

IMPLEMENTING PUBLIC INTERNATIONAL LAW EFFECTIVELY—TOWARDS CONCEPTUALIZING A STEERING OF BUSINESS ACTIVITIES

MYRIAM SENN*

ABSTRACT

The article considers initiatives to regulate disarmament focusing on an indirect component of peace. Taking chosen public international law conventions on disarmament into account, it explores ways to deal with and prevent the risk of adverse impact of business activities on human rights. It concentrates on measures to be adopted initially and which in effect will lead to disarmament, which is the investments in the production of banned weapons. Indeed, investment decisions and investment activities are the primary source rendering their production possible.

The issue of steering investment decisions and investment activities belongs to the broader corporate governance debate. Within that debate, the delineation of a concept of socially responsible investment, in particular, regarding environmental, social, and governance aspects, including human rights and its implementation, is being given increasing focus and legitimacy. This article assesses existing means to steer corporate investment activities. In order to move forward in terms of ensuring compliance, it focuses on the conceptualization of ways to harness the power of businesses and investors and to enroll them.

Abstract	485
Introduction	486
I. Current Regulatory Framework	489
A. Public International Law Conventions	489

* University of St.Gallen, Switzerland. Email: myriam.senn@unisg.ch. A version of this article was presented at the Conference on the Creation of International Law, Exploring the International Law Components of Peace, University of Wisconsin Law School, Madison, April 2014. I am grateful to the participants for their helpful comments. I also would like to thank especially Eileen Dorfman for very helpful suggestions and the editors of WILJ, Scott Freedenberg and Angela N. Muñoz, for their great editorial work.

1. Convention on Certain Conventional Weapons	490
2. Convention on Cluster Munitions	492
3. Anti-Personnel Landmines Convention	493
4. Kimberley Process.....	495
B. Soft Law Initiatives Focusing on Business Activities.....	496
1. UN Guiding Principles on Business and Human Rights	497
2. United Nations Principles for Responsible Investment	499
3. ISO 26000:2010 Guidance on Social Responsibility	499
4. Corporate Social Responsibility	500
5. ICGN Initiative.....	503
II. The Challenges.....	503
A. Current State of Scholarship	504
1. Scholarship on Public International Law Conventions.....	504
2. Scholarship on Soft Law Initiatives	505
3. Issues for Research.....	506
B. Institutional Structure of the Framework	507
1. Regulatory Characteristics	508
2. Actors Involved.....	509
3. Implementation.....	510
4. Temporal Aspect	511
C. Enrollment of Business Activities.....	513
1. Embedding Socially Responsible Investment: An Outline.....	513
2. Steering Business Conduct.....	518
III. Conclusion	519

INTRODUCTION

Article 1 paragraph 1 of the Charter of the United Nations (UN) states that a purpose of the UN is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law,

adjustment or settlement of international disputes or situations which might lead to a breach of the peace.¹

Indeed, the pursuit of peace remains a global challenge; it encompasses numerous issues. This article looks at initiatives to regulate disarmament pointing to an indirect component of peace.² Specifically, it explores measures to be adopted initially and which will finally result in either limiting or hindering the *production of weapons* such as cluster munitions, incendiary weapons, or also landmines.

Taking chosen conventions on disarmament into account,³ this article explores ways to deal with and prevent the risk of adverse impact of business activities on human rights. It is based on the premise that there is both an individual and a collective human right to be protected from banned weapons, not least because these weapons first endanger the innocent civil population, especially children. Indeed, to limit their production, investment decisions and activities play an important role, as far as they render the production of weapons possible in the first place.

At the corporate level, the issue can be subsumed under the broader *corporate governance* debate. Although there is no generally recognized definition of the concept of corporate governance,⁴ a large number of principles, initiatives, and codes of conduct have been defined over time. Most of them are soft law or also self-regulatory instruments in nature, such as the OECD Guidelines for Multinational Enterprises.⁵ Within the corporate governance debate, more attention is now directed toward the socially responsible operation of corporations, financial institutions, and financial intermediaries. The concept of *corporate social responsibility* (CSR) encompasses what corporations should be

¹ U.N. Charter art.1, para. 1.

² While the realization of human rights, the promotion of justice and equity, the elimination of violence, or also disarmament measures represent direct components of peace, the production of weapons and, in particular, the investments in their production, represent an indirect threat to the realization of peace. See *Human Rights Components of Peace Missions*, OFF. HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Countries/Pages/PeaceMissionsIndex.aspx> (last visited Sept. 18, 2014); Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

³ See *infra* Part II.1.

⁴ For a foundational work on the corporate governance debate, see ADOLF A. BERLE AND GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (9th ed., 2007).

⁵ See generally OECD, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2011), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

responsible for in society.⁶ In that context, the delineation of a concept of *socially responsible investment* (SRI), specifically regarding *environmental and social governance issues* (ESG), including human rights and its implementation, is being given increasing focus and legitimacy. The concept of SRI is regularly used to design investment processes applying a rigorous analysis and effective selection of investments, which fulfils ethical criteria in the broad sense.⁷ Thus, it means including religious, personal core values and morals, human rights, and environmental aspects, and which might also encompass a consideration of whether to invest in firms producing weapons.⁸ A SRI-approach enjoys growing support amongst asset owners, investors, and authorities.⁹

The current efforts made to implement a SRI-approach first concentrate on the regulation of those professionals and institutions whose business is to manage investments on behalf of others. Basically, these professionals and institutions operate under different regulatory frameworks around the globe. They are subject to the rules of their national jurisdictions. However, they are also in a position to manage huge amounts of freely tradable capital on the world's stock exchanges. As asset managers, they are well regulated and supervised both in the national and global financial markets by virtue of their status as intermediaries—licensed financial services firms, fiduciaries, or trustees—in their countries of domicile or of incorporation. To date, existing regulation of these intermediaries and institutional investors has not sought to regulate (or only selectively regulated) and supervise the investment strategy they pursue and the *manner* in which they carry out their investment activities.¹⁰ In addition, the investment attitude of the corporations producing weapons themselves needs to be considered.

⁶ Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUS. ETHICS (Supplement 2) 385, 391 (2009). See also MASHOOD BADERIN & ROBERT MCCORQUODALE, *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ACTION* (2007).

⁷ A range of ethical aspects may be taken into account. See HUNG-GAY FUNG, SHERYL A. LAW & JOT YAU, *SOCIALLY RESPONSIBLE INVESTMENT IN A GLOBAL ENVIRONMENT* 4 (2010).

⁸ See *id.*

⁹ See, e.g., *Companies Excluded from the Investment Universe*, MINISTRY FIN., <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u.html?id=447122> (last updated Apr. 9, 2014) (discussing Scandinavian sovereign wealth funds such as those of the Government Pension Fund of Norway can be mentioned.).

¹⁰ Myriam Senn, *Socially Responsible Investment*, 75 INT'L L. ASS'N REP. CONF. 1000, 1000 (2012).

Overall, this article tries to shed light on how current public international law conventions and soft law approaches coalesce and interact. It assesses existing means applied to steer the investment activities of corporations and the financial industry. In order to move forward in terms of defining and delimiting the scope of the right to peace in relation to that issue, and ensuring compliance, the article explores ways to harness the power of both corporations and investment professionals. In other words, it aims at elaborating on possible incentives to enroll them.

The article proceeds as follows. First, the approach is descriptive, giving an overview of the existing regulatory framework. Second, the approach is analytical, discussing challenges that arise out of this framework and trying to conceptualize ways to effectively implement and ensure compliance with the international law conventions defined.

I. CURRENT REGULATORY FRAMEWORK

To set the frame, this paper now provides an overview of chosen public international law conventions aimed at banning armament. Then, the focus shifts and initiatives aimed at steering business activities (i.e., investment behavior), are briefly described.

A. PUBLIC INTERNATIONAL LAW CONVENTIONS

Public international law conventions regulate a range of disarmament issues. These conventions address specific disarmament measures or rule on the use of specific weapons. In order to be effective, rules must take the nature of armed conflicts (both national and international)¹¹ into account, as well as the process of globalization. Owing to these complexities, rules have to be adopted at the international level in the first stage. Then, states ratifying these conventions commit themselves towards the international community and other party states to respect and adhere to these conventions at the national level. As will be discussed, the adoption of adequate measures at the national level

¹¹ DAVID HELD, ANTHONY G. MCGREW, DAVID GOLDBLATT & JONATHAN PERRATON, *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* 87–148 (2008); JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 532–35, 539–46 (2000); *see* JAN KLABBERS, *INTERNATIONAL LAW* 207–08 (2013) (discussing the distinction between international and non-international conflicts).

represents a core issue for the effective implementation of such conventions, and for steering business activities and investments.¹²

Hereinafter, the following public international law conventions and initiatives are briefly presented: the Convention on Certain Conventional Weapons, the Convention on Cluster Munitions, the Anti-Personnel Landmines Convention, and the Kimberley Process.¹³

1. *Convention on Certain Conventional Weapons*

The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW), adopted in October 1980,¹⁴ entered into force in December 1983 with three initial protocols.¹⁵ The CCW regulates the use of weapons which are thought to be *excessively injurious* or to have *indiscriminate effects*. Such weapons either cause unnecessary or unjustifiable suffering to combatants or affect civilians indiscriminately.¹⁶ Currently, 115 states are parties to the convention.¹⁷ With a view to the scope of the issue, and in order to ensure flexibility, the CCW contains only general provisions; it is structured as a “chapeau” or “umbrella convention” and is now accompanied by five protocols.¹⁸

Each protocol regulates the use of specific weapons or weapons systems¹⁹ and each protocol may be submitted to changes independently

¹² See *infra* Part III.

¹³ They are chosen from the work provided by the Conference on Disarmament (CD), the single multilateral disarmament negotiating forum of the international community, which has been established in 1979. *An Introduction to the Conference*, UNITED NATIONS OFF. GENEVA, [http://www.unog.ch/80256EE600585943/\(httpPages\)/BF18ABFEFE5D344DC1256F3100311CE9?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/BF18ABFEFE5D344DC1256F3100311CE9?OpenDocument) (last visited Aug. 14, 2014).

¹⁴ See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW]. The CCW is also called the United Nations Convention on Certain Conventional Weapons (CCWC) or Inhumane Weapons Convention. *The Convention on Certain Conventional Weapons*, UNITED NATIONS OFF. GENEVA, [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument) (last visited Oct. 31, 2014).

