A LEGAL ANALYSIS ON HOW FRANCE*, GERMANY**, THE EUROPEAN UNION*** AND SOUTH AFRICA RESPONDED TO THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

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Jeanette M. Buis

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Soli Deo Gloria.

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May you all be blessed for what you have done.

Dedicated to my fellow South Africans who toil daily to fill the shelves of German Discounters.[1]

[1] Discounter: A large business that sells goods or services at less than the usual price. Available at: https://www.lexico.com/definition/discounter. “Europe, including Germany, is starting to build incredibly dominant retailers who will just demand a price”. Oxfam Deutschland “Sold Cheap and Paid Dearly” (November 2017). Available at: https://lebasic.com/wp-content/uploads/2017/11/Oxfam_South-African-Wine-Study_2017.pdf.

Contents

List of Abbreviations

Adv Int Manag	Advances in International Management
Afr J Leg Stud	African Journal of Legal Studies
AM J INT L	The American Journal of International Law
ANC	African National Congress
Appeal	Appeal: Review of Current Law and Law Reform
BAFA	Federal Office of Economics and Export Control
B-BBEE	Broad-based Black Economic Empowerment
BEQ	Business Ethics Quarterly
Bus Hum Rights J	Business and Human Rights Journal
Bus Politics	Business and Politics
Camb J Econ	Cambridge Journal of Economics
CDU/CSU	Christian Democrats
Charter	Charter: African Charter on Human and People's Rights
CRISA	Code for Responsible Investing in South Africa
CSO	Civil Society Organisation
CSR	Corporate Social responsibility
Deakin L Rev	Deakin Law Review
DTI	Department of Trade and Industry
ECCJ	European Coalition for Corporate Justice
ECFR	European Company and Financial Law Review
EJIL	European Journal of International Law

EU	European Union
Eur J Int Law	European Journal of International Law
FTA	Free Trade Agreement
GDP	Gross Domestic Product
Georgia L Rev	Georgia Law Review
GoJIL	Goettingen Journal of International Law
GPRF	UNGP Reporting Framework
HRW	Human Rights Watch
Hum Rights Law Rev	Human Rights Law Review
Hum Rights Rev	Human Rights Review
ILO	International Labour Organization
Indiana J Glob Leg Stud	Indiana Journal of Global Legal Studies
Int Labour Rev	International Labour Review
Int Organ	International Organization
ICLQ	International & Comparative Law Quarterly
Int & Comp LQ	International & Comparative Law Quarterly
IoDSA	The Institute of Directors in South Africa
IoDSA 2016	King Code of Corporate Governance
ISO	International Organization for Standardization
JSE	Johannesburg Stock Exchange
J World Invest	Trade Journal of World Investment and Trade
LdV	*Loi de Vigilance* – France's Vigilance Law

LkSG	*Lieferkettensorgfaltspflichtengesetz* – Germany's Supply Chain Due Diligence Act
MBR	Multinational Business Review
Mediterr J Soc Sci	Mediterranean Journal of Social Sciences
Mich Law Rev	Michigan Law Review
MTBPS	Medium-Term Budget Policy Statement
NAP	National Action Plan
NBA	Shadow National Baseline Assessment
NGO	Non-Governmental Organisation
Norms	Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
OECD	Organization for Economic Co-operation and Development
OEIGWG	Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises Concerning Human Rights
OHCHR	UN High Commissioner for Human Rights
PRC	People's Republic of China
Probl Perspect Manag	Problems and Perspectives in Management
S Afr J Econ Manag Sci	South African Journal of Economic and Management Sciences:
S Afr J Int	South African Journal of International Affairs
SADC	Southern Africa Development Community
SADC EPA	Southern African Economic Partnership Agreement
SAHRC	South African Human Rights Commission
SASs	*Sociétés par Actions Simplifiées*
SCIO	China's State Council Information Office

SDG	Sustainable Development Goal
SLAPP	Strategic Lawsuit Against Public Participation
SME	Small and Medium-Sized Enterprise
SPD	Social Democrats
TNC	Transnational Corporation
Transnatl Leg Theory	Transnational Legal Theory
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGP	United Nations Guiding Principles on Business & Human Rights
UNHRC	United Nations Human Rights Council
UNWG	Working Group on Business, and Human Rights
US	United States
USD	US Dollar
WTO	World Trade Organization
Yale LJ	The Yale Law Journal

