement.⁵⁴

On 11 June 2021, the German Parliament (“Bundestag”) adopted the Act on Corporate Due Diligence Obligations in Supply Chains.⁵⁵ The Act will enter into force for companies with 3,000 or more employees with a registered office or domestic branch in Germany on 1 January 2023. From 1 January 2024, it will also apply to companies with 1,000 or more employees.

The Act obliges companies to conduct human rights and environmental due diligence in their supply chains, including establishing a risk management system and designating internal responsibilities, issuing a policy statement, regularly performing risk analyses, defining preventive measures, taking remedial action, reporting, and establishing a complaints procedure.⁵⁶

Current status

The adoption of national laws requiring enterprises to conduct due diligence has been celebrated as a breakthrough by civil society organisations, trade unions, investors, political parties, and businesses. Increasingly, business operators view mandatory due diligence as necessary to level the playing field and provide legal certainty.

After France pioneered such legislation in 2017, a dozen European countries have discussions underway on introducing similar legislation. The Norwegian and German laws adopted in 2021 were other significant developments.

54. For a discussion about possible ways to strengthen enforcement of the law, see Sherpa, *Creating a Public Authority to Enforce the Duty of Vigilance Law: A Step Backward?* April 2021 (<https://bit.ly/3nDeHuq>). See also European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), in particular paragraph 23, which recommends EU Member States to “set up or designate national authorities to share best practices, carry out investigations, supervise and impose sanctions.” (<https://bit.ly/3KjAsJv>)

55. The Act on Corporate Due Diligence Obligations in Supply Chains (“Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten”) was published in the federal law gazette on 22 July 2021 (<https://bit.ly/3GQxryt>).

56. For further overview of national laws and legislative processes, see International Organisation of Employers (IOE) and Konrad Adenauer Stiftung, *Key developments in mandatory human rights due diligence and supply chain law Considerations for employers*, September 2021. The report is available on the website of the IOE (<https://bit.ly/3I97jPt>).

However, processes on the EU level to adopt similar legislation have taken some time. The Dutch Minister of Foreign Trade and Development, Tom De Bruijn, stated in December 2021 that he was disappointed with the delays and that his government had decided to introduce a new national law on human rights and environmental due diligence. This way, Dutch law could pressure the European Commission to avoid losing time.⁵⁷ It is now expected, however, that the European Commission's 23 February 2022 proposal of a Directive on corporate sustainability due diligence will be adopted in 2023.

In addition to national laws, more than 40 governments have produced or are producing national action plans on business and human rights to implement the UNGP.⁵⁸ These plans articulate the government's expectations of companies operating in their jurisdiction to act responsibly concerning human rights at home and abroad. Statements by G7 and G20 leaders further add to this picture, underlining that business companies should conduct human rights due diligence.⁵⁹

In sum, after the adoption of the UNGP, developments have shown that voluntary international standards were not enough to reach the stated aims. There must be legislation and effective enforcement. Getting an agreement in the UN may, however, take time. At the EU level, expectations are that a Directive will be enacted in 2023, but its coverage and effectiveness remain to be seen.

The enactment of national laws, therefore, plays an important role.

First, national laws do not introduce new norms. They incorporate established international norms and transform them into legal requirements for thousands of companies registered or active in their respective national jurisdictions. In this way, an increasing number of international business enterprises must integrate due diligence into their operative routines, gain experience and competence, and contribute to normalising human rights and environmental concerns in business operations. Enforcement of the laws varies, but they have made it more difficult for business operators to disregard human rights concerns.

Second, the enactment of national laws put pressure on the EU and the UN to enact legally binding documents. In the words of Kjell Inge Ropstad, the Norwegian government Minister in charge of the Transparency Act proposal: "Even if national laws

57. European Coalition for Corporate Justice, "Dutch minister announces national corporate due diligence legislation", 6 December 2021 (<https://bit.ly/3lgcxsn>).

58. IOE and Konrad Adenauer Stiftung, *Op. Cit.*, page 7.

59. *Ibid.*

on business and human rights represent significant progress, it is paramount that we get stronger international regulation. We do not want to see companies moving to countries with weak legislation.”⁶⁰

Third, by ensuring that enterprises conduct due diligence in their supply chain, their competence to deal with the kind of dilemmas multinational enterprises risk being confronted with when entering authoritarian playing fields will, over time, increase. These playing fields are all, but ‘level’ and navigating them requires extensive competence and balancing skills. You need experience, which you can only get from practice.

60. Statement in Norwegian daily newspaper *Vårt Land* (<https://bit.ly/3qvilmB>).

4. Authoritarian dilemmas

As shown above, significant developments have taken place in the last two decades at the international level, leading to the adoption of comprehensive and consequential human rights principles for business enterprises. The UN and other governmental and non-governmental organisations also offer a range of meeting places and services for enterprises that want to increase their capacity and competence in dealing with human rights issues. A growing number of states have enacted action plans and/or legislation to promote enterprises' respect for fundamental human rights.

Initially, these developments were based on the realisation that global trade, cross-border supply chains, and the increasing role of large multinational enterprises in influencing and shaping the lives of people around the globe required stronger norms and regimes to ensure respect for human rights, the environment, and decent working conditions.

The breakdown of communism and the end of the Cold War around 1990 completely altered the world economy. The supply chains of supermarkets and consumer goods industries spread deeply into Asia, Africa, and South America. Oil, mining, and financial companies invested heavily in countries that were previously denied to them by political or ideological barriers. Multinational telecom and IT companies engage everywhere.⁶¹

While companies have seized the opportunities presented by globalisation, they have often been utterly unprepared for the risks presented by their headlong rush into these new markets. Companies have found themselves and their business partners operating in countries where corruption, injustice, internal conflict, and human rights violations are rife. An increasingly alert and critical world has acted as a watchdog, highlighting corporate malpractice and the links between corporations and repressive regimes.

Media revelations of business abuse of workers or pollution of the local environment added weight to those who argued that globalised business operations often produced more misery than benefits for many individuals and societies.

In such a perspective, therefore, the new norms about business and human rights represent significant progress in the global struggle for human rights, even though implementation of the norms varies. However, during the same period as these norms

61. For an overview of these developments and an assessment of the relationship between companies and human rights in the context of globalisation, see Rory Sullivan (Ed.), *Business and Human Rights: Dilemmas and Solutions*, Routledge 2017. The book also considers a range of specific examples of how companies have behaved in situations where human rights violations have occurred or where companies have a role or influence in protecting or promoting human rights.

were increasingly endorsed, numerous states experienced a significant decline in democratic governance and human rights. The so-called US-led liberal international order organised around “market exchanges and private property; the protection of political, civil and human rights; the normative superiority of representative democracy; and formally equal sovereign states often working through multilateral institutions” seems to have failed in advancing democracy. Instead, authoritarian governments use the liberal order to propagate authoritarian governance and illiberalism.⁶²

According to Freedom House, a human rights think tank, 2020 “marked the 15th consecutive year of decline in global freedom ... The impact of the long-term democratic decline has become increasingly global in nature, broad enough to be felt by those living under the cruellest dictatorships and by citizens of long-standing democracies. Nearly 75 per cent of the world’s population lived in a country that faced deterioration last year.” The trend continued in 2021.⁶³

The war in Ukraine started in 2014 and escalated dramatically from 24 February 2022 with a massive Russian invasion aimed at seizing Ukraine’s capital Kyiv and other major cities and replacing its Western-oriented government. While not achieving its goals, the attack illustrated the dangers of a world where big powers, led by authoritarian governments, disregard international law. The war created enormous challenges for Western companies invested in Russia due to sanctions and pressure from consumers and investors that they should exit the country.⁶⁴

These developments require more reflection on how multinational enterprises should prepare for and engage in business operations in increasingly authoritarian contexts. The OECD Guidelines and the UNGP effectively state the norms enterprises should abide by but give limited guidance on operating in such contexts. Much is left for the enterprises themselves to decide on.

Multinational enterprises that want to prevent or mitigate adverse human rights impacts of operations, products, or services through their business relationships in authoritarian contexts may face a range of complex scenarios. Many of them are linked to the fact that in authoritarian states, Pillar 1 of the UNGP is hardly or not at all

62. Cf. Alexander Cooley and Daniel H. Nexon, “The Real Crisis of Global Order: Illiberalism on the Rise”, *Foreign Affairs*, January-February 2022 (<https://fam.ag/3JAKqpE>). The US Biden Administration, recognising these challenges, initiated a new push for democracy, a so-called Summit for Democracy, which aims to renew “democracy in the United States and around the world” to meet “the unprecedented challenges of our time” (<https://bit.ly/3LMkXtg>).

63. Sarah Repucci and Amy Slipowitz, “Freedom in the world 2021: Democracy under siege”, available at the website of Freedom House (<https://bit.ly/31AR0LJ>). Sarah Repucci and Amy Slipowitz, “Freedom in the world 2022: The Global Expansion of Authoritarian Rule” is available at <https://bit.ly/3RMsYCb>.

64. For an overview of how multinational enterprises have reacted, see New York Times, “Companies Are Getting Out of Russia, Sometimes at a Cost”, Published 9 March, updated 23 May 2022 (<https://nyti.ms/3GI1M8E>).

implemented. State authorities do not play a protective role regarding human rights, ensuring that business enterprises respect human rights through legislation and other means.

Another critical factor is that authoritarian rulers tend to become more repressive over time, leading to playing fields becoming increasingly tilted against companies that strive to uphold respect for human rights throughout their supply chains. There are several reasons for this negative trajectory.

Autocratic rulers often come to power by promising to remove the elite's power, root out corruption, create stability, and improve the people's economic situation. When they fail to deliver on these promises and their popularity drops, restrictions on civil and political rights are a 'logical' step to stay in power. They need to control media, judiciary, election administration, and civil society to ensure their rule is positively portrayed, supported by court decisions, affirmed in 'elections', and hailed by loyal 'popular' movements and groups. Control, ensuring loyalty, and denying the growth of alternative political movements are among the critical components of autocratic governance, eroding respect and protection of human rights.

In the post-Soviet space, many leaders that came to power during the 1990s and the early 2000s were shaped by education and experiences during the previous years of communist dictatorship. In Russia, many of those close to President Vladimir Putin have a background in KGB or FSB, its successor security service. They adhere to specific ideas, habits, and emotions; what has been framed as 'the code of Putinism' by political scientist Brian D. Taylor.⁶⁵ Its main ideas are 'statism, including 'great power statism', 'anti-Westernism', 'anti-Americanism', and conservatism/antiliberalism. Its main habits and values are control, order, unity, loyalty and hypermasculinity, and it is influenced by emotions such as respect/disrespect and humiliation, resentment, and vulnerability/fear.

It is not hard to understand that by deciding on significant political, economic, and societal issues influenced by this code Putin and his aides were led to undermining democratic governance. The democratic experiments of the 1990s lost to increasingly authoritarian laws and policies. The point is, however, that the authoritarian turn in Russia and some other post-Soviet states should not be interpreted as the inevitable result of authoritarian cultures and traditions in these countries, favouring strong man authoritarian rule. Opinion research indicates, on the contrary, that contemporary Russians are not favouring authoritarianism. Instead, they want democracy and a "strong hand", supporting many democratic rights and freedoms.⁶⁶

65. Brian D. Taylor, *The Code of Putinism*, Oxford University Press, 2018.

66. Op. cit., page 37.

Suppose this is true for Russia and other post-Soviet autocracies; it has important implications for enterprises that want to ensure respect for human rights throughout their sphere of influence. They may find fertile ground locally, receiving support from workers and local communities who wish human rights to be respected. At the same time, central authorities will guard every step that could embolden people, trade unions, and civil society organisations to demand change.

Another implication of the trend of increased repression is that an assessment at an early stage in the authoritarian cycle may conclude that the enterprise will be able to ensure respect for human rights to a sufficient degree. Still, after a while, the pressure from an increasingly repressive state gradually diminishes its leverage.

The enterprises may find themselves in a situation like multinational enterprise *Yara* in Belarus. It achieved significant results in efforts to improve the work safety and conditions of workers of its business partner (Belaruskali) while being criticised by political opposition and civil society groups through the same business relationships to finance the increasingly repressive regime of Alexander Lukashenko.⁶⁷

The centralised ownership structure in many authoritarian states, making business part of the survival machinery of the regime, may also result in business partners of multinational enterprises being under orders *not* to respect certain human rights. This may result in situations where the foreign enterprise meets resistance and lacks cooperation from the leadership of their business partners, while workers are conducive to change. This creates dilemmas:

- How far can a foreign company align itself with workers against the leadership of its business partners?
- If the management of a partner company is the extended arm of a repressive regime, should it take on a protective role related to workers and trade union representatives?

The fundamental authoritarian dilemma for foreign enterprises may precisely be its dual role as a local protector and promotor of human rights, while at the same time, the regime uses its presence and the money generated from its business operations for repressive purposes:

- How to balance human rights gains achieved in the enterprise's sphere of influence against claims and realities that it is indirectly supporting repression by continuing

67. For information about Yara's view on its situation in Belarus, and presentation of the results it has achieved, see its report published on 9 January 2021: *Background and progress report on Yara's engagement with Belaruskali and Belarus Potash Company in Belarus* (<https://bit.ly/33H8k2e>). For further details and discussion on Yara's dilemmas in Belarus, see Chapter 5 below.

business relations with companies controlled and/or owned by the regime?