¹⁵ *The Convention on Certain Conventional Weapons*, *supra* note 14.

¹⁶ *Id.*

¹⁷ *Id.* Further, five states have signed but not yet ratified the Convention. *Id.*

¹⁸ *Id.* The five protocols are the Protocol I on Non-detectable fragments, Protocol II on Prohibitions or Restrictions on the use of mines, booby traps and other devices, Amended Protocol II on Prohibitions or Restrictions of mines, booby-traps and other devices, Protocol III on Prohibitions or Restrictions on the use of incendiary weapons, Protocol IV on Blinding laser weapons, and Protocol V on Explosive remnants of war. *Id.*

¹⁹ *Id.*

from the others.²⁰ Worth mentioning is that while it was not possible to agree to a total ban on landmines with Protocol II, the issue finally led to the Ottawa Treaty.²¹ Protocol IV prohibits the use of laser weapons specifically designed to cause permanent blindness.²² Such weapons shall not be transferred²³ at all, either to state or non-state entities.²⁴ Protocol V is the first multilaterally negotiated instrument to deal with the issue of unexploded and abandoned ordnance.²⁵ Focusing on post-conflict measures, its goal is to eradicate the threat that such legacies of war pose to civilian populations and to the humanitarian aid workers helping them.²⁶ It includes provisions regarding clearance, risk education, and information exchange.²⁷ It also establishes a responsibility regime on the parties that have used these weapons during hostilities and requires them to provide information and assist in efforts to destroy such weapons.²⁸

In December 2001, the states parties agreed to amend the CCW and extend the scope of its application and of the annexed Protocols.²⁹ The rationale for this lied in the fact that the CCW applied only to situations of international armed conflicts, although most conflicts occur

²⁰ For instance the Protocol II on Prohibitions or Restrictions on the use of mines, booby-traps and other devices as amended on May 3, 1996. See John Borrie, Declan Smyth, Stuart Casey-Maslen & Gro Nystuen, *Introduction to THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY* 19–20 (Gro Nystuen & Stuart Casey-Maslen, eds., 2010).

²¹ See *infra* Part II.1.c.

²² Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons), art. 1, Oct. 13, 1995, 1380 U.N.T.S. 370. The Protocol was adopted in 1995 and entered into force in July 1998. *The Convention on Certain Conventional Weapons*, *supra* note 14.

²³ The transfer of weapons includes the trade, export, and other possible forms of transferring weapons. Arms Trade Treaty art. 2, Apr. 2, 2013, https://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf; Anyssa Bellal, *Arms Transfers and International Human Rights Law*, in *WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW* 448–71 (Stuart Casey-Maslen ed., 2014); Andrew Clapham, *Weapons and Armed Non-state Actors*, in *WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW*, *supra*, at 163–69.

²⁴ Protocol IV on Blinding Laser Weapons, *supra* note 22, art. 1.

²⁵ *The Convention on Certain Conventional Weapons*, *supra* note 14. The Protocol was adopted in November 2003 and entered into force in November 2006. *Id.*

²⁶ *Id.*

²⁷ Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V), arts. 3–5, 8, Nov. 28, 2003, 2399 U.N.T.S. 100.

²⁸ *The Convention on Certain Conventional Weapons*, *supra* note 14; Borrie, Smyth, Casey-Maslen & Nystuen, *supra* note 20, at 12–13.

²⁹ *The Convention on Certain Conventional Weapons*, *supra* note 14.

within the borders of a state.³⁰ According to its amended article 1, the CCW now also applies to non-international armed conflicts.³¹

2. *Convention on Cluster Munitions*

The Convention on Cluster Munitions (CCM) adopted on May 30, 2008, entered into force on August 1, 2010.³² Currently, it has 108 signatories, out of which eighty-four have ratified it.³³ The CCM is a result of the so-called Oslo process, a diplomatic process including states, civil society, the International Committee of the Red Cross, and the United Nations.³⁴ It is a binding international treaty that lays down that states parties undertake never, under any circumstances, to develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly,³⁵ cluster munitions.³⁶ Whether this includes the

³⁰ See CCW, *supra* note 14, art. 8, para. 1(b).

³¹ *The Convention on Certain Conventional Weapons*, *supra* note 14. See also Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Dec. 21, 2001, 2260 U.N.T.S. 82 [hereinafter Amendment to CCW].

³² *Convention on Cluster Munitions*, UNITED NATIONS OFF. GENEVA, [http://www.unog.ch/80256EE600585943/\(httpPages\)/F27A2B84309E0C5AC12574F70036F176?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/F27A2B84309E0C5AC12574F70036F176?OpenDocument) (last visited Sept. 17, 2014). The CCM was adopted in Dublin, Ireland, and signed on December 3, 2008 in Oslo, Norway. *Id.*

³³ However, it has been opposed by a number of states that produce and stockpile these munitions, including China, North Korea, South Korea, Russia, and the United States. See REBECCA M.M. WALLACE & OLGA MARTIN-ORTEGA, INTERNATIONAL LAW 327–28 (7th ed., 2013).

³⁴ *Convention on Cluster Munitions*, *supra* note 32.

³⁵ Indirect production can encompass the production of components of cluster munitions or also the licensing of foreign corporations to produce these munitions. Virgil Wiebe, Christophe Lanord & Declan Smyth, *Article 1: General Obligations and Scope of Application*, in THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY, *supra* note 20, at 95, 117.

³⁶ *Convention on Cluster Munitions*, art. 1, para. 1(b), May 30, 2008, 2688 U.N.T.S. 35 [hereinafter CCM]. For the purposes of the CCM, a cluster munition is defined as follows: Cluster munition” means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:

- (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
- (b) A munition or submunition designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
 - (i) Each munition contains fewer than ten explosive submunitions;
 - (ii) Each explosive submunition weighs more than four kilograms;
 - (iii) Each explosive submunition is designed to detect and engage a single target object;

prohibition to invest in corporations producing components of these arms is still debated and a matter of interpretation of article 1 paragraph 1(c) of the CCM.³⁷

Moreover, even when directed at combat forces, these weapons pose a great risk of reaching civilian populations, without any mechanism for differentiating between the two.³⁸ When used, they leave behind high numbers of unexploded submunitions.³⁹ These remnants are able to detect and target heat signatures.⁴⁰ Despite advances in technology, cluster munitions can cause severe humanitarian injuries years, or even decades, after their use.⁴¹ Thus, the CCM also deals with the humanitarian consequences and unacceptable harm to civilians caused by these munitions.⁴² Further, the CCM defines a framework for cooperation and assistance to victims, clearance of contaminated areas, destruction of stockpiles, and risk-reduction education. It includes transparency measures and guidance regarding compliance issues.⁴³ In practice, the United Nations plays a key role in efforts to prevent their use.⁴⁴

3. *Anti-Personnel Landmines Convention*

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was adopted at the Oslo Diplomatic Conference on a Total

(iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;

(v) Each explosive submunition is equipped with an electronic self-deactivating feature.

CCM, *supra* note 36, art. 2, para. 2.

³⁷ Wiebe, Lanord & Smyth, *supra* note 35, at 130–37; CCM, *supra* note 36, art. 1, para. 1 (“Each State Party undertakes never under any circumstances to: . . . (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.”).

³⁸ Borrie, Smyth, Casey-Maslen & Nystuen, *supra* note 20, at 1–11.

³⁹ *Id.*

⁴⁰ *Id.* at 3.

⁴¹ *The Convention on Cluster Munitions*, CONVENTION ON CLUSTER MUNITIONS, <http://www.clusterconvention.org> (last visited Aug. 14, 2014); Borrie, Smyth, Casey-Maslen & Nystuen, *supra* note 20, at 1–11.

⁴² *Convention on Cluster Munitions*, *supra* note 32.

⁴³ See Borrie, Smyth, Casey-Maslen & Nystuen, *supra* note 20, at 11–36; *Convention on Cluster Munitions*, *supra* note 32.

⁴⁴ See Borrie, Smyth, Casey-Maslen & Nystuen, *supra* note 20, at 11–36.

Global Ban on Anti-Personnel Mines on September 18, 1997.⁴⁵ It is the result of the so-called Ottawa Process following the First Review Conference for the 1980 Convention on Conventional Weapons, as well as diverse efforts undertaken outside the UN-facilitated forum.⁴⁶ The Convention is an international agreement that bans antipersonnel landmines (AP-mines) around the world.⁴⁷ Signed in December 1997, in Ottawa, it entered into force on March 1, 1999.⁴⁸ Currently, it has 162 states parties.⁴⁹ As of today, it remains open for ratification by signatories and for accession by those that did not sign it before March 1999.⁵⁰

Article 1 of the Convention commits state parties to undertake never under any circumstances to: (a) “use anti-personnel mines;” (b) “develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;” or (c) “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”⁵¹ In addition, Article 1 lays down that state parties undertake to “destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.”⁵²

⁴⁵ *Anti-Personnel Landmines Convention*, UNITED NATIONS OFF. GENEVA, [http://www.unog.ch/80256EE600585943/\(httpPages\)/CA826818C8330D2BC1257180004B1B2E?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/CA826818C8330D2BC1257180004B1B2E?OpenDocument) (last visited Aug. 14, 2014); Borrie, Smyth, Casey-Maslen & Nystuen, *supra* note 20, at 12–13.

⁴⁶ WALLACE & MARTIN-ORTEGA, *supra* note 33, at 326–27; Borrie, Smyth, Casey-Maslen & Nystuen, *supra* note 20, at 12–13; Declan Smyth, Marcus Reiterer, Theo Boutruche, Andrew Clapham & Thomas Nash, *The Title and Preamble of the Convention, in THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY*, *supra* note 20, at 37, 69–71; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 [hereinafter *Mine Ban Treaty*].

⁴⁷ See *Anti-Personnel Landmines Convention*, *supra* note 45; *Mine Ban Treaty*, *supra* note 46.

⁴⁸ *Anti-Personnel Landmines Convention*, *supra* note 45.

⁴⁹ *States Parties and Signatories*, UNITED NATIONS OFF. GENEVA, [http://www.unog.ch/80256EE600585943/\(httpPages\)/6E65F97C9D695724C12571C0003D09EF?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/6E65F97C9D695724C12571C0003D09EF?OpenDocument) (last visited Sept. 17, 2014). It is usually called the Mine Ban Treaty, Ottawa Convention, or Anti-Personnel Mine Ban Convention. *Anti-Personnel Landmines Convention*, *supra* note 45. 35 states are non-signatories, a majority of them are permanent members of the UN Security Council such as China, the United States, and also Russia. North Korea and South Korea have not signed it either. See *id.*

⁵⁰ In accordance with its Article 15, the Convention was opened for signature by all States upon its adoption in 1997. *Anti-Personnel Landmines Convention*, *supra* note 44. Thereafter, it remained open at the UN Headquarters until its entry into force. *Id.* In December 1997 a total of 122 governments had signed the treaty. *Id.*

⁵¹ *Mine Ban Treaty*, *supra* note 46, art. 1, para. 1.

⁵² *Id.* para. 2.

The introduction of these rules was deemed critical to changing the behavior of combating forces in their use of landmines.⁵³ Although not all countries are signatories of the Convention, a downward trend in the use of landmines is clearly recognizable.⁵⁴ Hence, some authors argue that the prohibition of landmines now constitutes an emerging norm of customary international law.⁵⁵

4. Kimberley Process

The Kimberley Process was initiated when Southern African diamond-producing states met in Kimberley, South Africa, in May 2000, to discuss ways to stop the illegitimate trade in *conflict diamonds* or “rough diamonds.”⁵⁶ The goal was to ensure that diamonds were not purchased in order to finance violence (i.e., weapons, by rebel movements and their allies trying to destabilize and undermine the good functioning of legitimate governments).⁵⁷ The Process is a mixed governmental, industrial, and civil society initiative.⁵⁸ Currently, it counts fifty-four participants, representing eighty-one countries.⁵⁹ What is very important is that its members account for almost 100 percent of the global production of rough diamonds.⁶⁰ In addition, the World Diamond Council, representing the international diamond industry and civil society organizations, has played a determining role since the process’s outset and continues to exercise a large influence on its work.⁶¹

Then, in December 2000, the UN General Assembly adopted a landmark resolution supporting the creation of an international certification scheme for rough diamonds.⁶² The following negotiations between governments, the international diamond industry, and civil

⁵³ Smyth, Reiterer, Boutruche, Clapham & Nash, *supra* note 46, at 69–74.

⁵⁴ *Press release – Third Review Conference to the Mine Ban Treaty*, LAND MINE & CLUSTER MUNITION MONITOR, <http://www.the-monitor.org/index.php/LM/Press-Room/Press-Releases/Press-release-Third-Review-Conference-to-the-Mine-Ban-Treaty> (last visited Sept. 18, 2014).

⁵⁵ Smyth, Reiterer, Boutruche, Clapham & Nash, *supra* note 46, at 69–74.

⁵⁶ *About: KP Basics*, KIMBERLEY PROCESS, <http://www.kimberleyprocess.com/en/about> (last visited on Sept. 18, 2014).

⁵⁷ *Id.*

⁵⁸ KIMBERLEY PROCESS, <http://www.kimberleyprocess.com> (last visited Sept. 18, 2014).

⁵⁹ *About: KP Basics*, *supra* note 55.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

society organizations resulted in the creation of the Kimberley Process Certification Scheme (KPCS) in 2002.⁶³ It sets out the requirements for controlling the rough diamond production and trade. In that context, an important issue regards the certification of *shipments* of rough diamonds. The issuance of an appropriate certificate is necessary and must accompany the shipments to confirm that the diamonds are conflict-free.⁶⁴ To implement this requirement participants are only allowed to trade with other participants who have also met the minimum requirements of the KPCS.⁶⁵ At the same time, the KPCS requires that export and import conditions, control mechanisms, and national legislation be in place in the member countries.⁶⁶ Other important features of the process are its transparency requirements and the exchange and analysis of statistical data.⁶⁷

Participating countries, industry, and civil society observers meet twice a year and on a regular basis in the context of working groups and committees.⁶⁸ The implementation of the process is monitored through reviews and annual reports, as well as regular exchanges of information, which provide details on the process's evolution.⁶⁹

B. SOFT LAW INITIATIVES FOCUSING ON BUSINESS ACTIVITIES

To realize disarmament, it is important to limit the investments in the production of these weapons by private industry. Indeed, on the one hand, private corporations play a key role both with a view to their investment in the production of these weapons and because of the

⁶³ *Id.* It entered into force in 2003. *Id.* The requirements for participation are outlined in Sections II, V(a) and VI.8 and 9 of the KPCS. *Id.* See also FRANZISKA BIERI, FROM BLOOD DIAMONDS TO THE KIMBERLEY PROCESS: HOW NGOS CLEANED UP THE GLOBAL DIAMOND INDUSTRY 103–15 (2010) (underlining that the KPCS is a voluntary agreement and not a treaty).

⁶⁴ *About: KP Basics*, *supra* note 56.

⁶⁵ *Id.*

⁶⁶ Jan Erik Wetzel, *Targeted Economic Measures to Curb Armed Conflict? The Kimberley process on the Trade in 'Conflict Diamonds'*, in INTERNATIONAL LAW AND ARMED CONFLICT, CHALLENGES IN THE 21ST CENTURY 161 (Noëlle Quenivet & Shilan Shah-Davis eds., 2012); Kazumi Kawamoto, *Diamonds in war, diamonds for peace: Diamond sector management and kimberlite mining in Sierra Leone*, in HIGH-VALUE NATURAL RESOURCES AND POST-CONFLICT PEACEBUILDING 121 (Pavivi Lujala & Siri Aaa Rustad eds., 2012); Pavivi Lujala & Siri Aaa Rustad, *High-value resources: A blessing or curse?*, in HIGH-VALUE NATURAL RESOURCES AND POST-CONFLICT PEACEBUILDING, *supra*, at 3.

⁶⁷ *About: KP Basics*, *supra* note 56.

⁶⁸ *Id.*

⁶⁹ KIMBERLEY PROCESS, *supra* note 58.

specific know-how they possess, and which they are in a position to apply, to produce these weapons. On the other hand, the investors and asset managers also play a core role due to their financial power.

As far as the behavior of private corporations is concerned, within the corporate governance debate, the need to implement new standards in accord with the CSR, SRI and ESG concepts is becoming crucial.⁷⁰ A range of initiatives already exists. The following represent some of the broad spectrum of work in this area: the UN Guiding Principles on Business and Human Rights, the United Nations Principles for Responsible Investment, the ISO 26000:2010 Guidance on social responsibility, Corporate Social Responsibility effort and the work of the International Corporate Governance Network (ICGN).⁷¹

1. *UN Guiding Principles on Business and Human Rights*

The United Nations Guiding Principles on Business and Human Rights, released in March 2011, are a set of principles addressed to businesses and are designed to ensure that companies do not violate human rights.⁷² They should provide an authoritative global standard for preventing and addressing the risk of adverse impact on human rights linked to business activities.⁷³ The Principles are the result of the work of

⁷⁰ See *supra* Part I. See BADERIN & MCCORQUODALE, *supra* note 6, for an overview.

⁷¹ See SOCIALLY RESPONSIBLE INVESTMENTS IN BANKEN: MARKT – BEDINGUNGEN – PRAXISERFAHRUNGEN [SOCIALLY RESPONSIBLE INVESTMENTS IN BANKS: MARKET - CONDITIONS - PRACTICAL EXPERIENCE] 124–35 (Stefan Ziermann ed., 2013) (Ger.) [hereinafter SOCIALLY RESPONSIBLE INVESTMENTS IN BANKEN]. It should not be overlooked, that there are still a number of other initiatives, which may either directly or indirectly aim at limiting the financing of arms production. For example, OECD, *supra* note 5; *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Sept. 18, 2014); *OECD Declaration on International Investment and Multinational Enterprises*, OECD, <http://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm> (last visited Sept. 18, 2014); INT'L LABOUR ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES ON SOCIAL POLICY (4th ed., 2006), available at http://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/—multi/documents/publication/wcms_094386.pdf; *About GRI*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx> (last visited Sept. 18, 2014).

⁷² UN WORKING GRP. ON BUS. & HUMAN RIGHTS, THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: AN INTRODUCTION 2, available at http://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf (last visited Oct. 10, 2014).

⁷³ Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, ¶¶ 13–14, U.N. Doc. A/HCR/17/31 (Mar. 21, 2011) (by John Ruggie); UN Human Rights Council endorses

Professor John Ruggie, who served as Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises from 2005 to 2011.⁷⁴ He has supported the idea of there being a duty that states protect against human rights abuses, including by business organizations.⁷⁵ That is to say, he has advocated for the concept of corporate responsibility for the protection of human rights.

The Guiding Principles are a soft-law instrument that was endorsed unanimously by the UN Human Rights Council.⁷⁶ Their core provisions on corporate responsibility to respect human rights have been incorporated into a new human rights chapter in the OECD Guidelines for Multinational Enterprises⁷⁷ and are part of the European Commission's Corporate Social Responsibility Strategy.⁷⁸ Although criticized by non-governmental organizations, such as Amnesty International, for failing to effectively advance corporate responsibility and accountability for human rights,⁷⁹ overall, the Principles enjoy the strong support of international businesses and civil society organizations.⁸⁰ As a result, the international community has reached unprecedented convergence on normative standards for the human rights conduct of corporations,⁸¹ and the focus has now shifted to their implementation.⁸²

principles to ensure businesses respect human rights (June 16, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38742&Cr=human+rights&Cr1#.VHJFv4tH1o4>; Senn, *supra* note 10, at 1001.

⁷⁴ The UN 'Protect, Respect and Remedy' Framework for Business and Human Rights (Sept. 2010), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>. Professor Ruggie has first been working on a three-year mandate from the UN Human Rights Council on the subject of investment and human rights since 2005. In 2008, his mandate was renewed for another three years. See Mandate of the UN Special Representative, <http://business-humanrights.org/en/mandate-of-the-un-special-representative> (last visited Sept. 18, 2014).

⁷⁵ UN WORKING GRP. ON BUS. & HUMAN RIGHTS, *supra* note 72, at 2.

⁷⁶ *Id.*

⁷⁷ OECD, *supra* note 5, at 3.

⁷⁸ See *infra* Part II.2.d.