Today, most countries hold regular elections. Democracy does not end with a military coup or a fascist or communist violent takeover; Myanmar is a recent exception. "Since the end of the Cold War, most democratic breakdowns have been caused not by generals and soldiers but by elected government themselves. Like Chávez in Venezuela, elected leaders have subverted democratic institutions in Georgia, Hungary, Nicaragua, Peru, the Philippines, Poland, Russia, Sri Lanka, and Turkey. Democratic backsliding today begins at the ballot box."⁶⁸

Populist rulers, who may be seen as the modern autocratic ruler *in spe*, came to power by making promises of reclaiming and strengthening democracy by ridding it of corrupt elites. Step by step, he weakens democratic institutions, removes checks and balances, and puts measures in place to pressure and control people to remain loyal. Work-place democracy, deliberations as a method of agreeing on wage levels and other issues, and independent trade unions may all be seen to conflict with this script.

Therefore, trade unions and civil society organisations are restricted and controlled to ensure they do not become fertile ground for developing political alternatives, the nightmare of any autocratic leader. Workers of state-owned or controlled companies may be ordered to vote for the incumbent to avoid losing their job. Their peaceful protests against low wages and dangerous working conditions may be portrayed as a threat to the state's Constitutional order, extremism and even terrorism.

The 2011 shooting of protesting workers in the Kazakh oil industry in Zhanaozen may serve as an example of how far authoritarian governments are willing to go to end protests that may grow into existential threats to the regime. The brutalisation of work-related conflicts creates additional dilemmas for multinational enterprises.

On 16 December 2011, police opened fire on unarmed citizens of Zhanaozen in Western Kazakhstan. The victims included oil workers who had been on strike for seven-eight months and innocent passers-by. Authorities claimed that police had begun shooting in self-defence, but videos appeared on the internet showing how people ran from armed men in uniform, who were shooting to kill.⁶⁹

According to official data, 16 people died, and roughly 100 were injured. Zhanaozen residents and human rights defenders said the number of victims may have been several times greater. A state of emergency was immediately declared in the city, making communication and information sharing almost impossible. Reportedly,

68. Steven Levitsky & Daniel Ziblatt, *How Democracies Die*, Broadway Books, New York 2019, page 5.

69. «They shot to kill: the massacre of Kazakhstan's striking oil workers, eight years on», *openDemocracy*, 13 January 2020 (<https://bit.ly/33yDqc7>).

hundreds of men of all ages were detained and beaten by police. Subsequently, 37 people, including participants in the oil workers' strike, were tried and sentenced to time in jail or suspended sentences. Five police officers, and the director of the detention centre where people were tortured, were also tried for exceeding their legal powers.⁷⁰

Foreign enterprises having representatives present in such situations may face serious issues. Their priorities focus on the security of its staff and its business interests, but how to delineate the scope of liability:

- Should foreign enterprises remain silent to protect their interests, or should they be vocal in condemning serious human rights violations committed in front of their eyes in broad daylight and contribute to exposing the truth about the violations?⁷¹

According to human rights organisations, Kazakhstani authorities did everything to prevent independent reporting and investigations after the massacre. The official account that the protesters had attacked police was only disputed when private videos and testimonies started to appear online 7-8 days after the killings. It is clear from the videos that no one was threatening the police, that a police unit came onto the square and started shooting.

According to the Norwegian Helsinki Committee, "Investigations following the incident bear signs of determining scapegoats rather than addressing the conflict's core issues. Since the Zhanaozen events, the pressure on independent voices in Kazakhstan has intensified; activists are imprisoned, demonstrations hindered, and independent media outlets closed or involved in court cases."⁷²

In situations with serious deterioration of human rights, the fundamental question for foreign enterprises may be whether they should stay or go. The UNGP is clear that "there are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so."⁷³

70. *Ibid.*

71. Several international companies were involved in the oil business in the region. The strikes started in Ersai Caspian Contractor; a firm linked to an Italian company, which supplied and repaired equipment for the oil producers. In solidarity with that strike, another strike started in Aktau, at Karazhanbasmunai, which operates many oilfields in Mangistau region. The oil workers demonstrated in front of the head office, demanding a pay rise and fair working conditions. Karazhanbasmunai had been Canadian owned; then the authorities sold a 50 % share to a Chinese company. A Chinese director was appointed, and this had an effect on the immediate climate of [labour] relations. Workers at Ozenmunaigaz, a company with 12 employees in Zhanaozen, came also out in solidarity. *Ibid.*

72. *Ibid.* Cf. Norwegian Helsinki Committee, *Zhanaozen: NHC concerned with crack-down on independent voices one year after*, 19 December 2012 (<https://bit.ly/355lAxx>).

73. UNGP, commentary to Principle 19.

Even in complicated human rights settings, a foreign enterprise may be able to promote human rights and achieve significant results with its business partners. It may achieve substantial progress in its supply chain but is simultaneously asked to leave by political opposition and human rights groups.

The resulting dilemma is undoubtedly one of the most difficult:

- Should I go to save my reputation and ensure that the authoritarian and repressive regime cannot profit from my presence and business, or should I stay with colleagues and trade union representatives who ask me not to abandon them?

5. Testing the waters

Many companies have encountered difficult situations when implementing their human rights policies in authoritarian or otherwise challenging contexts. They experienced that “certain human rights issues may be outside the control of companies, others may be too large for companies to address on their own, and, in other situations, the pressures on companies to address specific issues may be outweighed by countervailing pressures.”⁷⁴

Yara’s situation in Belarus illustrates the complex dilemmas facing an international business enterprise with strong human rights policies, which was operating in an increasingly repressive autocracy.

5.1 Yara in Belarus: Fertilising the soil for democracy

*Should I stay or should I go now
If I go there will be trouble
If I stay there will be double
So you got to let me know
Should I stay or should I go*

English punk band The Clash, 1981

Belarus has never been a democracy.

The same can undoubtedly be said of several other former Soviet republics. But perched as the country is on the edge of the European Union, decades of systematic human rights violations, as well as the recent crackdowns on civil and political rights, have earned it an unenviable reputation as “the last dictatorship in Europe”. The situation after Russia made use of Belarusian territory during its February 2022 invasion of Ukraine has certainly not made the situation less challenging for the country’s embattled civil society activists, many of whom have received or are expecting lengthy prison sentences.

In the following, we’ll leave aside the unprecedented developments in the region after Russia’s attack on Ukraine and look at the situation in Belarus leading up to that point. The Organisation for Security and Cooperation in Europe (OSCE) has not given thumbs up to a single election organised under ‘President’ Alexander Lukashenko, who came to power in 1994 and has held on ever since.

74. Rory Sullivan (Ed.), *Op.Cit.*, page 14.

The UN currently has 13 Special Rapporteurs with single-country mandates. Belarus is the only European country with this special status, alongside notorious regimes such as Syria, North Korea, and the Central African Republic.⁷⁵

Belarus has been under various forms of western sanctions since 2004, the US and EU sanctions regimes being strengthened at times of deepening human rights crisis such as in 2006, 2011 and most recently, in 2020-2021. Whatever their effect, the international community's special attention bestowed on Lukashenko has yet to create a democracy or unseat him.

Yara International is a Norwegian chemical company particularly involved in producing fertilisers. The Norwegian government owns more than a third of the company and is its largest stakeholder. Yara is responsible for some 17,000 employees and has operations in over 60 countries.⁷⁶

Yara's parent organisation until the de-merger of the fertiliser business in 2004 was Norsk Hydro. The company made its first purchase of potassium from Belarus in March 1996.

Potassium is commonly extracted from a mineral salt called potash. The curious-sounding word comes from *pot-ash*, referring to ashes soaked in a pot, which was how water-soluble salts containing potassium were historically produced. Although regular consumers rarely lend it a thought, potash is an essential fertiliser in global food production. Potassium is extracted from a few specific places around the world. One of those places is Belarus.⁷⁷

In 2020, some 43 million tonnes of potash were produced globally. The largest share by a long shot came from Canada (33 %), with Russia and Belarus producing an equal 17 % each and China 12 % of the total.⁷⁸ Smaller amounts came from Germany, Israel, and Jordan, while several countries in the Americas had minute shares of the cake alongside Laos and two former Soviet republics, Uzbekistan and Turkmenistan. The largest exporters of potash are Canada (39 %), Belarus (21 %), Russia (19 %), Germany (6 %), and Israel (6 %),⁷⁹ while China, Brazil, the US, and India are the largest consumers.⁸⁰

75. For more information, see the website of the Office of the UN High Commissioner for Human Rights (<https://bit.ly/3GHeA8U>).

76. More information is available at Yara's website (<https://bit.ly/3qFOqxs>).

77. There are deposits of potash currently being mined in Canada, Russia, Belarus, China, Israel, Germany, Chile, the US, Jordan, Spain, the UK, and Brazil (<https://bit.ly/3AdAFtc>).

78. Melissa Pistili, "10 Top Potash Countries by Production", available at the website of Agriculture Investing News (<https://bit.ly/3s5QNea>).

79. "Potash Facts", available on the website of the Government of Canada (<https://bit.ly/3tcIDl5>). Figures of 2020.

80. Statista, "Consumption of potash fertilizer worldwide in 2018, by country»" (<https://bit.ly/3tvWbHF>).

Belaruskali's potash plant is in the town of Salihorsk.⁸¹ The name means "Salty Hills" and refers to the mounds of "kalinaya sol" – Russian for potash – that have dotted the area since the town's construction in 1958.⁸² This potash city of Belarus currently has a population of just over 100,000.

Presidential power grab

At the time of Norsk Hydro's (currently Yara) entry into the Belarusian market in 1996, Lukashenko was locked in a bitter power struggle with parliamentary leaders. In the same year as the Norwegians made their first Belarusian potash purchase, Lukashenko forced through a referendum in which Belarusians were asked to vote on several issues, including constitutional amendments that would dramatically expand the president's powers.

According to official results, almost 84 % of voters approved the amendments proposed by Lukashenko. Some 80 % supposedly also voted to retain the death penalty. The OSCE was markedly concerned⁸³ and condemned the vote as violating democratic standards.⁸⁴

Even at this early point, an OSCE fact-finding mission to Belarus concluded that "there is every indication that the Belarusian authorities are constructing a totalitarian system of government".⁸⁵

They have been proven right.

In the 25 years since that first Norsk Hydro potash purchase, Lukashenko's regime has made no attempt at building a democratic state or responding to the international community's human rights concerns. On the contrary: Violations of fundamental human rights have grown systematic and endemic, including restrictions on fundamental freedoms, political imprisonments, and inhuman treatment by police. Public protests against Lukashenko have come in waves, as have the crackdowns on civil society. Still, the opposition has kept up a certain momentum despite arrests, imprisonment, and

81. Belaruskali is one of the largest state-owned companies of Belarus, and one of the largest producers of potash fertilizers in the world. It is the largest single taxpayer in Belarus and an important source of foreign currency of the Belarusian government (<https://bit.ly/3GGWAj4>).

82. For more information about the town, see "Salihorsk", available at the website of Russian Wikipedia (<https://bit.ly/3qaNeRB>).

83. «OSCE Troika Ministers issue statement on Belarus», 16 November 1996 (<https://bit.ly/3547L3g>).

84. Michael R. Gordon, "President of Belarus Wins Referendum on Expanding His Power", *New York Times* November 26, 1996 (<https://nyti.ms/3s0gtsE>).

85. Quotation from Human Rights Watch, "Belarus and the International Community" (<https://bit.ly/30pv1H0>).

exile of central figures. Belarusian human rights organisations such as Viasna and news outlets like Charter'97 have kept up their invaluable work under extremely trying conditions.⁸⁶

In the years leading up to 2020, Belarusian repression seemed almost to have settled into some status quo. However, a tipping point in public opinion was reached by falsifying the results of the presidential elections on 9 August 2020 to secure Lukashenko's sixth re-election.

"I won't hang on to my seat with my fingers turning blue", Lukashenka told the media before the elections.⁸⁷ However, with tens of thousands marching in the capitol's streets, desperately hanging was precisely what he decided to do.

Unprecedented protests and repression

Following the announcement of results on 10 August 2020, thousands of protesters clogged Belarusian streets. The size of the demonstrations was unprecedented and would soon paralyse significant parts of Belarusian society, except the police force, who responded with unprecedented brutality. The protests quickly spread to all corners of society, including Belaruskali's potash plant in Salihorsk.

At the first wave of protest supported by labourers at Belaruskali, Yara was indirectly drawn into the conflict between Lukashenko and the democracy movement. As the situation grew increasingly severe, it would raise difficult questions for the company's leadership, including the fundamental question of whether to stay or go.

On 14 August 2020, in response to police raids and arrests in Salihorsk, residents gathered outside the potash plant with demands being read out in public. The demands included removing riot police, declaring voting results invalid and releasing political prisoners. The following Monday, 17 August, strike committees began being set up at Belaruskali and other factories such as the Belarus Metallurgical Plant and Grodno Azot.

According to the leadership at Belaruskali, 120 employees did not show up at work on

86. For more information about Viasna and Charter'97, see the organisations websites (<https://spring96.org/en>; <https://charter97.org/>).

87. RFE/RL's Belarus Service, "As Belarus Elects New Parliament, Lukashenka Says He Will Seek Another Presidential Term", 17 November 2019 (<https://bit.ly/34ekiBe>).

17 August, and a total of 671 employees were absent the following day.⁸⁸ However, this initial strike lasted only two days, with most employees returning to work after discussions with Belaruskali leadership.

The world watched in shock at the brutality of Belarusian riot police as they beat, arrested, and tortured civilian protesters. Videos and images of police violence were widely circulated in global media, partly thanks to the efficiency of popular Telegram channels such as Nexta,⁸⁹ co-founded by journalist Roman Protasevich. Lukashenko himself seemed pushed to the brink of madness. Two weeks into the protests gripping the country, he was seen jumping out of a helicopter brandishing a machine gun. He was apparently ready to protect his position come what may, shoulder-to-shoulder with his 16-year-old son, Kolya.