⁷⁹ Hugh Williamson, *Amnesty criticizes UN framework for multinationals*, FIN. TIMES (London), Jan. 17, 2011.

⁸⁰ Office of the High Comm'r, United Nations Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, at 2, U.N. Doc. HR/PUB/12/02 (2012), available at http://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf.

⁸¹ Senn, *supra* note 10, at 1001.

⁸² Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance*, 48 TEX. INT'L. L.J. 1, 33, 43 (2012); Anita Halvorssen & Karin Buhmann, *Extraterritorial Regulation of Companies and the*

2. *United Nations Principles for Responsible Investment*

The United Nations Principles for Responsible Investment (UNPRI) program was launched in April 2006 at the New York Stock Exchange.⁸³ The initiative is comprised of a network of international investors, working together to put the Principles into practice.⁸⁴ The Principles, expressed as a set of best-practice guidelines for responsible investment, provide a common framework for fiduciaries and their investment managers to put ESG issues at the core of their investment decision-making for their portfolios.⁸⁵ They reflect the view that ESG issues can affect the performance of investment portfolios, which may conflict with the fiduciary duties of asset managers and institutional investors.⁸⁶ At the same time, they recognize a responsibility of asset managers and institutional investors to act in the best long-term interests of their beneficiaries.⁸⁷ Therefore, ESG issues should be given appropriate consideration by asset managers and institutional investors if they are to fulfill their duties. As of today, the Principles have become increasingly well accepted in investment circles, among asset owners and managers, as well as institutional investors.⁸⁸

3. *ISO 26000:2010 Guidance on Social Responsibility*

The ISO 26000:2010 Guidance on Social Responsibility provides guidelines for how businesses and organizations can operate in a socially responsible way. According to the Guidance, social

UN Guiding Principles on Human Rights, in BUSINESS AND HUMAN RIGHTS 148 (Kuman Sinha Manoj ed., 2013).

⁸³ *About PRI*, PRINCIPLES FOR RESPONSIBLE INV., <http://www.unpri.org/about-pri/> (last visited Oct. 10, 2014).

⁸⁴ *Signatories to the Principles for Responsible Investment*, PRINCIPLES FOR RESPONSIBLE INV., <http://www.unpri.org/signatories/signatories/> (last visited Oct. 10, 2014). They are asset owners, investment managers, and professional service partners. *Id.*

⁸⁵ *About the PRI Initiative*, PRINCIPLES FOR RESPONSIBLE INV., <http://www.unpri.org/about> (last visited Oct. 10, 2014).

⁸⁶ *Responsible Investment and Investment Performance*, PRINCIPLES FOR RESPONSIBLE INV., <http://www.unpri.org/responsible-investment-and-investment-performance/> (last visited Oct. 10, 2014).

⁸⁷ See generally Jean-Pascal Gond & Valeria Piani, *Organizing the Collective Action of Institutional Investors: Three Case Studies from the Principles for Responsible Investment Initiative*, in CRITICAL STUDIES ON CORPORATE RESPONSIBILITY, GOVERNANCE AND SUSTAINABILITY VOL. 5: INSTITUTIONAL INVESTORS' POWER TO CHANGE CORPORATE BEHAVIOR: INTERNATIONAL PERSPECTIVES 19 (Suzanne Young & Stephen Gates eds., 2013).

⁸⁸ *About the PRI Initiative*, *supra* note 84; Senn, *supra* note 10, at 1001.

responsibility means that businesses and corporations should act in an ethical and transparent way that contributes to the health and welfare of society.⁸⁹ It is a voluntary international standard.⁹⁰ It is aimed at all types of organizations regardless of their activity, size, or location. The Guidance is based on the premise that the relationship of businesses to society and the environment is a critical factor in their ability to continue to operate effectively on a continuous basis.⁹¹ Representatives from governments, non-governmental organizations, industry, consumer groups, and labor organizations around the world were involved in formulating these guidelines.⁹² They have resonated well with the business and investment communities, and are increasingly being used as a measure to assess businesses' overall performance and assist them when translating the prescribed measures into effective actions, and sharing best practices relating to social responsibility.⁹³ Indeed, the guidelines now contribute to the formation of an international consensus on the meaning of social responsibility in practice.⁹⁴ Their intent is to encourage businesses to go beyond legal compliance in assessing their own activities and in adopting new measures towards increased social responsibility.⁹⁵

4. Corporate Social Responsibility

Although some progress has been made towards defining a concept of corporate social responsibility,⁹⁶ some authors still conclude that CSR remains an "essentially contested concept."⁹⁷ However, some

⁸⁹ INT'L ORG. FOR STANDARDIZATION, ISO 26000:2010 Guidance on Social Responsibility § 2.18 (2010), available at <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en>.

⁹⁰ It provides guidance rather than requirements. Therefore, it cannot be certified to unlike some other ISO standards. *Abstract of ISO 26000:2010 Guidance on Social Responsibility*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/catalogue_detail?csnumber=42546 (last visited Oct. 10, 2014).

⁹¹ *ISO 26000:2010 Guidance on Social Responsibility*, INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/iso26000.htm> (last visited Oct. 10, 2014).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Kernaghan Webb, *ISO 26000: Bridging the Public/Private Divide in Transnational Business Governance Interactions* 29 (Osgoode Hall Law Sch., CLPE Research Paper No. 21/2012, 2012), available at <http://digitalcommons.osgoode.yorku.ca/clpe/30>.

⁹⁶ McCorquodale, *supra* note 6, at 390–91.

⁹⁷ Jeremy Moon, Andrew Crane & Dirk Matten, *Can Corporations be Citizens? Corporate Citizenship as a Metaphor for Business Participation in Society*, 15 BUS. ETHICS Q. 427, 427–51 (2005); Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon & Donald Siegel, *The*

delimitations of what CSR is may be made. CSR is not the same concept as the idea of *business and human rights*. These two concepts start from different premises, although they also share some features. CSR takes the perspective of a corporation in evaluating business risks.⁹⁸ On the contrary, the business and human rights approach concentrates on the human rights issues those business operations create.⁹⁹ It is centered on the attitudes of corporations towards human rights and their duty to respect labor laws and standards. Though connected, these two areas of scholarship regard different, even opposing, rights holders in the business and human rights context.¹⁰⁰ Another aspect regarding the implementation of a socially responsible behaviour by listed corporations consists of the imposition of reporting requirements on companies with respect to human rights by stock exchanges. Their reporting requirements demonstrate how corporate responsibility to respect human rights can be transposed into legal obligations.¹⁰¹

For its part, the European Commission, recognizing that cooperation between industry and investment is necessary in the transition to a sustainable economy,¹⁰² announced a new policy and work group on CSR, together with an action agenda for the period of 2011-2014 in October 2011.¹⁰³ It defines CSR as “the responsibility of enterprises for their impacts on society.”¹⁰⁴ For the EU, the development of good CSR practices is considered to be crucial for building trust in the market economy, trade openness, and globalisation.¹⁰⁵ Europe’s

Corporate Social Responsibility Agenda, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 3, 5–7 (2008).

⁹⁸ See Robert McCorquodale, *Proceedings of the Inaugural Meeting of the Study Group on Business and Human Rights*, 108 AM. SOC’Y INT’L L. PROC. (forthcoming 2014) (on file with author).

⁹⁹ See *id.*

¹⁰⁰ McCorquodale, *supra* note 6, at 391.

¹⁰¹ See Antony Crockett, *Proceedings of the Inaugural Meeting of the Study Group on Business and Human Rights*, 108 AM. SOC’Y INT’L L. PROC. (forthcoming 2014) (on file with author).

¹⁰² As mentioned by Commission Vice-President Antonio Tajani in announcing the decision. *Teaming up with investors to drive the transition to a sustainable economy*, EUR. COMM’N, http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/teaming_up_with_investors_en.pdf (last visited Oct. 10, 2014).

¹⁰³ *Corporate Social Responsibility (CSR)*, EUR. COMM’N, http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm (last updated Apr. 29, 2014); Senn, *supra* note 10, at 1001.

¹⁰⁴ See *Corporate Social Responsibility (CSR)*, *supra* note 103.

¹⁰⁵ *Sustainable and Responsible Business*, EUR. COMM’N, http://ec.europa.eu/enterprise/policies/sustainable-business/index_en.htm (last updated Feb. 5, 2014).

enterprises need to ensure that their shareholders understand how social, environmental, and governmental performance affect financial performance.¹⁰⁶ The policy's goal is to enhance positive impacts—for example, through product innovations and the introduction of services that are beneficial to society and to enterprises themselves—and to minimize and prevent negative impacts on society.¹⁰⁷

For the European Commission, a central objective of the CSR concept is to develop ethical and responsible investment criteria and determine how to make adequate consideration of material non-financial information, which should be the norm amongst investors and financial analysts.¹⁰⁸ These qualitative aspects should be regulated as non-financial reporting requirements. Hence, in April 2013, the European Commission submitted a proposal for a directive, aimed at enhancing the transparency of certain large companies (ones with more than five hundred employees) on social and environmental matters for consultation.¹⁰⁹ According to that proposal, relevant information on policies, risks, and results regarding the performance of these companies, in relation to environmental matters, social and employment matters, respect for human rights, anti-corruption and bribery issues, and diversity on the boards of directors would have to be published in the annual report.¹¹⁰ It is expected, however, that the final measures to be adopted will probably not be prescriptive, which will leave significant flexibility to the corporations.¹¹¹

¹⁰⁶ The ICGN, UNPRI together with the European Federation of Financial Analysts Societies (EFFAS) have been appointed by the European Commission to build the capacity of investors to integrate ESG information into their investment decisions. See *European Commission Appoints ICGN, PRI and EFFAS to Build Capacity of Investors to Integrate ESG Information in Investment Decisions*, PRINCIPLES FOR RESPONSIBLE INV. (Sept. 27, 2011), <http://www.unpri.org/press/european-commission-appoints-icgn-pri-and-effas-to-build-capacity-of-investors-to-integrate-esg-information-in-investment-decisions-2/>.

¹⁰⁷ See generally CAROLINE SCHIMANSKI, EUROPEAN COMM'N, AN ANALYSIS OF POLICY REFERENCES MADE BY LARGE EU COMPANIES TO INTERNATIONALLY RECOGNISED CSR GUIDELINES AND PRINCIPLES (2013), available at http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en.pdf.