Yara CEO Svein Tore Holsether's visit to Salihorsk on 18 September 2020 could hardly have come at a politically more turbulent time. The day before, on 17 September, Lukashenko was hit with a significant setback as the European Parliament not only voted to reject the result of the presidential elections but also to welcome the recently established Coordination Council as the "interim representation of the people". MEPs called for EU sanctions against the regime.⁹⁰

Yara's position

On 22 September 2020, the situation in Belarus had worsened to the extent that Yara felt it was necessary to issue an official statement addressing the events.⁹¹ In the statement, Yara underlined that the enterprise "respects international human rights, freedom of expression and the right to participate in free elections. We endorse the UN's guiding principles on business and human rights, and we recognise and respect workers' rights, including the right to organise and the right to strike."

It pointed to "a clear expectation" that business partners follow Yara's Business Partner Code of Conduct and "comply with laws and regulations, as well as internationally recognised standards for human rights, employee rights and ethical business conduct."

88. Onliner, "Забастовка шахтеров «Беларускалия» признана незаконной, несколько человек задержаны возле суда» [The strike of Belaruskali miners was declared illegal, several people were detained near the court], 11 September 2020 (<https://bit.ly/3J6lfdA>).

89. https://t.me/nexta_tv

90. European Parliament News: "MEPs call for EU sanctions against Belarusian President and Navalny's poisoners", 17 September 2020 (<https://bit.ly/3Guq6DG>).

91. Yara News and Media, "Yara concerned over Belarus situation (updated September 22)", 22 September 2022 (<https://bit.ly/3shT30I>).

The statement focused on the “safety and well-being” of Belaruskali workers while leaving out the specifics of the crisis gripping Belarusian society at the time. It referred to human rights standards set out in Yara’s Business Partner Code of Conduct and the importance for the future business relationship that Belaruskali adheres to the standards set out in this document.⁹²

Notably, the statement said Yara had support from stakeholders, including activists and trade unionists, in continuing “a close dialogue” with Belaruskali and the Belarusian Potash Company (BPC).

Even as the statement was published, students protested outside Minsk universities while masked police targeted individual protesters, dragging them into waiting minivans.⁹³ Throughout the ongoing political and human rights crisis, Yara was repeatedly criticised for its focus on the safety and well-being of the workers of its business partners while neglecting the broader picture of repression in the country and how its purchase of potash fed the Lukashenko Regime. There were also claims that Belaruskali misled Yara to believe it could help improve workplace conditions, which had been neglected for years.⁹⁴

The second wave of support from labourers came after 11 weeks of mass protests and after Lukashenko failed to react to an ultimatum to surrender power by midnight on 25 October. Some 100,000 people flooded the streets of Minsk⁹⁵ as opposition leader Svetlana Tikhanovskaya announced the launch of a nationwide strike.⁹⁶ Students joining the strikes were expelled from the university.⁹⁷ Apart from Belaruskali, strikes began at numerous other large Belarusian factories involved in the oil industry and producing cars, tractors, and appliances.

In Minsk, student strikers were expelled from the university.⁹⁸ In the mines, potash production was halted, and authorities fought back against the workers. On 12 September, Minsk Regional Court declared the strike to be illegal. On 19 November, Belaruskali announced through its Telegram channel that 49 employees at the factory had been fired for participating in the strike.⁹⁹

92. The Code is available on the website of Yara (<https://bit.ly/3sAzyjH>).

93. Kanal24, «Акции студентов, обращение спортсменов: протесты в Беларуси 22 сентября – фото, видео» [Students' actions, sportsmen's appeal: protests in Belarus on September 22 – photo, video], 22 September 2022 (<https://bit.ly/330rjoq>).

94. Lara Rasin, “Norway’s Yara International accused of funding Belarus dictatorship: “Can you live knowing you helped murderers and rapists?””, 11 May 2021, *Norway Today* (<https://bit.ly/3HwrWVH>).

95. DW, “Belarus: Over 100,000 protest against Lukashenko ahead of strike ultimatum”, 25 October 2020 (<https://bit.ly/3HwT2w5>).

96. The announcement was made on Telegram (<https://bit.ly/33k0Kul>).

97. Reuters, “Belarusian students complain of expulsions after joining opposition strike”, 28 October 2020 (<https://reut.rs/3rxjS1E>).

98. *Ibid.*

On 22 November, tens of thousands of people again gathered in Minsk, chanting “Long live Belarus!” while authorities shut down internet and telephone connections to hinder protesters from organising. Several hundred were arrested, and at least a dozen were taken to hospital after being beaten by riot police. Three days later, Yara issued another statement which largely echoed the points raised in the September statement but added that the company had engaged in frequent dialogue with Belaruskali management, underlining a continued belief in “dialogue as a tool for improvement”.¹⁰⁰ The statement referred, however, to a “deteriorating political and security situation” in Belarus and Yara’s concern for the well-being of the Belaruskali workforce.

By the time of Yara’s CEO statement on 5 December 2020, improvements in working conditions appeared not to have come about. On the contrary, Holsether said, Yara had not seen “significant improvements” for Belaruskali workers. The situation was “not tenable” for Yara as a company.¹⁰¹

The statement referred to the suppression of human and worker’s rights, as described in a “recent report by the OSCE Rapporteur”.¹⁰² It reiterates that “Yara has a strong commitment to the universal human rights agenda and backs the UN High Commissioner for Human Rights in her condemnation of human rights abuses in Belarus”. The statement’s focus is, however, on Yara’s “expectation that workers’ rights are respected” and the company’s concern at reports that workers who “have expressed their democratic rights in a peaceful manner” had been dismissed. The statement also referred to “alarming” safety incidents on site.

Increasing pressure on the company

On 17 December, Belaruskali issued a press release stating the company was revoking disciplinary measures against staff. It noted that those who had lost their jobs over strikes during the fall of 2020 (more than 50 employees) could get their jobs back if

99. DW, ““Беларуськалий” уволил почти 50 сотрудников за участие в стачках» [Belaruskali dismissed almost 50 employees for participating in strikes], 20 November 2020 (<https://bit.ly/3ruJBYo>).

100. Yara News and Media, “Yara concerned over Belarus situation”, 25 November 2022 (<https://bit.ly/3shT30l>).

101. Yara News and Media, “Message from Yara CEO Svein Tore Holsether on situation in Belarus”, 5 December 2020 (<https://bit.ly/3LpaXXY>).

102. Holsether refers to a report by Wolfgang Benedek, “OSCE Rapporteur’s Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus”, 5 November 2020 (<https://bit.ly/3HIW1I9>).

they re-applied.¹⁰³ According to Yara, the 17 December 2020 announcement by Belaruskali to provide for fired workers to return was “a direct consequence of the Yara engagement with Belaruskali ...”¹⁰⁴

Yara’s social media presence was gradually transformed into a platform for Belarusian democracy activists. A casual “Season’s Greetings” on Yara’s Facebook page on Christmas Eve 2020 attracted over 1000 comments, most of them pleading with Yara to “stop supporting torturers and murderers” and “stop supporting the dictator”.¹⁰⁵ On Twitter, posts from Yara’s account on anything from holidays to climate change would attract negative reactions from Belarusian followers. A simple re-tweet from Davos about fair and sustainable development could draw dozens of angry comments about Yara’s contracts with the “fascist” Belarusian regime.¹⁰⁶

On 21 January 2021, a fourth public statement from Yara underlined that their approach of “seeking influence through continued presence” was supported by several Belarusian trade unions, including the Belarus Independent Trade Union (BITU), The Belarus Congress of Democratic Trade Unions (BKDP) and IndustriALL.¹⁰⁷

On the same day, Belaruskali issued a statement that they were ready for long-term cooperation with the Norwegian company on security issues, repeating the message from the 17 December statement that disciplinary measures had been lifted and adding that fired staff could be taken back to work if they presented such request.¹⁰⁸

To outside observers, some confusion of terms arose when in March 2021, the Belaruskali Strike Committee launched a petition, supported by the office of Tikhanovskaya, urging Yara to suspend their cooperation with Belaruskali temporarily. The online petition has collected over 84,000 signatures.¹⁰⁹

The petition acknowledged Yara’s “principled and consistent position regarding the violations of human and worker’s rights” and “is delighted that Belaruskali, one of the biggest businesses in our country, has such a well-reputed partner who is thoroughly committed to corporate responsibility and an ethical approach”. It still appeals, however, that Yara should “temporarily suspend” its cooperation with Belaruskali.

103. Some 100 workers at Belaruskali joined strikes to demand Lukashenko to step down after the fraudulent 9 August 2020 election. Like workers elsewhere, dozens of employees at Belaruskali were arrested and more than 50 were fired for rising up. Tony Wesolowsky, «Norwegian Agro-Giant Faces Pressure To Leave Lukashenka's Belarus», 10 March 2020 (<https://bit.ly/3J5Tba4>).

104. Yara, *Background and progress report on Yara's engagement with Belaruskali and Belarus Potash Company in Belarus*, 9 January 2022, page 1 (<https://bit.ly/33H8k2e>).

105. <https://bit.ly/34fKLOQ>

106. <https://bit.ly/3J6W0YI>

107. Yara News and Media, “Yara statement on the situation in Belarus”, 21 January 2021 (<https://bit.ly/3so8ILO>).

108. Belaruskali, «PRESS RELEASE JSC BELARUSKALI (<https://bit.ly/3HxHKrx>)

109. The headline of the petition is, “Yara: Stand Firm Defending Human Rights in Belarus”, (<https://bit.ly/3JdbYjZ>).

The main arguments provided are that Belaruskali remains under the control of the Lukashenko regime and “has no possibility to do what is right in law and ethics”. It must follow any instructions from the regime. And equally important, revenues from the business are feeding the oppressive machinery of the regime.

While all involved, excluding the Lukashenko regime, saw a democratic Belarus as the goal, these different statements made evident an important split in terms of the preferred approach – independent Belarusian trade unions supporting Yara’s tentative decision to stay, and the Strike Committee and opposition’s preference that the company should temporarily leave.

This points to an additional dilemma concerning likely outcomes and timing of developments in protest situations in authoritarian countries:

- Should an international company stay involved even if its human rights leverage is uncertain in anticipation of positive outcomes of political protests, leading to improved respect for human rights and democratic reforms, or should it instead suspend business partnerships “temporarily”, if feasible?

Lukashenko’s state of mind became evident on 23 May when Belarusian authorities had their air force divert a Ryan Air flight from Athens to Vilnius, forcing it to land in Minsk under the pretence of a bomb threat. It soon became evident that the special operation had been launched to arrest opposition activist and journalist Roman Protasevich and his girlfriend.

Lukashenko had crossed another red line in what many called a “state hijacking”, and the EU responded by stopping European airlines from using Belarusian airspace and banning the country’s flagship carrier Belavia.¹¹⁰

Visiting Oslo for a string of meetings with the Minister of Foreign Affairs, the Norwegian Helsinki Committee and the Yara CEO, Tikhanovskaya told Norwegian media on 12 August that Yara should consider their moral obligations and “temporarily stop their cooperation with the regime until changes take place”.¹¹¹ After a meeting with Yara

110. RFE/RL, “UN Aviation Agency Delays Report On Belarus’s Diversion Of Ryanair Flight”, 9 November 2021 (<https://bit.ly/3ouAOUC>). For a legal analysis of the ‘hijacking’, see: International Partnership for Human Rights (‘IPHR’), Global Diligence LLP, Truth Hounds, and the Norwegian Helsinki Committee, “Communication submitted under Article 15(2) of The Rome Statute of the International Criminal Court: Supplementary information on the Situation in Belarus/Lithuania/Poland/Latvia and Ukraine: The Flight FR4978 Incident”, 26 May 2022 (<https://bit.ly/3JoCZ46>).

111. TV2 Nyheter, «Ber Yara trekke seg ut fra Hviterussland» [Asks Yara to withdraw from Belarus], 12 August 2021 (<https://bit.ly/3siFNsq>).

CEO Holsether, Tikhanovskaya repeated her position as expressed earlier in the year, that Yara should “freeze its activity” in Belarus until the rule of law and democracy was re-established and all political prisoners were released.

Holsether stated that the meeting provided him with deeper insights, “that we could have a stronger voice and take further action”, and that Yara would re-evaluate and “make a decision on our further presence in Belarus by December. Meanwhile we will continue to use our position to further drive the workers’ safety and human rights agenda.”¹¹²

On 10 January 2022, Yara announced that it initiated a “Belarus sourcing wind-down due to effects of sanctions on supply chain while continuing safety program and trade union support”.¹¹³ The reason was that “the effects on the supply chain from the current sanctions on Belarus” resulted in the withdrawal of “essential services required to enable potash exports from Belarus”.

In other words, Yara’s decision to leave came about because purchasing the Belarusian potash became too difficult in practical terms. The statement was consistent with earlier statements in underlining the importance of Yara’s efforts to support workers’ rights. According to Holsether, “this is a disappointing development. We remain strongly committed to the safety and well-being of Belaruskali’s workers. Despite the wind-down of potash sourcing, Yara aims to continue the industrial safety program initiated in 2021, in close cooperation with the independent trade union in Belaruskali and in full compliance with applicable sanctions.”

The main arguments

During Belarus's political and human rights crisis, several arguments were presented on why Yara should leave. Yara and others, including the Norwegian Helsinki Committee and the Confederation of Trade Unions in Norway (LO Norway), presented on the other side arguments for why it should maintain its business relationships in the country while promoting human and workers’ rights.¹¹⁴ In the following, the main arguments are presented.

112. Yara News and Media, “Joint statement after meeting between Holsether and Tsikhanouskaya today”, 13 August 2021 (<https://bit.ly/3J9tDZQ>).

113. Yara News and Media, “Yara initiates Belarus sourcing wind-down due to effects of sanctions on supply chain, while continuing safety program and trade union support”, 10 January 2022 (<https://bit.ly/3JgimXL>).

114. Geir Hønneland and Julie Lødrup, “Belarus – bli eller gå?» [Belarus – Stay or Leave?] Norwegian Daily Klassekampen 20 December 2021 (<https://bit.ly/34Kn5BG>). Hønneland was Secretary General of the Norwegian Helsinki Committee at the time, while Julie Lødrup is First Secretary of the Norwegian Confederation of Trade Unions (Norwegian LO).

First, a strong argument favouring maintaining business relationships was that Yara's presence made its human and worker's rights promotion possible. Yara stepped up its engagement in this regard after the August 2020 fraudulent elections when the country's ensuing political and human rights crisis escalated. It made systematic efforts to improve workplace safety and protect workers' rights, including participating in peaceful protests, strengthening the role of independent trade unions, and reintroducing a system of Public Inspectors elected by the workers and from the trade unions.¹¹⁵

Beyond the official slogan of "responsibly feeding the world and protecting the planet", the company considered that it was conquering more and more space in Belarus by pushing for improvements in workers' rights, fertilising the soil for a strengthened safety culture even beyond its strict sphere of influence.

Yara's purchase represented 11-12% of Belaruskali's production, and Belaruskali, in turn, answered for 20% of Belarusian exports. Yara was Belaruskali's largest private customer. Being associated with a Norwegian company may also have been important to the regime. This afforded Yara some leverage, which they used during Holsether's visits to Belarus and through comprehensive programs to improve safety.

Several actors testified to the positive effects of Yara's presence, underlining that it was among the very few, if not the only, company of such a size that engaged in the serious human rights situation and criticised the regime. They confirmed that the company contributed to improved safety work in the potassium mines and effectively defended trade union rights. Yara had comprehensive dialogue with trade unions, civil society organisations, and the Belarusian opposition, including meetings with opposition leader Tikhanovskaya.

It is also worth noting that Tikhanovskaya did not ask Yara to leave Belarus but to freeze its potash purchases until a new regime was in place. Yara, for its part, claimed that such a freeze was not possible and that the only alternative to stay was to terminate contracts and leave the country.¹¹⁶

In this way, the Belarusian opposition and Yara seem to have gotten caught in a situation where they argued past each other, particularly regarding the possibility of "freezing" the business until Lukashenko was removed from power. Tikhanovskaya said that she wanted Yara in Belarus, but "afterwards".¹¹⁷ Yara representatives

115. For an account of Yara's efforts and results in this regard, see *Background and progress report on Yara's engagement with Belaruskali and Belarus Potash Company in Belarus*, 9 January 2022 (<https://bit.ly/33H8k2e>).

116. Hønneland and Lødrup, *Op. Cit.* (note 1112 above), Tony Wesolowsky, *Op. Cit.* (note 101 above) and Jens Marius Sæther, "Norske Yara om handelen med Hviterussland: – Vi vil ikke stå i det for enhver pris", Norwegian Daily Dagsavisen, 11 August 2021 (<https://bit.ly/3GFq0sV>).

117. NHC conversation with Svetlana Tikhanovskaya, Oslo, 13 August 2021.

appreciated the logic behind the demand but said it is technically impossible to halt its relationship for an indefinite time.¹¹⁸ They believed that Tikhonovskaya's approach would have been formulated differently had she been aware of the technical challenges involved.

The company considered it a balancing act. It deliberated the effect going out with a "big bang" would have as a statement on the precarious human rights situation in the country but held that leaving would mean that they believed that *nothing more could be done* to improve the situation or that their presence on the ground was "useless". Yara did not think that to be true.

When the company finally decided to leave in January 2022, Yara repeated its belief that it is "possible to have a positive and lasting impact on responsible and safe operations in the entire value chain. ... We remain ready to support the workers in Belaruskali regardless of the sanctions-related wind-down of our sourcing from Belarus."¹¹⁹

It should be added that this argument goes well with the emphasis of the UN Guiding Principles (UNGP) on ensuring respect for human rights in a company's operations as well as in its supply chain. As stated in the commentary to UNGP Article 19, "there are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so." Yara proved, however, to have leverage and was able to influence the situation in its supply chain positively, although it admitted that it did not achieve "revolutionary results." It is, however, according to the company, "widely recognised that improving a corporate safety culture" takes considerable time.

Second, an argument was repeatedly presented that Yara provided necessary income for the increasingly repressive Lukashenko regime and should therefore end its purchase from Belaruskali. Belaruskali is the world's largest potash producer, with an estimated share of world production of 20%.¹²⁰ The percentage share of Norway is only 3% in value terms and 3.1% in physical terms. But the share of Yara's purchase was much more significant since much of the potash it bought did not go to Norway. Belaruskali sold potash to Yara worth \$265 million to \$289 million in 2020, while its total income from potash was \$2.5 Billion.¹²¹

118. NHC conversation with Yara representatives, Oslo, 12 October 2021.

119. *Background and progress report on Yara's engagement with Belaruskali and Belarus Potash Company in Belarus*, 9 January 2022 (Supra note 107).

120. FITCH WIRE, *Global Potash Producers May Benefit from Lower Belarus Exports*, 25 August 2020 (<https://bit.ly/3LISbb>).

121. Euroradio, "How much will Belaruskali lose after Yara withdraws?" 13 January 2022 (<https://bit.ly/3rJyCKY>).

Data on how much Belarus earned from selling potash fertilisers in 2020 indicate that Yara's share of the total value was 11-12%. According to experts, this was a significant amount for Belaruskali but not critical. Belaruskali would be able to redirect exports to other countries such as Brazil, India, or China. There was also an option to sell the potash to the Russian competitor, Uralchem. "The fertiliser may even be supplied to Yara as if it were Russian", one expert stated.¹²²

Yara's argument that if it left, others would fill the void seems, therefore, to be correct. The other part of the argument – that the Lukashenko regime is becoming increasingly repressive and that income from the potash industry is essential in financing repression – nevertheless holds. In May 2021, a group of human rights organisations submitted a communication to the Prosecutor of the International Criminal Court (ICC), documenting that "there is a reasonable basis to believe that the conduct of the Aleksandr Lukashenko regime amounts to a widespread and systematic attack on the civilian population. Its abuses, therefore, constitute *crimes against humanity*. Since May 2020, the regime has conducted a campaign of violence against the civilian population in a bid to retain power at all costs."¹²³

Despite large-scale protests by the end of 2020 due to the government's intense crackdown, the authorities escalated prosecutions against political and civic activists, independent journalists, and human rights defenders. In July 2021, Lukashenko announced a "purge" of civil society, and the authorities shut down dozens of independent mass media outlets and human rights groups. At the end of the year, there were at least 862 political prisoners facing beatings, threats, ill-treatment, and inhumane detention conditions. Close to 30 lawyers were disbarred for representing victims in politically motivated prosecutions and protesting human rights abuses.¹²⁴

In sum, this argument is valid in pointing to the importance of the potash industry for the regime. Still, Yara was right in underlining that its part of the about \$2.5 Billion total annual income from the potash industry would be replaced by others. It was likely also correct that those replacing it would be less – if at all – engaged in improving human and worker's rights.

Third, an argument was put forward, *i.a.*, by Norwegian members of parliament that even if they recognised that Yara's situation in Belarus included dilemmas, the company should listen to the internationally endorsed opposition leader, Tikhanovskaya, who appealed for the company to leave.¹²⁵

122. *Ibid.*

123. The communication was submitted by Global Diligence LLP, International Partnership for Human Rights, the Norwegian Helsinki Committee, and Truth Hounds. It contains a detailed account of events and legal analysis. It is available at the website of the Norwegian Helsinki Committee (<https://bit.ly/3HCUnkW>).

124. Human Rights Watch, Belarus events of 2021 (<https://bit.ly/3gBuXbo>).

The Norwegian state had direct ownership of 36,2% in Yara, while one of the State's Pension Funds owned 7,1%. The head of the Liberal party, Guri Melby, therefore asked the Norwegian government to clarify its position on Yara's engagement in Belarus. "The question of keeping or terminating the contract is clearly a difficult dilemma for Yara. But when the democratically elected president of Belarus in such clear terms asks them to withdraw from the contract, then I think they should respect this view and end the contract", she stated.¹²⁶

The head of the Christian Democrat party, Olaug Bollestad, also stated that Yara should listen to the Belarus opposition. "It is not sustainable over time to be on a collision course with the democratic opposition in the country".¹²⁷

In a written appeal to Yara published in Norwegian daily VG on 3 January 2022, Tikhanovskaya underlined that the deterioration of human rights in Belarus continued. In addition, documentation had come forward that the leadership of Belaruskali had played an important role in electoral fraud over several years. "There is solid evidence that all election committees in Salihorsk were at all times chaired by top executives from Belaruskali Production Units. The committees are also filled with employees from the company. Belaruskali's task is to guarantee that Lukashenko wins the election," she stated. "It is clear that Belaruskali – Yara's partner – is part of the oppressive regime in Minsk. This is a fact. And financing the regime means financing oppression."¹²⁸

Even if Yara had made substantial efforts to improve worker's rights, the overall picture of financial and operational links in falsifying elections between Belaruskali and the repressive regime should compel Yara to reconsider its position in the view of the opposition leader. Thirty-two international companies – including Rolls Royce, Scania Steel and British American Tobacco – had already decided to leave. Yara should follow suit.¹²⁹

In responding to the appeal, Yara stated that it was true that it could not change the regime but could improve only the conditions for workers in Belaruskali's mines. – "A small step in the right direction is better than no step at all." The company had abided fully with international sanctions regulations and conducted extensive stakeholder dialogues dealing with the situation.¹³⁰

125. Alf Bjarne Johnsen, "Venstre og KrF ber Yara vurdere Hviterussland-kontrakt på nytt» [The Liberal Party and the Christian Democrat Party asks Yara to reconsider Belarus-contract], 3 January 2022 (<https://bit.ly/3gJCFAg>).

126. *Ibid.*

127. *Ibid.*

128. Svetlana Tikhanovskaya, «Hviterusserne forventer mer konkret handling fra Yara» [Belarusians expect more concrete action from Yara], 3 January 2022 (<https://bit.ly/3swKChN>).

129. *Ibid.*

130. Alf Bjarne Johnsen, "Øker presset: Eksil-lederen ber Yara bryte med Hviterussland», VG 3 January 2022 (<https://bit.ly/3gGltvy>).

At the same time as this exchange took place in Norwegian media, it became known that the Lithuanian government, in light of a new round of US sanctions against Belaruskali, coming into effect on 8 December 2021, was struggling to find a way to cancel contractual obligations of its state railway company to transport Potash through Lithuania for export.¹³¹

In the end, this effect of US sanctions compelled Yara to leave. The potash could no longer be exported through Lithuania.

When the Norwegian government answered Guri Melby, clarifying its position on Yara's engagement in Belarus, Yara had already informed that it would stop purchasing potash from Belaruskali. On 10 January 2022, Minister of Trade and Industry Jan Christian Vestre spoke in the Parliament, outlining the principles relevant in Yara's situation of the Government's relationships with companies in which the state was a shareholder.

"The state as the owner has expectations that companies with a state ownership share are in the front of developing responsible business. Yara has stated that they make continuous assessments of the situation and emphasises that this is a very demanding case with a balance of partly conflicting considerations.

The state's exercise of ownership in Yara and other companies with state ownership is based on a clear division of roles and responsibilities between the owner, the board, and the company's administration in line with the Norwegian company law. This means that the company's board and administration are responsible for the operation of the company, including assessing the business conditions associated with Belarus."¹³³

In researching this report, we found no government statement deviating from these principles. The government stated its trust in Yara, striking the right balance between conflicting considerations, underlining that it would be a breach of ownership principles to interfere directly in its decision-making.¹³⁴

The discussion above could be portrayed as a struggle between two approaches, one focusing on weighing consequences in the sphere of influence of Yara staying or leaving, and the other focusing on the contribution of the Belarussian potash industry to repression and a deteriorating human rights situation in the country. Linked to the

131. Baltic News Network, «Belarus' Belaruskali threatens Lithuania's Conservatives-led Cabinet», 9 December 2021 (<https://bit.ly/3rHASIK>).

133. "Skriftlig spørsmål fra Guri Melby (V) til næringsministeren» [Written question from Guri Melby (Liberal Party) to the Minister of Trade and Industry], Stortinget 10 January 2022 (<https://bit.ly/3zdPr4O>). Translated from Norwegian to English by the authors.

134. For more information about state ownership principles, see: "State ownership", available on the website of the Norwegian government (<https://bit.ly/3x4PTzC>).

second approach was also a reference to the importance of ‘messaging’ and ‘the way you communicate your values’: a Western company known for its principled support for human rights should in no way stay with or risk being perceived as staying with a repressive regime.

While human rights groups traditionally put the most weight on arguments belonging to the second approach – referring to the broader context of state oppression and how dealing with state-owned companies provides support for the regime – the UNGP could be read as putting much more focus on how companies operate within their more narrowly understood sphere of influence, *i.e.*, its supply chain and local communities affected by its or partners’ business operations.

The need for balancing these two approaches is one of the main takeaways from the discussion of Yara in Belarus. Without weighing both categories of arguments, one misses out on the complexities of the situations. Regarding consequential or utilitarian perspectives, Yara believed there to be an even broader context to consider. Deciding on whether to stay or leave Belarus had consequences well beyond the relations with Belaruskali and the national context of repression in Belarus.