¹⁰⁸ *Non-Financial Reporting*, EUR. COMM'N, http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.htm (last visited Oct. 10, 2014); *Commission Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups*, at 2, COM (2013) 207 final (Apr. 16, 2013) [hereinafter *Commission Proposal*].

¹⁰⁹ See *Commission Proposal*, *supra* note 108.

¹¹⁰ *Id.* at 11–13.

¹¹¹ Press Release, Eur. Comm'n, Commission moves to enhance business transparency on social and environmental matters (Apr. 16, 2013), available at http://europa.eu/rapid/press-release_IP-13-

5. ICGN Initiative

The initiative conducted by the ICGN aims to raise standards of corporate governance worldwide and to promote best-practice guidance.¹¹² In the course of the last decade, corporate governance has emerged as an issue of acute significance and prominence in multiple jurisdictions.¹¹³ There is a demonstrated growing convergence in accepting the critical role of good governance as a best practice for public companies. On the investors' side there is also the recognition that corporate governance should encourage shareholder engagement, in order to forestall another financial crisis such as the one triggered by the credit crunch and collapse of global financial markets in 2008.¹¹⁴ In that context, the need has arisen to assess whether *responsible investment* has "arrived" as a legal concept and can no longer be considered purely voluntary. In other words, it should be established whether governance principles have achieved sufficiently widespread adoption and recognition as to set a global legal and business standard.¹¹⁵

II. THE CHALLENGES

Based on the description of the current regulatory situation (II), this paper now turns to exploring whether the aforementioned public international law conventions and the diverse soft-law initiatives have the potential to effectively contribute to eliminating violence and

330_en.htm. The proposal has been adopted by the plenary of the European Parliament on April 2014. See *Non-Financial Reporting*, *supra* note 108. To become law, the proposal still needs to be adopted jointly by the European Parliament and by the EU Member States in the Council. *Id.* Improving corporate governance: Europe's largest companies will have to be more transparent about how they operate. Statement, Eur. Comm'n, Improving corporate governance: Europe's largest companies will have to be more transparent about how they operate (Apr. 15, 2014), available at http://europa.eu/rapid/press-release_STATEMENT-14-124_en.htm.

¹¹² *Guidance: Global Corporate Governance Principles*, INT'L CORPORATE GOVERNANCE NETWORK, <https://www.icgn.org/best-practice> (last visited Oct. 2, 2014).

¹¹³ This is demonstrated by the efforts undertaken by the OECD to develop and enforce good corporate governance practices. See *Corporate governance*, OECD, <http://www.oecd.org/corporate/> (last visited Oct. 10, 2014).

¹¹⁴ *Corporate governance principles: Corporate governance and the financial crisis*, OECD <http://www.oecd.org/daf/ca/corporategovernanceprinciples/corporategovernanceandthefinancialcrisis.htm> (last visited Oct. 10, 2014); INT'L CORPORATE GOVERNANCE NETWORK INT'L CORPORATE GOVERNANCE NETWORK, ICGN GLOBAL GOVERNANCE PRINCIPLES 5 (2014), available at https://www.icgn.org/images/Global_Governance_Principles_2014.pdf.

¹¹⁵ Senn, *supra* note 10, at 1001; INT'L LAW ASS'N, NINTH INTERIM REPORT OF THE HAGUE CONFERENCE (2010): INTERNATIONAL SECURITIES REGULATION 15 (2010), available at <http://www.ila-hq.org/download.cfm/docid/02356B34-5B0A-44A8-B3D8C2B012A6F4C5>.

enhance respect for human rights in practice. To approach the issue, due to the relatively short period of time since their adoption, it is instructive to first examine how scholarship on the subject has addressed the *relationships* between these measures up to now. Second, to get a picture of how they function and interact, and to determine whether they represent a positive peace approach based on their respective roles as either direct or indirect components of peace, this paper will consider several analytical challenges.¹¹⁶ One aspect to examine is the overall institutional structure of the framework, in particular, the specific characteristics of the existing regulatory measures. Third, the issue of enrollment of business activities arises. It regards their possible embedment taking CSR, ESG, and SRI issues into account. It also elaborates on incentives which may lead to the effective implementation of the regulatory measures and could be appropriate to contribute to ensure compliance. Overall, it corresponds to the delineation of a responsive regulation approach.¹¹⁷

A. CURRENT STATE OF SCHOLARSHIP

As it appears, to date, scholarship has focused on either public international law conventions or business, i.e. CSR and ESG-SRI approaches, including human rights initiatives.

1. *Scholarship on Public International Law Conventions*

As described, much of the research on disarmament in international law thus far has centered on analysis and evaluation of existing international law conventions and processes, targeted at banning the use of specific weapons under an international human rights law approach. The studies published concentrate on identifying and analyzing the stages of the various conventions' emergence, the rationales leading to their conclusion, their formulation, and legal considerations, such as their legitimacy and effectiveness.¹¹⁸

¹¹⁶ See *supra* text accompanying note 2.

¹¹⁷ See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992).

¹¹⁸ See generally THE CONVENTION ON CLUSTER MUNITIONS, *supra* note 20; WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 23; ALAN BRYDEN, *INTERNATIONAL LAW, POLITICS AND INHUMAN WEAPONS: THE EFFECTIVENESS OF GLOBAL LANDMINE REGIMES* (2013); KENNETH R. RUTHERFORD, *DISARMING STATES: THE INTERNATIONAL MOVEMENT TO BAN LANDMINES* (2011); BIERI, *supra* note 63.

2. Scholarship on Soft Law Initiatives

A further strand of research concentrates on the relationships between business activities and human rights in the broad sense.¹¹⁹ More specifically, this research focuses on the delineation of a concept of corporate social responsibility and socially responsible financing and investment.¹²⁰ Most of the literature on this subject explores the behavior of businesses and private corporations under legal obligations, such as their fiduciary duties, their responsibility towards shareholders, their motivation to adopt measures on a voluntary basis, and the difficulty of implementing new approaches to this issue.¹²¹ An important part of this literature also discusses possible means of enforcing ethical and/or sustainable approaches to investment.¹²²

Aside from the legal scholarship, economic studies on the issue appear to be more widespread and comprehensive. They focus on analyzing the performance of investments in funds or other investment vehicles that utilize a sustainable and/or ethical model when choosing how to invest.¹²³ Undoubtedly, investments in funds and other investment vehicles are primarily designed to attain the highest possible performance. Success is a determinant in choosing whether to invest in a particular company. Thus, such studies scrutinize the performance of socially responsible investment activities.¹²⁴ This may occur either in comparison to other forms of investments, or with regard to the impact of

¹¹⁹ See, e.g., John Gerard Ruggie, *Global Governance and 'New Governance Theory': Lessons from Business and Human Rights*, 20 GLOBAL GOVERNANCE 5 (2014); THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (Radu Mares ed., 2012); HUMAN RIGHTS OBLIGATIONS OF BUSINESS, (Surya Deva & David Bilchitz, eds., 2013).

¹²⁰ See, e.g., THE NEXT GENERATION OF RESPONSIBLE INVESTING (Tessa Hebb ed., 2012); SOCIALLY RESPONSIBLE FINANCE AND INVESTING (H. Kent Baker & John R. Nofsinger eds., 2012); SOCIALLY RESPONSIBLE INVESTMENTS IN BANKEN, *supra* note 71.

¹²¹ See, e.g., HUMAN RIGHTS OBLIGATIONS OF BUSINESS, *supra* note 119; THE NEXT GENERATION OF RESPONSIBLE INVESTING, *supra* note 120; SOCIALLY RESPONSIBLE FINANCE AND INVESTING, *supra* note 120; SOCIALLY RESPONSIBLE INVESTMENTS IN BANKEN, *supra* note 71.

¹²² See, e.g., THE NEXT GENERATION OF RESPONSIBLE INVESTING, *supra* note 120; SOCIALLY RESPONSIBLE FINANCE AND INVESTING, *supra* note 120; SOCIALLY RESPONSIBLE INVESTMENTS IN BANKEN, *supra* note 71.

¹²³ See, e.g., Alexander Kempf & Peer Osthoff, *The Effect of Socially Responsible Investing on Portfolio Performance*, 13 EUR. FIN. MGMT. 908 (2007); Luc Renneboog, Jenke Ter Horst & Chendi Zhang, *The price of ethics and stakeholder governance: The performance of socially responsible mutual funds*, 14 J. CORP. FIN. 302, 303 (2008); Greig A. Mill, *The Financial Performance of a Socially Responsible Investment Over Time and a Possible Link with Corporate Social Responsibility*, 63 J. BUS. ETHICS 131, 133 (2006).

¹²⁴ See generally Kempf & Osthoff, *supra* note 123; Renneboog, Horst & Zhang, *supra* note 123; Mill, *supra* note 123.

these investments on the value of the corporations concerned. These studies query whether such investments have a significant impact on the performance of the funds or of the chosen investment vehicles.¹²⁵ They also focus on the issue of whether they increase the value of the corporations or on analysis of types of corporations that successfully apply sustainable investment strategies.¹²⁶

3. *Issues for Research*

This overview of the current state of scholarship does not pretend to be complete or all-inclusive. It has briefly pointed to the main directions of research on the topic and the emerging body of scholarship in that field. It indicates that the current state of scholarship still poses analytical challenges, which holds implications for future research. This situation is not least due to the relative recency of the emergence of these issues and research in this field. Yet, the existing scholarship provides a useful basis to outline the prevailing framework. It gives initial insights into the main objective pursued here, the conceptualization of a steering of business activities, as well as the delineation of possible schemes to be applied, in order to realize the goal of disarmament.

Precisely, there is no all-encompassing and coherent picture of the existing diverse regulatory and self-regulatory measures currently in place. Most studies do not concentrate on their overall institutional structure. Neither have the interplay and contingent cooperative patterns of these measures been studied thoroughly. At a macro-level, this implicates the linkage of public international law conventions and soft-law initiatives. At a micro-level, it regards the possible linkage of business and human rights to socially responsible approaches to investment by corporations and the financial industry.¹²⁷ It should be interesting to determine whether this presents an adequate and stable configuration; whether these diverse measures complement one another; and whether this is done in a satisfactory way. Exhaustive research of these measures could have significant implications to assess their efficacy. Thus, in order to advance, it would be helpful first to analyze the extent to which public international law has met the objectives laid

¹²⁵ See generally Kempf & Osthoff, *supra* note 123; Renneboog, Horst & Zhang, *supra* note 123; Mill, *supra* note 123.

¹²⁶ See generally Kempf & Osthoff, *supra* note 123; Renneboog, Horst & Zhang, *supra* note 123; Mill, *supra* note 123.

¹²⁷ See BADERIN & MCCORQUODALE, *supra* note 6.

down in these conventions, and has possibly led to effectively steer the conduct of corporations and of the financial industry toward the same objectives.¹²⁸

Furthermore, contemporary scholarship has addressed the relationship between investment behavior and a broad range of sociological factors, such as religion, culture, ethics, and also environment.¹²⁹ In most of these studies, however, the subject of disarmament has been referred to only randomly or indirectly, if at all.¹³⁰ In addition, up to this point, little focus has been placed on implementing behavioral tools¹³¹ to prevent investment in the production of banned weapons. Nor has in-depth research been carried out on the regulatory conditions accompanying the trade in such weapons. This is somewhat surprising, considering the vast resources occupied in the production and trade of these weapons.

With a view to this situation, the questions that arise now regard the approaches to be adopted in future research. On the one side, it is necessary to concentrate specifically on the issue of disarmament in relation to investment activities. On the other side, the divide between hard-law and soft-law measures should also be examined, and methods for overcoming this gap should be explored. Interactions and linkages with the emerging concept of CSR, ESG-SRI behavior should be identified, and their potential to offer real opportunities to reach the objectives pursued through the adoption of international law conventions should be assessed.

B. INSTITUTIONAL STRUCTURE OF THE FRAMEWORK

With view to that situation, a first challenge is to map the contours of the institutional structure we face. At first glance, the current institutional structure of the measures focusing on disarmament, on the one hand, and the behavior of corporations, financial institutions, and investors, on the other hand, appear to present a colorful array of features. To picture a preliminary framework of the situation, the focus

¹²⁸ See *supra* Part II.

¹²⁹ See, e.g., FUNG, LAW & YAU, *supra* note 7, at 5 (2010).

¹³⁰ See, e.g., *id.*

¹³¹ See *infra* Part II.2.d.

of this paper now shifts to exploring the regulatory characteristics, actors involved, implementation, and temporal aspect of these measures.¹³²

1. Regulatory Characteristics

From a regulatory perspective, we face both hard-law and soft-law measures. The hard, public international law conventions contain rules banning the use and production of weapons.¹³³ They are well defined and clearly reflect the will and determination of states to eradicate the use and production of the weapons they regulate.¹³⁴ Due to their public international law character, they lack monitoring mechanisms similar to those of states.¹³⁵ States ratifying these conventions have to transpose the rules into their own statutes,¹³⁶ and create implementation and enforcement strategies within their territories.

Soft-law measures and initiatives have in recent years been developed by international organizations, such as the UN, and transnational¹³⁷ organizations, such as the OECD.¹³⁸ They focus on behavior within the private sector; this includes business corporations that produce banned weapons, as well as individual and institutional investors, and financial institutions. Such initiatives are also the result of self-regulatory measures of the private sector, such as the ICGN. Still other regulatory frameworks are in the process of being defined, such as in the case of the EU as a supranational organization.

Altogether, these measures offer a mixed picture. Both their emergence and the substantive aspects they cover are not the result of a definite or elaborated strategy or program. On the contrary, the main public international law conventions on disarmament have been adopted on an ad hoc basis. They are the result of successful political

¹³² See generally Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION* 44 (Walter Mattli & Ngaire Woods eds., 2009).

¹³³ See *supra* Part II.1 (discussing cluster munitions, anti-personnel landmines, and weapons thought to be excessively injurious or to have indiscriminate effects).

¹³⁴ See *supra* Part II.1.

¹³⁵ Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421, 453 (2014).

¹³⁶ This depends on the method they have opted for the integration of international law: monistic or dualistic. WALLACE & MARTIN-ORTEGA, *supra* note 33, at 38–39.

¹³⁷ On the concept of transnationalism, see Calliess, *Law, Transnational*, in *The Encyclopedia of Global Studies* 1035 (Mark Juergensmeyer, Helmut Anheier & Victor Faessel, eds., 2012).

¹³⁸ See *supra* Part II.1.a. See also OECD, *supra* note 5.

negotiations, dependent on the realities of the moment. No basic concept or mode of regulatory governance exists in this area. Each convention also pursues proper and clearly defined goals in relation to definite types of weapons.¹³⁹ The conventions do not fit into the approach applied by states when opting for policy and regulatory measures either. This process typically consists of the following steps: first, the definition of a short, medium, and long-term strategy; second, the introduction of the subsequent regulatory measures; third, their implementation.¹⁴⁰ By the same token, the soft-law initiatives and codes of conduct have been introduced on a case-by-case basis, and are not the result of a determined strategy either.¹⁴¹ It also should be stressed that the vast majority of these measures have been initiated and worked out by international organizations of states (i.e., the public sector).¹⁴² They are not the result of genuine efforts undertaken by the private sector, although they are essentially addressed to private market participants—corporations and investment professionals.¹⁴³ At first sight, they appear to be the result of public pressure and of the work of particular interest groups and organizations pleading for disarmament.¹⁴⁴

2. Actors Involved

Both the hard-law and soft-law measures involve a large spectrum of actors. Besides the international, transnational, and supranational organizations¹⁴⁵ and state actors—governments, political forces, and specialized authorities, such as financial market supervisors—non-state and private actors are also involved.¹⁴⁶ Indeed, they are the secondary addressees of the measures, alongside states.

¹³⁹ This has been the trend. *See, e.g., supra* Part II.1 (discussing the Convention on Certain Conventional Weapons and its protocols addressing weapons such as the use of mines, booby traps and other devices, the use of incendiary weapons, or the blinding laser weapons; the Convention on Cluster Munitions; the Anti-Personnel Landmines Convention).

¹⁴⁰ *See generally* MYRIAM SENN, NON-STATE REGULATORY REGIMES, UNDERSTANDING INSTITUTIONAL TRANSFORMATION 11–20 (2011).

¹⁴¹ *See supra* Part II.2.

¹⁴² *See, e.g., supra* Part II.2.a–b (on the initiatives of the UN).

¹⁴³ *See, e.g., supra* Part II.2.a (on the UN Guiding Principles on Business and Human Rights developed by the UN).

¹⁴⁴ *See, e.g., supra* Part II.1.b (on the International Committee of the Red Cross in relation to the introduction of the CCM).

¹⁴⁵ *See supra* Part III.2.a.

¹⁴⁶ *See, e.g., supra* Part II.2.a (on Amnesty International in relation to the introduction of the UN Guiding Principles on Business and Human Rights).

An important subgroup of actors in the private sector worth mentioning are the associations, in particular, the non-governmental organizations, lobbying for a better protection of human rights and the effective implementation of disarmament measures.¹⁴⁷ Other very important, and essentially oppositional, subgroups are the multinational and national corporations, and the financial industry, encompassing banks, investment management firms, and institutional and small investors. They pursue commercial interests, which may incite investment in the production of these weapons.

Thus, one major issue to investigate regards the operations and management of possible interactions, collaborations, and also confrontations between states, private businesses, and civil society actors.

3. Implementation

Still another aspect regarding the structure of the framework is implementation of the regulations. The hard-law conventions require the elaboration of detailed rules or guidelines at the national level in order to be enforced effectively.¹⁴⁸ On the contrary, the soft-law codes of conduct, principles, or recommendations regarding private business activities concentrate on the sensitization of the general public and the stakeholders they focus on. Yet, they do not entail mandatory enforcement mechanisms either. They can be qualified broadly as a kind of educational measure for the business community. In addition, the corporations themselves are under increasing pressure to define and implement internal codes of conduct to defend their interests and position vis-à-vis the general public.¹⁴⁹ The implementation of a socially responsible approach is becoming crucial for a corporation's reputation and future development.¹⁵⁰

¹⁴⁷ For a list of involved associations, see *Peace and Disarmament*, GENEVA INT'L, http://www.genevainternational.org/pages/en/99;Peace_&_Disarmament#subth279 (last visited Sept. 18, 2014).

¹⁴⁸ See *infra* Part III.2.d.

¹⁴⁹ See, e.g., NOVARTIS, CODE OF CONDUCT (2011), <http://www.novartis.com/downloads/corporate-responsibility/resources/code-of-conduct-english.pdf>. See also Ralph G. Steinhardt, *Weapons and the human rights responsibilities of multinational corporations*, in *WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW* 507–41 (Stuart Casey-Maslen ed., 2014) (on the role of corporations).

¹⁵⁰ Worth mentioning are the investments made by central banks. Central banks, such as Swiss National Bank (SNB), may declare on their own applying a sustainable, ethical or responsible

Taking the broader corporate governance debate into account, its global reach, duration, and the efforts undertaken to implement good governance rules at different levels, it should not be overlooked that soft-law measures may also require the intervention of states for their implementation. As an example, the OECD Guidelines for Multinational Enterprises require the establishment of National Contact Points in member states to provide assistance to corporations and guarantee the guidelines' effective implementation in OECD countries.¹⁵¹ Within this context, governments act as supporters of the corporations.¹⁵²

Considered together, these bodies of rules appear to complement one another, and to provide for an evolving and increasingly coherent global framework, but some gaps remain. In particular, there is a basic structural gap, as far as it concerns private investment's role as a primary source leading to the production of these weapons. In contrast, the international law conventions primarily aim at banning the use of these weapons by states.¹⁵³ In reality, we face a singular institutional structure including state and non-state actors, and encompassing the whole chain of activities, from the initial investment in the production of these weapons to the prohibition of their use in a case of war.

4. Temporal Aspect

A further aspect worth noting and which characterizes the institutional structure of the framework is the temporal one. Such hard-law measures, as well as soft-law initiatives have only recently come into being. Furthermore, they are currently in the process of being implemented.¹⁵⁴ The Convention on Cluster Munitions, for instance, only entered into force in 2010.¹⁵⁵ Once states have ratified it, they have a

investment approach. See Fritz Zurbrügg, Member of the Governing Board, Swiss Nat'l Bank, Speech at Swiss National Bank Money Market Event: The SNB's investment policy: options and limitations (Mar. 27, 2014), available at http://www.snb.ch/en/mmr/speeches/id/ref_20140327_zur/source/ref_20140327_zur.en.pdf. At the beginning of 2014 the SNB declared considering ethics in relation to its investments. *Id.* It will not invest or disinvest from companies producing banned weapons and companies not respecting basic human rights. *Id.*

¹⁵¹ See, e.g., OECD, *supra* note 5, at 68; *National Contact Points*, OECD GUIDELINES FOR MULTINATIONAL ENTERS., <http://mneguidelines.oecd.org/ncps/> (last visited Sept. 14, 2014).