Potash is an essential nutrient for plant growth and global food production. The mining of potash requires long-term perspectives, as developing a new mine takes several years and requires substantial investments. Contracts in the business are long-term. On this background, Yara noted an adverse effect of Belarus’ isolation. The continued threat of and imposition of sanctions against Belarus had led to an increase in potash prices, something that at least in the short term would lead to more money flowing into state coffers but also to higher food prices worldwide and reduced food security.¹³⁵

Lastly, and geopolitically, to the extent that one considers Russian influence over an isolated Belarus to be a further negative to the growth conditions for democracy, Yara’s withdrawal from the country would not fertilise the soil.

5.2 Norsk Hydro in Brazil

- *And how are things otherwise? With the business and all?*
- *Oh, taking one day at a time. We just made a small investment in Brazil which I hope will pay off.*

135. Yara, *Background and progress report on Yara’s engagement with Belaruskali and Belarus Potash Company in Belarus*, 9 January 2022, page 2 (<https://bit.ly/33H8k2e>). This dimension has been further accentuated by the war in Ukraine since both Russia’s and Ukraine’s export of wheat and other food products will be substantially reduced as an effect of the war.

In the novel “New Earth” (1893), by Norwegian Nobel laureate Knut Hamsun

Before an important de-merger in 2004, Yara and its fertiliser business in Belarus were part of a larger and more well-known parent company, Norsk Hydro.

Soon after the fertilisers were taken out, Hydro Oil & Gas was merged with Statoil in 2006, which in 2018 changed named to Equinor. Hydro, however, retained its engagement in the aluminium industry and is currently the eighth largest aluminium company in the world. Even so, it has only a third of the capacity of the two largest aluminium companies globally, both Chinese. It has half the capacity of the world’s third largest aluminium company, which is Russian.¹³⁶

The Norwegian government owns 34,3% of Norsk Hydro through the Ministry of Trade and Fisheries, while the Government Pension Fund Norway holds an additional 7,7%.¹³⁷ Like Yara’s experience in Belarus, Hydro has faced human rights-related challenges while working abroad but on a different continent. And not due to perceptions of indirect support given to a brutal dictator responsible for widespread violations. Instead, Hydro has been accused of being the source of human rights abuses by causing environmental damage and violating the rights of vulnerable communities in Brazil.

Hydro has over 6070 employees in Brazil, in 11 different locations around the country.¹³⁸

The Mineração Rio do Norte bauxite mine in Trombetas was established in 1970, during a period of exceptional economic growth known as the “Brazilian Miracle”, but also at a time when serious human rights violations were taking place under the military dictatorship which existed in the country from the 1960s until around 1985.¹³⁹

Norsk Hydro made its first investment in a bauxite mine as early as 1974. In 1977, the company established an office in Rio de Janeiro under Hydro Comércio & Indústria Ltda. Hydro’s alumina refinery in Brazil, which it acquired in 2010, is called Alunorte and is in the state of Pará in the north. It is the world’s largest of its kind outside of China.

136. The Global Aluminium Industry Factsheet 2020: The top 10 largest aluminium companies in the world (<https://bit.ly/3IYf6Ao>).

137. «Norsk Hydro ASA», Regnskapstall.no (<https://bit.ly/3CsHJmL>).

138. Information on Norsk Hydro’s operations in Brazil is presented on the company’s website (<https://bit.ly/3Myx8eB>).

139. https://en.wikipedia.org/wiki/Brazilian_Miracle

Looking back on its history in Brazil during an anniversary at the turn of the millennium, Hydro reflected that as a newcomer, the company had been “completely aware of the importance of cooperating with local companies and nurturing relations with Brazil’s producers and importers.”¹⁴⁰

The question today, not 25 but 45 years down the road, is whether the company neglected to also nurture sufficient relations with the local population.

To summarise complex operations in Brazil, a type of rock known as bauxite is extracted from two mines in the country’s north. The bauxite, or “aluminium ore”, is transported from these mines to the Alunorte refinery in Barcarena. It is refined into a chemical compound called aluminium oxide, or *alumina*. These mounds of white powder are finally transported to the Albras aluminium plant next door, where the alumina is smelted into primary aluminium.

From there, the sky is literally the limit, as the aluminium is processed further and finds its way into everything from beer cans to airplanes.

Allegations of environmental damage

For years before the dramatic flooding in 2018, Hydro’s operations in the municipality of Barcarena were subject to allegations of environmental damage. The bauxite residue deposits were said by social media users to leak, contaminating the surrounding area. This led to inspections by Brazilian authorities.

A short documentary published by Brazil de Fato online newspaper in June 2018 says locals had complained already in June 2003 about the “red mud spill” from Alunorte.¹⁴¹ They saw signs of pollution in the rivers over the years, not just from Alunorte but also from other industries in the area. In the video, many point to rashes and other skin diseases. Locals interviewed say that they have all but stopped fishing in the rivers in Barcarena because the fish and shrimp caught there tastes like “perfume” or “detergent”. A doctor in chemistry, Simone Pereira, is interviewed, saying she has tested the water and found it to contain lead, “and we’ve known about it since 2014”.¹⁴²

140. Equinor, “Focus: 25 years in Brazil” (<https://bit.ly/3QTthdn>).

141. <https://www.youtube.com/watch?v=5Y-veie86O0>

142. Hydro informed NHC that they have conducted multiple tests without finding lead levels above critical values according to Brazilian and international standards. Surveys made on requests from Hydro show no link between Alunorte and high lead levels in soil and/or groundwater. NHC conversations with Hydro 12 September 2022.

In another video report published in December 2020 by Mongabay, residents claim that polluted water in the areas is causing abnormal numbers of stomach cancer and diarrhoea and that birds and other animals can feel the contamination in the fruit and therefore avoid eating it.¹⁴³

Hydro has never accepted that its operations are a source of pollution but concedes that its communication with affected communities was not good enough from the start. According to the company, they gradually built up their Corporate Social Responsibility (CSR) team in Brazil. Since 2016, they have increased its size from 10 employees to more than 25 with subject matter experts in human rights, stakeholder engagement, and social dialogue.

Nonetheless, for several years, news reports about Hydro's operations in Barcarena and their environmental and social impact drew a negative image, sometimes leaving the reading public with an impression of a powerful foreign company exploiting resources and leaving little or nothing for the local and indigenous population.

A short quote from Hydro at the end of Brazil de Fato's 15-minute documentary does little to balance the impression: "There is no evidence of long-lasting impact on Barcarena's rivers and communities". The quote is the only time we hear Hydro's perspective, and the quote is immediately contrasted with the company's soaring profit numbers.

For over a decade leading up to 2018, Hydro and Alunorte were the subjects of lawsuits in Barcarena. According to Hydro's annual report 2021, there are still unsettled legal issues following the stormwater overflow from the bauxite residue deposits at Alunorte in 2009. In 2012, more than 5,400 claims related to the overflow were filed in the local court. By the end of October 2021, a total of 5035 cases were closed with a favourable decision to Alunorte, and 419 cases were pending decision from the lower Court and/or the Court of Appeal.¹⁴⁴ It generally seems very difficult for plaintiffs to break through with their arguments, the courts finding that there is "no evidence" that they have suffered from spillage of bauxite residue and water contamination.

In short, suspicions had been directed at Norsk Hydro and Alunorte for years without being confirmed by courts before events in 2018 took the matter to a new level.

On 17-18 February 2018, a thunderstorm caused extreme rainfall in the area of Norsk Hydro's operations, causing water to flood streets, homes, and rain forests near the Alunorte plant, and contaminating drinking water wells.¹⁴⁵ In the aftermath, Hydro

143. "Brazil's Barcarena residents face health concerns from mining pollution", *Mongabay*, December 12, 2020 (<https://bit.ly/3DhIXUj>).

144. Hydro, Annual Report 2021, page 226 (<https://bit.ly/3qJA3rm>).

claimed that “all relevant inspecting authorities” confirmed that “there were no leaks or overflow from the bauxite residue deposit areas”. The only issue discovered by inspectors was described as being of irrelevant impact, concerning a crack in the sealing of a pipe that was not in use, which led to “very limited” amounts of rainwater escaping the area.

This contrasted with media reports giving voice to claims that Hydro stood accused of “contaminating water, causing diarrhoea and vomiting and poisoning fish and local produce”.¹⁴⁶

While not admitting to having caused any spillage or pollution, Hydro did recognise that they did not “adequately inform the local population” – not in terms of warning of potential pollution, but instead of “not giving them reassurance that they were *not* affected.”¹⁴⁷

Nonetheless, media reports started claiming Hydro was responsible for polluting drinking water. At this early stage, disagreements about the facts of the matter were evident. The Instituto Evandro Chagas (IEC), a non-profit promoting public health, said they had found high levels of heavy metals in the drinking water. At the same time, Hydro noted that their research showed values acceptable by WHO standards.

A string of lawsuits

Whether or not Hydro’s operations did cause hazardous pollution in the area would become a central point of disagreement between the local population filing lawsuits against Hydro and Alunorte on the one hand and the company and its lawyers on the other. The UN Special Rapporteur on toxics and human rights¹⁴⁸ did not visit Alunorte during his Brazil country visit in 2019. Still, many of his observations may be relevant: “Throughout Brazil, factories and plants are located in unimaginably close proximity to communities, who are subjected to grave infringements of their human rights.”¹⁴⁹

Following the 2018 rainfall, Brazilian authorities imposed a temporary production embargo on Alunorte, leaving it operating at half capacity. While residents filed lawsuits, Hydro underlined in its reports that staff at the plant came out in large

145. “Evidence of contamination at Hydro plant in Brazil, researchers say”, *Reuters*, March 9, 2018 (<https://reut.rs/3U2drQe>).

146. “Pollution, illness, threats and murder: Is this Amazon factory the link?” *The Guardian*, March 16, 2018 (<https://bit.ly/2phLVkW>).

147. Hydro, *Timeline and overview of the Alunorte situation*, 26 September 2021 (<https://bit.ly/3PLBgck>).

148. OHCHR Special Rapporteur on Toxics and Human Rights (<https://bit.ly/3TZ8IEt>).

149. Ibid.

numbers to support the resumption of normal operations to “secure value and jobs and Hydro’s contribution to sustainable growth.”

The events led to a renewed string of lawsuits in the Brazilian justice system, as complex as they are numerous. Lawsuits were filed against Norsk Hydro, Alunorte, the Municipality of Barcarena, the State of Pará, and even against the National Institute of Metrology, the Department of Mineral Production, and the Federal Environmental Agency. The plaintiffs were numerous and varied, but an association named Cainquaima was involved in many of the cases appearing between March 2018 and May 2019.

Cainquaima is the short name for the *Amazon Association of Mixed Race, Indigenous and Quilombolas*, the latter being the term for descendants of enslaved people from Africa who escaped horrific conditions in Brazilian plantations in the hinterland, in so-called *quilombos*. Over three centuries, Brazil received 40% of all enslaved people shipped to the Americas and was the last nation in the Western world to officially abolish slavery in 1880.¹⁵⁰

Today, poverty and unemployment are endemic in these settlements, including in the villages around Hydro’s aluminium production.¹⁵¹

The Cainquaima association is frequently represented in the media by *Maria do Socorro Silva*, a local woman with a powerful life story.¹⁵² She has taken on Hydro in leading international media such as *The Guardian*: “The Norwegians get rich at our expense. They don’t care about our poor and miserable people.”¹⁵³ Or in the *Financial Times* stating that the Norwegians were the reason, “her grandson died after being born with his intestines outside his body, while others were missing organs or had undeveloped bones.”¹⁵⁴ Socorro even travelled to Norway, where she offered a bottle of water from Barcarena to former Hydro CEO Svein Richard Brandtzæg.

According to Hydro, they had for long-time difficulties meeting with representatives of Cainquaima, who wished to meet only in the court system. This changed in 2022 when Cainguaima and Maria do Socorro Silva started to take part in dialogue meetings with Hydro.¹⁵⁵

150. Bergad, Laird W., *The Comparative Histories of Slavery in Brazil, Cuba, and the United States*, New York: Cambridge University Press, 2007.

151. “Descendants of slaves still suffer in Brazil”, *Reuters*, July 4, 2007 (<https://reut.rs/3Ldo4Me>)

152. “Fierce Life: Maria do Socorro Silva”, *Atmos*, March 5, 2020 (<https://bit.ly/3eFzXOF>).

153. “‘They should be put in prison’: Battling Brazil’s huge alumina plant”, *The Guardian*, July 21, 2018 (<https://bit.ly/2P8OyzD>).

154. “Norsk Hydro blamed for birth defects in Amazon forest pollution case”, *Financial Times*, 27 February 2021 (<https://on.ft.com/3RAe9m9>).

155. NHC conversations with Norsk Hydro, 23 June 2021 and 12 September 2022.

The UN Special Rapporteur on toxics and human rights noted in his report after visiting Brazil in 2019: “Indigenous, *quilombola* and other Afro-Brazilian communities are often the most exposed to toxic pollution, further accentuating their already precarious situations. There is a strong intersection with poverty, and low-income communities in urban centres are also implicated.”¹⁵⁶

Outside of the media storm, Hydro provides a detailed summary of the lawsuits and the legal claims faced by the company in its annual reports. These involve claims that “chemical waste was intentionally discharged” from Alunorte, that deposits were subject to a “fraudulent license”, and that bauxite residue had been “illegally dumped” in an ecological reserve or discharged through “hidden pipes”. Claims were also made that the products used in Brazil are “more toxic than the ones used in Norway”, ultimately preventing locals from sustaining their livelihoods as farmers and fishermen, as well as claims by both labourers and the local population that they experienced severe health problems due to toxic waste from Alunorte and other industries in the area.

As of September 2022, lawsuits are still circulating in the Brazilian legal system, but allegations of such seriousness do not remain in the legal sphere. Regardless of the counterclaims presented by Hydro in the courtrooms and research reports, the fallout from the flooding quickly reached international media.