¹⁵² Michael A. Pirson, *Business Models and Social Entrepreneurship*, in SOCIALLY RESPONSIBLE FINANCE AND INVESTING, *supra* note 120, at 55–66; *National Contact Points*, *supra* note 151.

¹⁵³ See *supra* Part II.1.

¹⁵⁴ See *supra* Part II.1.

¹⁵⁵ See *supra* Part II.1.b.

period of eight years to destroy or ensure the destruction of all cluster munitions.¹⁵⁶ Thus, whether the measures will result in a real ban of investments in the production and use of these weapons has yet to be demonstrated. At the national level, a number of jurisdictions, including Belgium,¹⁵⁷ The Netherlands,¹⁵⁸ and Switzerland,¹⁵⁹ have enacted detailed legislation, which restricts investment managers and funds from investing in corporations producing land mines and/or cluster munitions.¹⁶⁰ Besides, other states have not yet passed legislation against investment in cluster munitions producers, but they express the view that investments in cluster munitions are prohibited by the CCM.¹⁶¹ Similarly, the initiatives directed at harnessing private investment can be seen as a consequence of the existing conventions. Whether they will contribute to the implementation of the hard-law measures has yet to be established as well. Moreover, at the state level, the introduction of regulations encouraging corporate social responsibility and socially responsible

¹⁵⁶ CCM, *supra* note 36, art. 3, para. 2.

¹⁵⁷ See Wet inzake het verbod op de financiering van de productie, gebruik en bezit van anti-persoonsmijnen en submunitie [Law Banning Financing for the Production, Use and Possession of Anti-Personnel Mines and Submunitions] of Mar. 20, 2007, BELGISCH STAATSBAD [B.S.] [Official Gazette of Belgium] Apr. 26, 2007 (Belg.), http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2007032048&tab_le_name=wet.

¹⁵⁸ See Besluit van 21 december 2012 tot wijziging van het Besluit Gedragstoezicht financiële ondernemingen Wft, het Besluit marktmisbruik Wft, het Besluit prudentiële regels Wft, alsmede enige andere besluiten op het terrein van de financiële markten (Wijzigingsbesluit financiële markten 2013) [Decree of 21 December 2012 to amend the Market Conduct Supervision (Financial Institutions) Decree, the Market Abuse (Financial Supervision Act) Decree, the Prudential Rules (Financial Supervision Act) Decree and other decisions in the domain of the financial markets (Financial Markets (Amendment) Decree 2013], Stb. 2012, p. 695, Dec. 28, 2012, (Neth.), <https://zoek.officielebekendmakingen.nl/stb-2012-695.html>. In detail, Section 21a of the Market Abuse (Financial Supervision Act) Decree (Besluit Marktmisbruik Wft), which represents an executive and supervisory measure. See *Ban on Investment in Cluster Munitions*, AFM, <http://www.afm.nl/en/professionals/afm-voor/effectenuitgevend-ondernemingen/marktmisbruik/clustermunitie.aspx> (last visited May 20, 2014). It took effect on January 1, 2013. *Id.* The Netherlands Authority for the Financial Markets (AFM) is responsible for supervision of compliance with the ban, and has published detailed information for the market participants. *Id.*

¹⁵⁹ LEGGE FEDERALE SUL MATERIALE BELLICO [LMB] [FEDERAL ACT ON WAR MATERIAL] Dec. 13, 1996, SR 514.51, art. 8a–c, 35a (Switz.), <http://www.admin.ch/ch/e/rs/514.51.en.pdf>.

¹⁶⁰ According to PAX, in March 2014, nine states had adopted legislation that prohibits (various forms of) investments in cluster munitions: Belgium, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Samoa and Switzerland. ROOS BOER & SUZANNE OOSTERWIJK, PAX FOR PEACE, BANNING INVESTMENTS IN CLUSTER MUNITIONS PRODUCERS: NATIONAL LEGISLATION 6 (2014) available at <http://www.paxforpeace.nl/media/files/paxrapportbanning-investmentsfinal.pdf>.

¹⁶¹ According to PAX, there were 27 states in March 2014. See *id.* at 7.

investments remains under scrutiny in many jurisdictions, such as in the EU.¹⁶²

Based on the delineation of this institutional framework, the main challenge is to explore and understand whether and how these differing measures fuse together toward the goal of effectively banning the production and use of the weapons concerned. This represents an issue of enrollment.

C. ENROLLMENT OF BUSINESS ACTIVITIES¹⁶³

Taking the contours of the institutional structure just mapped, a core aspect regards how widely these public international law conventions are recognized, understood, and followed by the business community.¹⁶⁴ In particular, the issue is how to steer the investment activities of corporations and financial institutions. The issue regards the enrollment of business activities, in order to hinder or stop them from producing these weapons or components of these weapons. Concomitantly, the power of the investors should be harnessed. Thus, the role played by the soft-law initiatives in enhancing the community's awareness of the issue can serve as an indicator. Indeed, compliance with the standards they define should be ensured.

1. *Embedding Socially Responsible Investment: An Outline*

Based on corporate governance, in principle, a socially responsible investment behavior scheme, leading to the effective implementation of the disarmament measures, should be delineated and implemented.¹⁶⁵ The scheme's constitutive elements have to be delimited. Further, the issue regarding how to enroll relevant actors has to be

¹⁶² See *supra* Part II.2.d.

¹⁶³ On the concept of enrollment, see BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF THE SCIENTIFIC FACTS* (Princeton Univ. Press 1986) (1979); JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); Julia Black, Enrolling actors in regulatory systems: examples from UK financial services regulation, 2003 PUB. L. 63; Burkard Eberlein, Kenneth W. Abbott, Julia Black, Errol Meidinger & Stepan Wood, *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE 1, 4–6 (2014).

¹⁶⁴ This is important, because a range of influential countries has not ratified the international law conventions. See *supra* Part II.1.

¹⁶⁵ See WILLIAM RANSOME & CHARLES SAMPFORD, *ETHICS AND SOCIALLY RESPONSIBLE INVESTMENT: A PHILOSOPHICAL APPROACH* (2010) for an approach.

solved. This requires figuring out which incentives operate to lead relevant actors to adopt behaviors that are in line with the rules.

In light of the corporate governance debate, there is now increasing pressure to integrate ESG and human rights considerations into investment processes.¹⁶⁶ Although it is not a new issue, this process remains a challenge. In addition, the regulatory debate that emerged following the 2007-2009 financial crisis is progressively focusing on quality, sustainability, and ethical aspects of investments.¹⁶⁷ This debate is centered on adopting measures to prevent hazardous investment strategies by financial institutions.¹⁶⁸ Relatedly, the question of defining ethical forms and approaches to investment activities is gaining support.

Nevertheless, it should not be ignored that along with the concept of corporate governance, definitional challenges of the concepts of CSR, ESG, and SRI remain.¹⁶⁹ SRI concerns the roles of investors and investment managers who value social responsibility, but at the same time, it also concerns the financial reward of their investments.¹⁷⁰ The responsible investment managers will exclude investments in firms not matching these criteria. Thus, their portfolios will not include any shares or other investment products in these firms. Their decision not to invest in these firms may represent an enforcement measure of an international law convention,¹⁷¹ following its ratification in their country of domicile. In that case, the responsible authorities in countries having ratified the said conventions, will supervise and, if necessary, take adequate measures to enforce these conventions.¹⁷² The decision not to invest when the criteria are not being met may also be deliberate.¹⁷³ In that case, it is important for the investment managers to delimit what SRI represents in the first place and try to concretize what is considered ethically permissible for them, as individuals, and for their investment firm in relation to the broader public. To approach SRI, the following basic

¹⁶⁶ See, e.g., FUNG, LAW & YAU, *supra* note 7, at 1-4.

¹⁶⁷ See the efforts undertaken by the OECD to develop and enforce good corporate governance practices. See generally *Corporate Governance*, *supra* note 113; *Corporate governance principles: Corporate governance and the financial crisis*, *supra* note 114; INT'L CORPORATE GOVERNANCE NETWORK, *supra* note 114.

¹⁶⁸ See *Corporate Governance*, *supra* note 113; *Corporate Governance Principles*, *supra* note 167; INT'L CORPORATE GOVERNANCE NETWORK, *supra* note 114.

¹⁶⁹ See *supra* Part I.

¹⁷⁰ See *supra* Part I and notes 7-8. FUNG, LAW & YAU, *supra* note 7, at 1-2.

¹⁷¹ See, e.g., *supra* Part II.1.

¹⁷² See Part II.1.

¹⁷³ See FUNG, LAW & YAU, *supra* note 7, at 5.

categories of socially responsible investment can be distinguished: those related to human rights, to environmental issues, to the sustainability of investments, to political regimes, and to military regimes. This list is not exhaustive. A further possible type of SRI could regard the taking into account of discrimination issues.¹⁷⁴ In that context, it is also helpful to mention concrete examples, characterizing SRI attitudes, such as in the case of ING. On June 28, 2012, the shareholders of the ING Emerging Countries Fund approved a measure opposing genocide-linked investments by a wide margin.¹⁷⁵ More than 59 percent of the shareholders voted in favour of genocide-free investing.¹⁷⁶ Indeed, the ING vote on genocide represents an interesting starting point to explore and define SRI attitudes. As another example, Scandinavian funds routinely do outside research and screening before investing.¹⁷⁷ If they find out that a company is involved in human rights abuses, child labor, or manufacturing processes that are not environmentally friendly, they will either not invest or disinvest from these companies.¹⁷⁸

As far as the refusal to invest in weapons-producing corporations is concerned, the activity is designated as white investing.¹⁷⁹ While the concept of white investing originally referred to the idea of making investment choices that exclude investing in firms that produce weapons, the concept has evolved and the scope of its application is expanding.¹⁸⁰ It can now also include investing in firms that have opted for sustainable investment strategies. In that regard, the approach differentiates between positive and negative screening. Positive screening means focusing on companies pursuing sustainable strategies, while negative screening is connected to investments in corporations producing socially questionable goods, such as tobacco.¹⁸¹ As far as investments in weapons are

¹⁷⁴ Senn, *supra* note 10, at 1002.

¹⁷⁵ *Genocide-free Investing Wins Vote at ING*, INVESTORS AGAINST GENOCIDE (July 20, 2012), <http://www.investorsagainstgenocide.org/2012/07/genocide-free-investing-wins-vote-at-ing/>.

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* note 9 and accompanying text. See *Companies Excluded from the Investment Universe*, MINISTRY OF FIN., <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u.html?id=447122> (last updated Apr. 9, 2014).

¹⁷⁸ See *Companies Excluded from the Investment Universe*, *supra* note 177.

¹⁷⁹ By the same token, green investing usually refers to the exclusion of investments in corporations whose operations lead to environmental pollution or, on the contrary to the inclusion of investments in corporations with business strategies that help the environment, such as alternative energy. FUNG, LAW & YAU, *supra* note 7, at 5.

¹⁸⁰ *Id.* at 4–7.

¹⁸¹ *Id.* See also SOCIALLY RESPONSIBLE INVESTMENTS IN BANKEN, *supra* note 71, at 47.

concerned, the SRI-issue is not sufficiently elaborated. There is no established governance concept to determine how they can be integrated in SRI-motivated behavior. Up to now, the focus first has been placed on the use of these weapons, and not on the factors that lead to their production. Neither is the approach systematic.¹⁸² Besides the necessity to ensure compliance¹⁸³ at the national level for countries that ratified the international law conventions, there is no binding legal guidance. Guidelines and principles for investment managers and financial institutions stating how SRI-criteria should be included in their investment decisions are being developed. They are not addressed to investors themselves, but to investment firms, banks, and financial institutions, as well as investment managers.¹⁸⁴

Corporations may deal with the issue internally, in line with ideas of corporate social responsibility.¹⁸⁵ CSR does not solely refer to the efforts undertaken by corporations to implement ESG and SRI issues on their own initiative. Rather, it represents the corporations' response to the ESG and SRI issues raised by shareholder advocacy and activism,¹⁸⁶ as well as by public pressure. In fact, the investors expect that the corporations they invest in integrate social, environmental, ethical human rights, and consumer concerns into their business operations and strategies, in collaboration with their stakeholders. These investors value social responsibility as much as financial reward. At the same time, the corporations consider CSR as a way to align CSR-values with their shareholders.¹⁸⁷ CSR also covers sustainability issues. While there is no statutory basis for addressing these issues, there are codes of conduct, guidelines, and principles.¹⁸⁸ As an example, to get an overview of the situation, the EU published a report scrutinizing the public references

¹⁸² See *supra* Part III.2.d (mentioning examples of countries having introduced hard law measures in their national legislation and which concentrate on its enforcement).

¹⁸³ On the issue of compliance with international law, see van Aaken, *supra* note 135 at 463–80.

¹⁸⁴ In the Netherlands for instance, a signatory of the Convention on Cluster Munitions, a ban on investments in cluster munitions has been included in Section 21a of the Market Abuse (Financial Supervision Act) Decree (Besluit Marktmissbruik Wft). *Ban on Investment in Cluster Munitions*, *supra* note 158. See *supra* note 158 and accompanying text.

¹⁸⁵ See *supra* Part II.2.d; McCorquodale, *supra* note 6.

¹⁸⁶ See *supra* Part II.2.d; FUNG, LAW & YAU, *supra* note 7, at 2.

¹⁸⁷ FUNG, LAW & YAU, *supra* note 7, at 2.

¹⁸⁸ See *supra* Part II.2.d. In addition, worth mentioning are the United Nations Global Compact, the Universal Declaration on Human Rights, the OECD Guidelines for Multinational Enterprises, the Instruments of the ILO, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy, the Global Reporting Initiative (GRI). See generally SCHIMANSKI, EUROPEAN COMM'N, *supra* note 107.

corporations¹⁸⁹ made to existing internationally recognised CSR guidelines, codes of conduct, and principles in 2013.¹⁹⁰ Some of the main findings¹⁹¹ of the report were that: First, 68 percent of the sample corporations make reference to “corporate social responsibility” or an equivalent term, and 40 percent refer to at least one internationally recognised CSR instrument.¹⁹² Second, very large corporations (those with over ten thousand employees) are about three times more likely to refer to internationally recognized CSR instruments than corporations with between one and ten thousand employees.¹⁹³ Third, Danish, Spanish, and Swedish sample corporations refer to internationally recognised CSR instruments more often than the average sample corporation in the EU.¹⁹⁴

Over the course of time, however, the attention corporations provide to CSR as a response to SRI¹⁹⁵ has begun to focus on a further subject: the current developments in the regulation of professionals and financial institutions, specialized in the management of investments on behalf of others.¹⁹⁶ In other words, the concept of SRI is linked to CSR, with its focus placed on finance. As a matter of fact, both CSR and SRI cover the same issue, but from opposite sides.¹⁹⁷

Furthermore, it should not be overlooked, that as far as the financial institutions and asset managers are concerned, they are part of a regulated industry. They have to apply the rules of their national jurisdiction. Until now, however, the quantitative aspects of their investments have been regulated, while no or little focus has been placed on the qualitative aspects of these investments. Indeed, on the investors’ side it is now a core issue to encourage engagement with SRI by shareholders, specifically pertaining to environmental, social, and human-rights motivated approaches to investment opportunities. Although there is growing consensus in introducing governance

¹⁸⁹ The report examined two hundred randomly selected large corporations, i.e. with over thousand employees, or twenty corporations from each of ten different EU Member States. See SCHIMANSKI, EUROPEAN COMM’N, *supra* note 107, at 1–4.

¹⁹⁰ *Id.*

¹⁹¹ See *id.* for the full details of the main findings.

¹⁹² *Id.* at 6.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ FUNG, LAW & YAU, *supra* note 7, at 2.

¹⁹⁶ *Id.* at 1–2.

¹⁹⁷ *Id.* at 2.

practices,¹⁹⁸ at the same time, a basic conflict of interest has to be resolved: investment managers are judged based on financial performance. Investors and shareholders will only be motivated to invest in a socially responsible way as long as the performance of their investments is satisfactory.

2. *Steering Business Conduct*

To move forward in steering the business conduct of companies and investors, the overall challenge remains to create an institutional framework and governance regime that will guarantee a socially responsible investment climate. Taking the existing framework into account, it is important that investment firms and corporations, as well as investors, develop a *sense of responsibility* first. As a guidance measure, it is necessary to create appropriate incentives. These incentives have to be determined with regard to their potential ability to constitute and result in a trust-building measure, as far as the relationship between the investment firms and investors, and also the corporations, is concerned.

At first glance, two aspects are relevant for tracing out incentives aiming at the implementation of such an approach and assessing its impact. The first one concerns *transparency*. In that regard, the issue of investing in cluster munitions can serve as an example. Investment managers and finance institutions are well aware of the issue.¹⁹⁹ They

¹⁹⁸ See *supra* Part II.2.e. *Corporate governance principles: Corporate governance and the financial crisis*, *supra* note 114; INT'L CORPORATE GOVERNANCE NETWORK, *supra* note 114.

¹⁹⁹ For instance, the Swiss bank UBS publishes an 'UBS position on the financing of controversial weapons' on its website, which reads as:

In light of Switzerland's ratification of the Convention on Cluster Munitions and the subsequent changes to Swiss law, UBS amended its policies and guidelines pertaining to controversial weapons.

Relevant UBS policies and guidelines are consistent with the revised "Swiss Federal Act on War Materials". UBS does not directly or indirectly finance the development, production or purchase of controversial weapons of such companies determined to fall within the law.

All dealings with potentially affected companies require a case by case assessment of the transaction and of the likelihood that the transaction could be used to circumvent above financing prohibition. Dealings with potentially affected companies require pre-approval from UBS's Sanctions Compliance department.

UBS employs external expert advice for the assessment of whether a company falls within the restrictions established by Swiss law.

On the topic of cluster munitions and anti-personnel mines:

know that they have to apply the particular regulatory requirements that are in place anyway if they are in a signatory country.²⁰⁰ Thus, it is becoming a generally accepted policy not to invest in the production of these weapons.²⁰¹ By enhancing the transparency of their rationales for this investment behavior, there may be much greater potential for positive outcomes, taking countries that have not ratified the international law conventions into account. It may serve to align the values of investment managers generally.

Another aspect consists of ensuring *compliance*. The more investors comply with SRI guidance, the more it becomes a widely observed norm.²⁰² To steer business conduct, the issue is whether to opt for a self-regulatory or voluntary solution, or to introduce a statute, which state authorities will enforce. The solution to be adopted will largely be dependent on the existing public pressure, and the fear of a loss of face or risk of reputational damage for corporations.

III. CONCLUSION

This article represents a first attempt to outline the current regulatory structure and efforts needed in order to enforce disarmament measures by steering business activities. Its main purpose has been to try to shed light on the issue, taking the current landscape of hard-law and soft-law measures and their relationship into account. At this point, the main conclusion is that the process of developing and implementing approaches to steer business activities effectively has just begun. Indeed, it is a critical process. However, the development of hard-law and soft-law regulatory mechanisms in this field demonstrates that serious efforts have already been made to put these standards into practice. An

UBS does not provide credit facilities to nor conduct capital market transactions for companies that are involved in the development, production or purchase of cluster munitions and anti-personnel mines.

UBS does not include securities of affected companies in its actively-managed retail and institutional funds and in discretionary mandates.

Environmental and Social Risk Management, UBS, http://www.ubs.com/global/en/about_ubs/corporate_responsibility/cr_in_banking/cr_risk.html (last modified Apr. 13, 2014).

²⁰⁰ See, e.g., *Environmental and Social Risk Management*, *supra* note 199.

²⁰¹ For instance, the Dutch association PAX, publishes a list of financial institutions banning investments in cluster munitions. BOER & OOSTERWIJK, *supra* note 160, at 6. It also offers guidance in legislator matters. See *id.*

²⁰² SENN, *supra* note 140, at 240–51.

important issue now is to delimit incentives to enhance transparency and ensure compliance with the regulatory framework already in place.