Although Hydro produced systematic overviews of the situation, including a detailed timeline,¹⁵⁷ dense text hidden away in reports has less impact than headlines in major international newspapers or articles by well-known and respected transparency groups like Global Witness, which wrote about death threats against Maria do Socorro Silva.¹⁵⁸

On 5 February 2021, the London-based law firm PGMBM filed a group-action lawsuit against Hydro in the District Court of Rotterdam in the Netherlands¹⁵⁹ on behalf of 9 persons and the Cainquiama association, which has 11,000 members.¹⁶⁰

156. *Brazil: Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, OHCHR, September 17, 2020 (<https://bit.ly/3d7H2Hh>).

157. Hydro, *Timeline and Overview of the Alunorte Situation*, 26 September 2019 (<https://bit.ly/3PLBgck>).

158. Global Witness: “At what cost? Irresponsible business and the murder of land and environmental defenders in 2017”. The report is available at the website of Global Witness (<https://bit.ly/3qBDEYh>).

159. “Mass litigation against Hydro: Indigenous peoples and locals in Brazil go to Dutch court”, *Dagens Næringsliv*, February 9, 2021 (<https://bit.ly/3xjFfnp>).

160. “Brazil group sues Norsk Hydro over alleged pollution”, *Reuters*, February 9, 2021 (<https://reut.rs/3ByWaac>) and NHC conversations with Hydro representatives 12 September 2020. The Norwegian Helsinki Committee wrote to PGMBM in November 2021 to request a conversation about the lawsuits but did not receive a response.

Today, Hydro admits that they underestimated the conflict potential between the company and the local population before the crisis. They were not sensitive to societal conflicts, which included a low level of trust in weak institutions. In addition, Barcarena is characterised by high crime rates and is located on the smuggling route out of Brazil. The area is complicated demographically, as it consists of different communities with differing needs, wishes and historical backgrounds.

30% of the population has no access to clean water. Given a lack of relevant education among the locals, the plants were operated by personnel from the outside, creating more friction.¹⁶¹

The dilemmas

Hydro's main challenge in Barcarena was not that political opposition and civil society demanded it to leave. The company was instead faced with a somewhat paradoxical combination of *deep mistrust* and *exceedingly high expectations* that it would fill the void of weak institutions and local government, which could not provide basic services to the population.

Like Yara in Belarus, Hydro experienced that Pillar I of the UNGP was not in place. Neither local nor national authorities invested in sufficient measures to ensure the fulfilment of the human rights of the local population. However, there were also significant differences, such as the violated human rights being economic and social rather than civil and political. The main problem with authorities may also have been the *inability* to fulfil rights, rather than blatant disrespect and unwillingness, as in Belarus.¹⁶²

According to international evaluations, Brazil is "a democracy that holds competitive elections, and the political arena, though polarised, is characterised by vibrant public debate. However, independent journalists and civil society activists risk harassment and violent attack. The government has struggled to address high rates of violent crime and disproportionate violence against and economic exclusion of minorities. Corruption is endemic at top levels, contributing to widespread disillusionment with traditional political parties."¹⁶³

161. NHC conversation with Hydro, 23 June 2021. A technical school for 1200 students has now been opened to increase competence among locals. Hydro financed the building of the school. (NHC conversations with Hydro on 12 September 2022).

162. Freedom House ranks Brazil 'free' in its global freedom scores, and 'partly free' in its internet freedom scores (<https://bit.ly/3a1zofW>).

163. Freedom House, «Brazil», in *Freedom of the World 2022* (<https://bit.ly/39YyMHY>)

Like Yara in Belarus Hydro faced complex dilemmas, which it is still struggling to tackle. But in the end, the company benefitted from Brazil being a more open society, courts being more independent, and lack of other characteristics of authoritarian playing fields.

Among the complicating factors was that even though Hydro had a long history of business activities in Brazil, its engagement in the north of the vast country was new. When it bought ownership in Alunorte from a big Brazilian mining company, Vale, in 2010,¹⁶⁴ it was informed that relationships with local communities were overall good. Over time it turned out, however, that the local communities had little knowledge about the Alunorte operations and their consequences, according to Hydro.¹⁶⁵

In general, Hydro invests substantially in local communities where its business activities are located. According to the company, “we always focus on taking care of local communities. That is our tradition. We entered Brazil with the same attitude, but we did not know enough about the conflicts in the society, the low trust in institutions, and the weakness of those institutions.”¹⁶⁶

There are about 127 000 inhabitants in the Barcarena municipality.¹⁶⁷ Fishery and agriculture are the main occupations, while Hydro is the largest employer, with several thousand employees. However, many employees are not recruited locally because it is hard to find persons with sufficient competence. Hydro is seen as the strongest actor in the area, resulting in many demands from the local community.

The February 2018 incident created a problematic situation. Due to the heavy rains, partially treated rainwater from the refinery area was discharged into the Pará river. Monitoring of the river at the time showed, however, that pH and turbidity limits remained within the relevant permit limits even during this (unlicensed) discharge. Hydro maintains that “there were no leaks or overflow from the bauxite residue deposit areas. This was confirmed on-site by all relevant inspecting authorities, and later confirmed by relevant authorities in public hearings, including in a congressional hearing in Brasília on 15 March.”¹⁶⁸

But even if independent investigations confirmed Hydro’s claims, the local population did not believe them. The media reported that previous leakages from the dam had led to significant damage to the environment, and pictures were circulated of water allegedly escaping from the landfill, leading to further suspicions. According to Hydro, the research they had been involved in documented only short-term damage. Pictures

164. For more information about Vale, see its website (<https://bit.ly/3lIDtbt>).

165. NHC conversations with Hydro, 23 June 2021 and 12 September 2022.

166. NHC conversation with Hydro, 23 June 2021.

167. Wikipedia, «Barcarena, Para» (<https://bit.ly/38nLJum>).

168. Hydro, *Op. Cit.*, page 2 (see note 154).

of water allegedly escaping from the landfill circulated in the media, but the photos were taken inside the Alunorte compound, and canals led the water to the cleaning facilities.¹⁶⁹

The main dilemma resulting from the situation was:

- Due to the long-ingrained mistrust, Hydro had to invest substantially in proving that they did not fit the picture of greedy Norwegians that did not care about the wellbeing of the local population and the environment. It was not enough to win cases in the courtroom and prove that Hydro operations and installations did not cause environmental degradation. They had to support infrastructure development on the ground while ensuring they did not take over the authorities' role.

According to Hydro, the company could “be a catalyst to start processes. We have been committed to contributing financially to sustainable initiatives for ten years. The municipality now sees that this is a win-win. We also contribute to platforms for dialogue and more resources and bring in other major players who contribute resources (like USAID).”¹⁷⁰

Another dilemma was how Hydro could communicate its values and principles while constantly being accused of being guilty of local pollution that harmed both the environment and people.

- Hydro's “goodwill” measures were interpreted as acceptance of responsibility for environmental degradation. National authorities and politicians entered the blaming game against the company, and it became a widely believed narrative in Brazil that Hydro had polluted. When Hydro CEO at the time, Svein Richard Brandtzæg, came to visit in early March 2018, it was rather interpreted as Hydro accepting responsibility than signalling the company's willingness to address the broader problems caused by the rainfall, weaknesses in the authorities' response, and the overall issue of lack of essential services provided to the population.

Lawsuits against the company will continue to nurture a negative image of Hydro and negative coverage in local, national, and international media.

- Even if the company wins in the courts, this may not help Hydro to overcome the negative narrative that it is a significant foreign actor that can win due to its size and financial muscles. The company may be portrayed as a major international player who always gets its will, even though this is not based on reality.¹⁷¹

169. NHC conversations with Hydro, 12 September 2022.

170. NHC conversation with Norsk Hydro representatives, 23 June 2021.

The way forward

Being determined to stay in Alunorte and continue developing its operations there, Hydro has initiated a range of long-term measures to help develop the community and build trust with the local population. It has established the Sustainable Barcarena Initiative, “a platform for sustainable development funded by but independent from Hydro”. Hydro has committed NOK 250 million through the platform to local community investments.¹⁷²

In 2019, the company established *the Hydro Sustainability Fund*, “a non-profit organisation created to promote sustainable development and support community-based projects, following the guidelines outlined within the scope of the Sustainable Barcarena Initiative”. The fund finances projects that may contribute to sustainable development based on local needs. It is financed by Hydro, Albras and Alunorte and has a 10-year investment commitment of NOK 250 million.¹⁷³

Part of the approach is frequently meeting the local population to provide information and engage in dialogue. Annually, several hundred such meetings take place. Community leaders and other representatives from the communities have visited Alunorte to better understand the operations. Hydro also supported the establishment of a technical school with 1200 students to increase local hiring of staff.¹⁷⁴

In conclusion, even though Hydro faced complex challenges and dilemmas related to its operations in Barcarena, the possibilities for addressing them were better than in Yara’s situation in Belarus. Belarus is a brutal autocracy, while Brazil is a functioning democracy, although its flaws and a dictatorship-admiring far-right president, Jair Bolsonaro, create fear that tyranny may come back.¹⁷⁵ Hydro seems never to have doubted that it would be able to stay in a way that is in line with the company’s stated principles and values. Time was on its side.

Even though the playing field in Barcarena entailed difficulties for Hydro in terms of lack of popular trust, widespread poverty, inadequate public services, a “blame game”, and “politicisation” concerning the environmental problems in the area, it did not entail some of the characteristics of authoritarian playing fields. It was enough for the company to address the issues within its sphere of influence locally; it did not need to include the consequences of feeding an authoritarian government in its human rights deliberations, as Yara was constantly challenged to do in Belarus.

171. NHC conversation with Norsk Hydro representatives, 23 June 2021.

172. Hydro, “The Sustainable Barcarena Initiative”, available at the website of Hydro (<https://bit.ly/3t38ISC>)

173. Ibid.

174. NHC conversation with Hydro, 23 June 2021 and 12 September 2022.

175. “Brazilians fear return to dictatorship as ‘deranged’ Bolsonaro trails in polls”, *The Guardian* 9 August 2022, (<https://bit.ly/3qzP9Q6>)

While Yara in Belarus was able to improve work conditions and safeguard other critical human rights of workers and local communities around the mines, it could not influence the overall human rights situation of the country. Hydro was not expected to do that in Brazil and could focus on local issues around its plant. In the end, it may come out strengthened and with a model of dealing with local problems that inspires respect and become an example.

5.3 Telenor in Myanmar

'George Orwell,' I repeated - 'the author of Nineteen Eighty-Four.' The old man's eyes suddenly lit up. He looked at me with a brilliant flash of recognition, slapped his forehead gleefully, and said, 'You mean the prophet!'

Emma Larkin, "Finding George Orwell in Burma"

Telenor is Norway's sixth largest company by turnover.¹⁷⁶ It is partially state-owned but to an even larger degree than Yara and Hydro, with the Norwegian Government owning 56% of the company.

Telenor operates in broadband, TV, and mobile telephony in the Nordic countries but is also a prominent actor in Asia. Over the past few years, Telenor has withdrawn from some Eastern European countries, such as Serbia, Hungary, Montenegro, Bulgaria, and most recently, Russia and Ukraine. At the same time, it has strengthened its presence in several Asian countries.

Telenor entered Myanmar in 2013, during a period of reforms welcomed by Western governments and businesses eager to enter the market. Before starting up, it conducted pre-entry due diligence,¹⁷⁷ engaging with civil society and representatives of ethnic groups in the country and conducting stakeholder dialogue. "We built a big network in the country, which proved important after the 2021 military coup", according to Telenor.¹⁷⁸

176. Hans Jørgen Næss, "Norges 500 største bedrifter» [Norway's 500 largest companies], Kapital 24 June 2022 (<https://bit.ly/3U5GemQ>).

177. Telenor: *Responsible Decision-Making in Myanmar*, BSR Case Studies, 9 December 2015 (<https://bit.ly/3eZFhwg>).

178. The Norwegian Helsinki Committee had conversations with Telenor about its Myanmar operations and dilemmas on 20 May and 3 June 2022.

Eight years later, following the coup, the company announced its decision to withdraw. Telenor retains large operations in countries like Thailand, Malaysia, and Bangladesh, but Myanmar is a closed chapter. The company's decision to sell its operations was met with strong criticism from the local and international human rights community and Myanmar's exiled political opposition.

In some ways, the criticism of Telenor in Myanmar was the opposite of what Yara went through in Belarus. While democracy activists in Belarus urged Yara to leave and accused the company of being in cahoots with dictator Lukashenko, many activists in Myanmar demanded that Telenor stay and oppose the new regime and support the opposition. Others demanded Telenor leave, but when it became known that *Telenor Myanmar* would be sold to a "dodgy" Lebanese investment firm, M1 Group, this was portrayed as a "further nail in the coffin" for freedom of expression and privacy in the country.¹⁷⁹

"Something everyone in Telenor is proud of"

Today's Myanmar is very different from the country that Telenor entered with support from the Norwegian government in 2013. At the time, Myanmar had just started what, in hindsight, was a short period of transition to democracy after the military accepted holding parliamentary elections and the country embarked on a period of liberalisation. The country had been under military rule since 1962 but started in 2011 to implement political, economic, and administrative reforms to improve its international standing. Tens of thousands of prisoners were released under a series of amnesties, including several prominent political prisoners. Authorities also made promises to end forced labour and other pressing human rights issues and to combat corruption. While serious human rights challenges remained, developments in Myanmar over the past decade were met with "cautious optimism" both inside the country and internationally.

In 2013, at a relatively early stage in the reform period, Telenor was awarded one of two contracts for developing telecommunications in Myanmar, receiving its license the following year. The signing of a nationwide telecommunications license agreement with the Myanmar government occurred on 30 January 2014. As Gunn Wærsted, Chairperson of Telenor's board, put it, "[t]he development of Telenor Myanmar from 2014 is something everyone in Telenor is proud of, and it enjoyed strong support from Norwegian politicians."¹⁸⁰ In a relatively short time, Telenor Myanmar built an industry from scratch. "We have never built a network so fast and become profitable in such a short time", according to the company.¹⁸¹

179. "TELENOR Myanmar's buyers have financed atrocities and cosied up to dictators", Justice for Myanmar, 9 July 2021 (<https://bit.ly/3DhTYVB>). According to the article, "Telenor Myanmar's buyer, M1 Group, is a holding company owned by the Mikati family, who are Lebanese oligarchs. Founded by former two-time Prime Minister of Lebanon Najib Mikati and his brother Taha, the family is mired in corruption and has a history of cosying up to dictators, disregarding human rights and privacy in search of profits." M1 Group later sold parts of its engagement to Shwe Byain Phyu Group (SBP), which has close ties to the military.

In the November 2020 general elections, the National League of Democracy (NLD), led by Aung San Suu Kyi, won by a landslide, achieving a clear majority in Myanmar's Assembly of the Union. Angered by the defeat of the military-backed Union Solidarity and Development Party (USDP), the Armed Forces declared the election results illegitimate. On 1 February 2021, a military coup d'état began unfolding.¹⁸²

The coup was widely condemned internationally as an attack on Myanmar's transition toward democracy. The Norwegian government condemned the coup, urging "military leaders to adhere to democratic norms and respect the outcome of the elections."¹⁸³ Telenor also publicly expressed concerns about the worsening situation in Myanmar during the period following the coup.¹⁸⁴

As of September 2022, the Assistance Association for Political Prisoners (AAPP), a human rights organisation focusing on Myanmar, said 2272 people had been killed by the military since the coup, while over 15,000 had been arrested. More than 12,000 remained in detention.¹⁸⁵

"The power of the rifle prevails"

The coup was carried out by detaining the leaders of the NLD and other civilian officials, including Aung San Suu Kyi and President U Win Myint, cabinet ministers, the chief ministers of several regions, politicians, writers, and activists. It was announced on the military Myawaddy TV station, citing the 2008 Constitution, which allows the military to declare a national emergency. As the military seized infrastructure control, they also suspended most television broadcasts and telephone and internet access in major cities.¹⁸⁶

In July 2021, Telenor announced that it had entered into an agreement to sell Telenor Myanmar to M1 Group for about 100 million euros. Telenor had earlier booked a loss of about 730 million euros after seeing its mobile business in Myanmar severely restricted following the coup.¹⁸⁷ Reactions to the sale announcement were unusually strong,

180. Gunn Wærsted, «Mange ønsket at Telenor ble i Myanmar. Men det overordnede ble å ta vare på ansattes sikkerhet» [«Many voices wanted Telenor to remain in Myanmar. But the overriding priority had to be the safety of our employees»], Aftenposten 29 March 2022 (<https://bit.ly/3qtcp27>). An English version of the statement is available on the website of Telenor (<https://bit.ly/3ddSwcy>).

181. NHC conversations with Telenor.

182. "Myanmar" in Encyclopedia Britannica. The article is available on the website of Britannica (www.britannica.com).

183. "Myanmar: Norway condemns the coup", 1 February 2022 (<https://bit.ly/3QBbEPf>).

184. "Directives from Myanmar authorities 1 February 2021 - 25 March 2022" (<https://bit.ly/3qGcLCI>). Telenor updates and information related to Myanmar are available on its website (<https://bit.ly/3dizEJK>).

185. Website of the AAPP accessed on 12 September 2022 (<https://aappb.org/>).

186. Russel Goldman, «Myanmar's Coup, Explained», New York Times 27 April 2022 (<https://nyti.ms/3U0WRjA>).

187. Victoria Klesty, «Telenor quits Myanmar with \$105 mln sale to Lebanon's M1 Group», Reuters 8 July 2021. The article is available on the website of Reuters (www.reuters.com).

both in Norway and internationally. As a Norwegian media outlet put it, Telenor was “carpet bombed with criticism”.¹⁸⁸

At the core of the matter for civil society was the military regime’s demand for access to personal metadata from Telenor. According to *Myanmar Now*, an online news outlet, the junta-controlled Ministry of Transport and Communications (MOTC) made at least 200 requests over a one-year period for information, including records of calls, call locations and the last known location of a number. In commenting on why Telenor abided by these requests (which it later specified to have been 153), the company underlined that “[v]iolating or not complying with directives issued under the existing legal framework would have severe and completely unacceptable consequences for our employees.”¹⁸⁹

However, the red line for the company was that it became clear in May-June 2021 that the military would not accept that it did not activate equipment for *lawful intercept*. This equipment is commonly used to investigate crime and allows law enforcement to request real-time access to the content of communications, traffic data, and location information, *i.e.*, information on the location of mobile terminals or phones.¹⁹⁰

Most countries require licensed telecommunications operators to provide their networks with legal interception gateways and nodes for the interception of communications. In democratic countries like Norway, there are regulatory frameworks restricting police or security services’ access to such interception, including by requiring court orders in the investigation of serious crimes.

Myanmar’s parliament had failed to put such a legal framework in place, and Telenor refused to activate the equipment. In September 2021, Telenor stated, “... as a legal and regulatory framework that safeguards our customers and adheres to fundamental human rights and international laws is not in place in Myanmar now, operating such equipment in this situation would constitute a breach of our values and standards as a company.”¹⁹¹ Interception equipment had also been under EU and Norwegian sanctions since 2018.

188. Thomas Paust, “Telenor teppebombes med kritikk: – Forstår at mange er opptatt av dette” [Telenor carpet bombed with criticism. – Understand that many people are concerned about this], *Nettavisen* 17 February 2022 (<https://bit.ly/3B13EB6>).

189. Aung Naing, “Telenor has shared sensitive customer data with military since the coup: industry sources”, *Myanmar Now*, 7 February 2022 (<https://bit.ly/3xco1tZ>). See also *Telenor 2021 Authority Request Disclosure Report*, pages 16-17 (<https://bit.ly/3eToivN>). According to Telenor, they received 153 requests for historical data, 115 blocking requests, and 73 requests for network shutdown in 2021. The company only distributed 14% of requests to distribute authority information.

190. Telenor 2021 Authority Request Disclosure Report, page 10 (see note 186 above).

191. Telenor announcement, “Continued presence in Myanmar not possible for Telenor”, 15 September 2021 (<https://bit.ly/3BHizNV>).

Under the new military rule, and due to more threatening actions against its employees, Telenor concluded that it could not continue refusing to activate the equipment: “We would not be able to resist activating the monitoring system, which provides for the authorities in real time to hear content and know where someone is when they speak.”¹⁹²

In a response to criticism of its decision to sell its operations, Telenor stated on 13 November 2021:¹⁹³

At Telenor, we live by our Code of Conduct and operate with the same ethical business standards across all our operations. Developments in Myanmar since the military took power on 1 February, unfortunately, mean that it is no longer possible for us to adhere to these standards, keep our employees safe and at the same time remain as an operator in Myanmar. It has also become clear that Telenor’s continued presence would require Telenor Myanmar to activate intercept equipment... Ultimately, this conflict between local and international law and human rights principles made a continued presence in Myanmar impossible for Telenor Group.

The sale of Telenor Myanmar to M1 Group, would allow for continued employment for our 750 employees, and access to service with a fourth operator, for 17 million subscribers, as well as essential industries such as hospitals and banks. This decision was not motivated by financial or strategic objectives.

In short, Telenor decided to leave since it deemed it could not protect its customers from the military rulers without risking the safety of its employees. It would not be able to uphold its code of conduct, including respecting human rights and EU and Norwegian sanctions, in a situation where “the power of the rifles prevails”.¹⁹⁴ Telenor CEO Sigve Brekke summarised the situation by referring to “three reasons why we think a sale is necessary: it is the safety of our employees, but also the regulatory conditions and also that there is good compliance.”¹⁹⁵

On 18 March 2022, Telenor announced that the government of Myanmar had approved the sale of Myanmar Telenor. On 25 March 2022, Telenor confirmed the sale had been completed with significant financial loss.¹⁹⁶

192. NHC conversation with Telenor. Cf. Telenor announcement 18 February 2022, “We cannot make our employees in Myanmar delete data and break the law” (<https://bit.ly/3UbFqwZ>).

193. “Telenor response to concerns regarding Myanmar withdrawal”, Business and Human Rights Resource Centre, 13 November 2021 (<https://bit.ly/3BHU1Jv>). See also, “Many voices wanted Telenor to remain in Myanmar. But the overriding priority had to be the safety of our employees” (<https://bit.ly/3ddSwcy>).

194. Gunn Wærsted, *Op. Cit.* (see note 175).

195. Victoria Klesty, *Op. Cit.*

196. Leila Feratovic, “Telenor har fullført salget i Myanmar – tar tap på 800 millioner”, [Telenor has completed the sale in Myanmar – taking a loss of NOK 800 million], Dagens Næringsliv, 25 March 2022 (<https://bit.ly/3B6IXVD>).

The dilemmas

While Telenor considers that the company carried out thorough due diligence procedures ahead of its engagement in Myanmar and that its entry into the market was “applauded”, the situation quickly deteriorated after the coup. In conversations with the Norwegian Helsinki Committee, Telenor described technological and moral dilemmas without any clear positive outcomes.

First, as mentioned above, at the core of the concern among Telenor and civil society in Myanmar was the handing over of metadata and the possibility of lawful intercept of mobile traffic, a function allowing authorities to listen in on conversations in real-time and to see where a person is located geographically.

In authoritarian states or military dictatorships, the possibility is misused to survey political opposition and democracy activists that the regime considers a threat.

- In accepting interception in its network, Telenor could eventually be accused of complicity in gross human rights violations. Telenor’s dilemma resulted from the risk that democracy activists could be targeted if their metadata was transferred into the hands of the military regime or if the regime would listen in to their mobile conversations.
- Denying requests by the regime would, however, be in breach of Myanmar’s laws, putting its employees at risk of arrests, mistreatment and even killings by a notoriously brutal military regime.
- Telenor’s choice was, therefore, between the risk of becoming complicit in human rights violations against customers if it gave in to the requests of the military regime or, if denying access, risking its staff being arrested and subject to mistreatment. The military rulers in Myanmar declared a state of emergency, with extensive use of martial law and a lack of due process. Telenor employees in data centres (under martial law) opposing a direct order from the military risked being shot and killed.¹⁹⁷

Telenor had refused demands to enable lawful intercept until May-June 2021, when they realised that further refusals would pose an unacceptable danger to their staff. To avoid becoming complicit in human rights violations or risking the safety of its staff, the company decided to withdraw.

197. Jørgen C. Arentz Rostrup, Head of Telenor in Asia, «Ingen skal sette livet i fare for Telenor: Å forlate Myanmar var en avgjørelse vi har tatt med tungt hjerte» [No one should put their lives at risk for Telenor: Leaving Myanmar was a decision we have taken with a heavy heart], Dagsavisen, 1 April 2022 (<https://bit.ly/3QLZmU9>).

Second, by deciding to sell Telenor Myanmar to M1 Group, the company faced another dilemma. Activists demanded that Telenor delete metadata before transferring the business to its new owners. The Minister for Telecommunications, Information and Technology in the exiled National Unity Government wrote a damning op-ed in the Norwegian daily Aftenposten entitled “Telenor has failed Myanmar”. In the article, he accused the company of putting the lives of democracy activists in danger. “It is deeply irresponsible and difficult to understand.”¹⁹⁸

Telenor argued, however, that deleting metadata could not be done without endangering the company’s employees. In a statement, Telenor explained, “Some players have said they understand that we have to leave the country but have asked us to close the operation and delete data, or to delete data before we transfer the business to the new owner. We cannot do this without exposing our employees to significant danger – it can have unacceptable consequences if we do not respond to direct orders or local law enforced by the military authorities.”¹⁹⁹

Adding to the pressure on the company, the Norwegian Forum for Development and Environment, a network of about 60 Norwegian civil society organisations, reported Telenor to the Norwegian police for complicity in crimes against humanity, such as the arrests, torture, or executions of customers due to handing over metadata.²⁰⁰

A Norwegian expert on international criminal law, *Hanne Sophie Greve*, told the media that she feared Telenor could become complicit in crimes against humanity: “The military dictatorship in Myanmar acts so brutally that there is reason to fear that it commits crimes against humanity. It is claimed that people in Myanmar have been arrested, tortured, and killed as a result of Telenor handing over sensitive telecommunications data”. If the company in this situation sells itself out of Myanmar in a way that means that the military dictatorship gets access to telecommunications data for Telenor’s around 17 million subscribers, “the company could, in the worst case, risk being held responsible for complicity in crimes against humanity.”²⁰¹

198. Htin Linn Aung, Minister for telecom, information and technology, The National Unity Government of Myanmar, and Maung Maung Myint, National Unity Government Representative, Norway, “Telenor har sviktet Myanmar” [Telenor has failed Myanmar], Aftenposten, 4 April 2022 (<https://bit.ly/3U5kYO4>).

199. Gwladys Fouche, «Norway can't stop transfer of Telenor data to Myanmar rulers-minister», Reuters 16 February 2022 (<https://reut.rs/3xfY9xz>). See also Jørgen C. Arentz Rostrup, “We cannot make our employees in Myanmar delete data and break the law”, 18 February 2022 (<https://bit.ly/3UbFqwZ>).

200. “Melder Telenor til politiet for Myanmar-sal» [Reporting Telenor to the police for the Myanmar sale], NRK (Norway’s Public Broadcaster) 11 February 2022 (<https://bit.ly/3U0F0cK>).

201. Amund Bakke Foss and Kyrre Lien, «Frykter Telenor kan være medansvarlige i forbrytelser mot menneskeheten» [Fears Telenor may be aiding and abetting crimes against humanity], VG 10 February 2022 (<https://bit.ly/3BbeggS>). Translations by the authors.

In February 2022, Myanmar's exiled unity government sent a letter to the Norwegian Prime Minister requesting that the Norwegian government stop the sale of Telenor Myanmar. Even some of Telenor Myanmar's staff asked for the deal to be stopped.²⁰² Norwegian Parliamentarians also raised concerns. Jan Christian Vestre, Minister of Trade and Industry, responded, "as an owner in a telecommunications company with operations in Myanmar, we cannot stop the transfer of metadata. This is a difficult answer to give, but it's a straightforward and honest answer. The company tells [the Norwegian government] that they had to choose between alternatives that could all have serious consequences. The sale of Telenor Myanmar may have consequences for Norway's reputation abroad, but so would the other alternatives. This is not a simple matter."²⁰³

Telenor's CEO defended the decision, saying it was the company's "most difficult challenge ever. The deteriorating situation and conflict with our values, Norwegian law, and international law made Telenor's continued presence in Myanmar impossible. I am proud of the impact we have created through delivering communication services to the people of Myanmar and devastated that the story has ended here. Our thoughts are with the people of Myanmar."²⁰⁴

Human rights organisations devoted to Myanmar say they cannot verify whether metadata from Telenor has led to arrests, imprisonment, or other reactions against democracy activists, as this information is not made public by authorities.²⁰⁵ There are several other factors, though, that may correct the picture somewhat. In general, the police and not the military requests access to metadata. The military coup may also have a limited effect on the use of metadata because the amount of data is vast. Finding what one searches for among the enormous number of recorded connections is difficult. In addition, democracy activists have switched to encrypted communication and use several sim cards to avoid being targeted. They know the danger of being intercepted while communicating online or using mobile phones and can take precautions.²⁰⁶

Third, the fact that Telenor, during its engagement in Myanmar, became known for its high ethical standards and transparency, for instance, by publishing directives it received from authorities until this became too dangerous for the employees, may also have contributed to the strong reactions against the company when it decided to

202. Iselin Elise Fjeld, "Lokalt ansatte i Myanmar trygler Telenor om å ikke selge" [Local employees in Myanmar beg Telenor not to sell], NRK 10 February 2022 (<https://bit.ly/3B9IJ01>).

203. Thomas Paust, "Statsråden grillet om Telenor-salget. Ekspert mener salget er «rått og usivilisert» [The minister «grilled» about the Telenor sale. Expert believes the sale is "raw and uncivilized"]], Nettavisen 16 February 2022.

204. Telenor, *Annual Report 2021*, page 4 (<https://bit.ly/3BcxGlt>).

205. Correspondence with Burma Campaign, Assistance Association for Political Prisoners, and others.

206. Conversations with Telenor.

withdraw.²⁰⁷ When it entered Myanmar, Telenor had “a clear ambition to support the country in its progress towards democracy and economic development”.²⁰⁸ Telenor supported educational and other projects to support development in the country.²⁰⁹

In this way, the company may have heightened expectations. Telenor was the only European telecom actor and may have been perceived as a guarantor of privacy and fundamental freedoms in ways no business actor can deliver on.²¹⁰ As we have seen, the OECD and UN guidelines do not request companies to breach national laws to safeguard human rights. But this was precisely what some democracy activists and international commentators demanded. It may be argued that a company must do its utmost to avoid aiding and abetting international crimes, but this was precisely what the company wanted to avoid by selling its operations. In all its communications, it underlined that it was bound by its code of conduct and international law. When developments in Myanmar meant it could no longer abide by these standards, it decided it could no longer operate there.

This dilemma may be formulated in several ways:

- Companies that adhere to high ethical standards during difficult circumstances may create unfulfillable expectations that they will function as guarantors against abuse and fight with repressive governments in almost activist ways. Since other telecom companies in Myanmar had ties to the military or operated without the same ethical standards as Telenor, the company, in the end, was judged hard when it decided it could not live up to its standards and had to withdraw.
- Based on its hierarchy of principles, including the top priority that no employee should have to sacrifice life or health, Telenor could not be open about the reasons for its decisions.²¹¹ If it deemed disclosure of information could jeopardise the safety of its staff, it had to keep silent instead of providing full explanations. Winning the argument was thus not priority number one, even if it could weaken the credibility and hurt the image of the company. According to Gunn Wærsted, Head of Telenor’s Board, “[e]ven now that the sale of Telenor Myanmar has been completed,

207. Telenor established a webpage, “Updates on Telenor in Myanmar”, where it publishes important information about its Myanmar engagement, including directives from authorities. The latest directive it has published is from 14 February 2021 (<https://bit.ly/3eDT3Vn>).

208. *Ibid.*

209. ‘Telenor Myanmar’ has been renamed ‘Atom’ by its new owners. On its website, it states that “[s]ince 2014, ATOM Myanmar has been contributing towards socio-economic developments in Myanmar” and presents a range of *Telenor Myanmar* projects. Telenor’s logo is visible on some of the photos documenting the projects (<https://bit.ly/3Bdl4uu>).

210. The only other international telecommunications company with operations in Myanmar, the Qatari Ooredoo group, is also withdrawing from the country. Financial Times, 13 September 2022 (<https://on.ft.com/3BmfTbU>).

211. Telenor’s principles are: 1) No employee should have to sacrifice their life or health. 2) Customers’ safety must be ensured. 3) Telenor shall run its operations based on good morals, ethics, and integrity. 4) Laws and regulations in the markets in which we operate, Norwegian and international, shall be complied with. Gunn Wærsted, *Op. Cit.* (see note 175 above).

there are trade-offs that we still cannot be open about. Simply because we fear reprisals against 730 employees who are still working in Myanmar, and who do not have the opportunity to leave the country.”²¹²

- Based on the bad experiences of companies with high ethical standards that become the target of hard accusations to the contrary while striving to tackle dilemmas, we may end up with such companies staying away from authoritarian or otherwise difficult playing fields. This may be an unwanted outcome of an otherwise positive development of companies investing more in respecting international human rights standards.

The way forward

While withdrawing from Myanmar in March 2022, Telenor has still to close its Myanmar chapter completely. The company is processing its experiences to learn from them and possibly avoid similar dilemmas in the future to occur.²¹³

The Committee Seeking Justice for Alethankyaw (CSJA) has complained Telenor to the National Contact Point for Responsible Business Norway (NCP) for “an incident where an inactive mobile tower owned and operated by a vendor to TML, was used in a military operation to kill and drive out unarmed civilians from Alethankyaw in Rakhine State in Myanmar in August 2017». ²¹⁴ The NCP found, however, that “Telenor has not caused or contributed to the misuse of the mobile tower”. It should though have conducted stakeholder dialogue with the most vulnerable groups after the military operations, in this case, the Rohingya. “The NCP recommends Telenor to prioritise the most vulnerable groups in future stakeholder engagement.”

The overall assessment by the NCP must have been a relief for Telenor:

The NCP has determined that Telenor in general sought to respect human rights and carry out due diligence in accordance with the OECD Guidelines. There were several positive features in Telenor’s efforts to identify, prevent and mitigate human rights risks and communicate about these in Myanmar. Human rights policies were included in contracts with vendors and business partners and followed up. Telenor engaged with stakeholders in Myanmar and internationally.

A second complaint to the NCP on Telenor’s withdrawal from Myanmar is still pending.

212. Wærsted, *Op. Cit.*

213. NHC conversations with Telenor.

214. “NCP concludes examination of specific instance with Final Statement”, NCP, 29 August 2022 (<https://bit.ly/3BzS6pZ>).

The human rights situation in Myanmar remains dire. In March 2022, the UN High Commissioner for Human Rights released a report urging the international community to take “concerted, immediate measures to stem the spiral of violence”.²¹⁵ The call did not prevent further deterioration. In June, the UN Special rapporteur for Myanmar sounded the alarm over the junta’s decision to enforce death sentences.²¹⁶ On 25 July, the military went through with the execution of four democracy activists, with more executions expected to follow.²¹⁷

Telenor was then right in deeming it could not stay in Myanmar and, at the same time, uphold its values and principles. Whether it should have remained regardless is still a controversial issue.

However, it is little doubt that the company tried its best to tackle dilemmas according to its principles and values.

215. UN High Commissioner for Human Rights, *Situation of human rights in Myanmar since 1 February 2021*, Geneva 25 February 2022. Available at the website of the UNHCHR (<https://www.ohchr.org/>).

216. “Myanmar: UN experts sound alarm over junta’s decision to enforce death sentences”, Geneva 10 June 2022 (<https://bit.ly/3S1nQKj>).

217. “Myanmar: Bachelet condemns executions, calls for release of all political prisoners”, Geneva 25 July 2022 (<https://bit.ly/3QJ6Xmh>).

6. Comprehensive approaches as ways to overcoming authoritarian dilemmas

A common feature of the cases presented above is that the companies try to tackle dilemmas while preserving their human rights integrity. They present themselves as companies respecting human rights while simultaneously communicating that there are no easy solutions to the human rights problems they face under the circumstances. They struggle with dilemmas where there are no good choices or easy fixes.

This is particularly true for Yara and Telenor, while Hydro is in a somewhat better position since time may be on its side. Investing in measures to better inform the local communities about its operations and helping develop communities in Barcarena may, over time, improve relations and trust.

The complicating authoritarian factors which the two other companies struggled with, *i.e.*, centralised authorities that repress opposition and violate human rights, are not fully present in Brazil. True, environmental human rights defenders are attacked and killed. The country *is* among the worst in the world regarding the killings of environmental human rights defenders. However, the main failing of the government is a lack of will and/or ability to provide effective protection.²¹⁸ In authoritarian states, the authorities may be ordering the killings.

All three companies experienced difficulties convincing democracy activists, political opposition, local communities, and media that they were serious about human rights and not only after money. At the same time, perhaps paradoxically, the companies were welcome by locals and staff, who recognized that they represent principled approaches to human rights and the environment. The governments tolerated them because they represented investments and know-how.

There may be some ways to strengthen the position of struggling international companies.

International and national guidelines or laws requesting or obliging the companies to respect human rights, and conduct due diligence, contain little concrete guidance on manoeuvring in authoritarian playing fields. The companies must therefore strive to learn from experience, each other, and stakeholder dialogues. This learning can never end, however, as new situations that differ significantly from previous ones require fresh thinking. There will never be a blueprint which can be implemented anywhere.

218. Global Witness, *Op. Cit.* (see note 155 above).

There is also a need for human rights and democracy activists to learn more about the roles companies can play in authoritarian states. There may be mistrust towards big international companies based on ideology, reputation, and other factors. But there may also be misunderstandings about the role of business companies in *respecting* human rights and expectations that they in addition should *protect* and even *fulfil* human rights. Companies are neither states nor human rights activists but can nevertheless play essential roles within their sphere of influence. Employees and communities affected by their operations come first, but good examples of treating employees and communities well can spread and have broader effects on society.

States have much broader human rights obligations than companies. They can support international companies dealing with dilemmas. One idea would be for the US, the EU, Norway, and other like-minded states to design targeted sanctions (entry denial, freezing of assets, forfeiture of financial services, etc.) against businesspersons responsible for human rights violations in states where international companies are struggling to find a moral way to conduct their business. Human rights sanctions, or Magnitsky sanctions as they are called, can be designed to address the companies' human rights problems. For instance, a business leader, who actively supports the repressive regime and puts pressure on staff in companies in the supply chain of an international company, can be sanctioned. The sanctions may weaken his or her negative influence as well as business opportunities.²¹⁹

Well-designed targeted sanctions can work in concert with the efforts of international non-governmental organisations, domestic activists, and the numerous tools at the disposal of democratic governments wishing to influence a repressive and violent situation in authoritarian states. Business companies, including Norwegian ones, who are invested in authoritarian states may play essential roles along with such actors within their spheres of influence.

While withdrawing may send a strong moral message from business companies, leaving a challenging situation may not always be the best option if the goal is to strengthen human rights. Company measures to ensure respect for human rights throughout its sphere of influence accompanied by targeted sanctions by democratic states against those responsible for the same human rights violations the company aims to address (imprisonments, torture, denial of fundamental freedoms) may prove more effective than leaving.

Another problem with leaving is that some high-demand natural resources tend to be found only or primarily in authoritarian states. A Western company leaving may mean that a non-Western company without a principled approach to human rights will take

219. Norway's sanction law authorises the government to impose targeted sanctions against human rights violators on certain conditions, but the government can do more to utilise it, cf. NHC, "Unfinished business: Implementing Norway's Sanction Act" (<https://bit.ly/3RHYG3z>).

over, as is the case in Myanmar after Telenor withdrew. However, in some circumstances, withdrawing is necessary to avoid compromising the company's principles and adherence to international norms, particularly if the company has very little leverage.

After reading about Yara and Telenor in this report, a possible conclusion could be that their biggest mistake was to engage in Belarus and Myanmar in the first place. Hydro was a bit luckier in Brazil. There are, however, strong reasons to resist such conclusions. Not because trade and business relations automatically, over time, lead to democratisation in authoritarian states. But because international companies that respect human rights in words and deeds can be a force for good.

When entering the authoritarian playing field, companies should step up support for human rights within their spheres of influence and publicly state their values and principles. When they struggle to uphold their human rights integrity due to government pressure and persecution, democratic states should support them. They can act bilaterally and in multilateral human rights forums. They can introduce targeted sanctions, as in Belarus and Myanmar.

In the end, the companies may still have to leave. But they may have left a human rights legacy that remains important for many individuals and can become a positive factor when better days come.