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CHAPTER 1 – INTRODUCTION

> *"Globalization is a fact of life. But I believe we have underestimated its fragility. The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long".*[2]

1.1. Overview

The Second World War propelled the issue of human rights onto the global stage and into a worldwide consciousness. The contemporary interpretation of the idea that everyone is entitled to certain human rights by virtue of their humanity is relatively new.[3] From the beginning, human rights instruments,[4] which "secure the moral minimum necessary for us to live a liveable, dignified life as human beings",[5] fell in the purview of states. Only states were considered subjects under international law and thus capable of violating human rights. Over time, the definition given to international human rights law subjects has evolved to "anyone who is the bearer of rights and duties in international law and is subject to the international legal order".[6] Consequently, some non-state actors, such as international organisations that are the creation of states, are also seen as international subjects and are expected not to violate human rights.[7] Corporations, in the same way as individuals, are holders of rights under international law and have no separate status except that enjoyed by their constituent entities under national laws.[8]

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[2] UNSG Kofi Annan. Available at: https://www.un.org/press/en/1999/19990201.sgsm6881.html (accessed 5 May 2022).
[3] Flowers (ed) *Human Rights Here and Now* (1998).
[4] The Human Rights Regime: The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 together with the two United Nations Covenants adopted in 1966, one which addresses such civil and political rights, and the other which addresses economic, social and cultural rights constitute the international human rights regime. Available at https://www.ucl.ac.uk/global-governance/news/2017/aug/united-nations-human-rights-regime (accessed 2 January 2021).
[5] Wettstein 2009 *Bus & Soc Rev* 125.
[6] Čertanec 2019 *Danube L Econ & Soc Issues Rev* 104.
[7] Cassese *International Law* (2005) 35–140.
[8] Zerk (2006) *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* 74.

Botha considers corporations to be "wealth-creators"[9] and, as such, they utilise resources and design activities with the primary objective of making profits.[10] In a globalised world and in pursuit of this objective, corporations outsource production or services to countries where labour costs are low.[11] With their global production and services, corporations are companies, that is, "creatures of national law",[12] but which operate in several "countries around the world, and increasingly in socio-political contexts that pose novel challenges […], especially with regards to human rights".[13] With advances in technology, the ease of travel, and low transportation costs of goods, corporations have morphed into entities that operate diverse industries located in far-flung countries. Domestic entities that previously operated only in local markets have become multinational enterprises, also called multinational corporations or transnational corporations (TNCs).[14] They are said to generate revenue that surpasses the gross domestic product (GDP) of some nation states, resulting in a situation where they "appear to be a power unto themselves".[15] According to Gumpinger, corporations govern in the manner of states.[16] In recent years, we have witnessed how major corporations, such as Facebook (Meta), have unscrupulously abused the power to influence political processes in the same way as nation states.[17] In one instance, the social media company unethically allowed its users' information to be harvested by Cambridge Analytica, a political consulting firm, and used it to conduct targeted political campaigns that influenced the 2016 United States (US) elections.[18] Moreover, the corporation's algorithms have been found to have contributed to the violence in Myanmar, resulting in hateful anti-Rohingya information being spread among users.[19]

One could be forgiven for thinking that the power of corporations is a contemporary idea. However, Thomas Jefferson warned against the "aristocracy of our monied corporations"[20] in

[9] Botha *Employee participation and voice in companies: A legal perspective* 1. Also see Fox "The Social Responsibility of Business is to Increase … What Exactly?" *HBR* (18 April 2012).
[10] Friedman "The Social Responsibility of Business is to Increase its Profits" (13 September 1970).
[11] See Ruggie (2013) *Just Business: Multinational Corporations and Human Rights*.
[12] *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, Case 81/87 European Court Reports 1988 – 5483 5511.
[13] Ruggie (2013).
[14] Multinational enterprises, multinational corporations, and TNCs are used interchangeably.
[15] Muchlinski *Multinational Enterprises and the Law* (2007) 3.
[16] Gumpinger 2011 *Appeal Rev Current L & L Reform*.
[17] Vaidhyanathan (2022) *Antisocial Media: How Facebook Disconnects Us and Undermines Democracy*).
[18] Sacasas 2018 *The New Atlantis* 35.
[19] Amnesty International "Myanmar: The social atrocity: Meta and the right to remedy for the Rohingya" (29 September 2022). Available at: https://www.amnesty.org/en/documents/ASA16/5933/2022/en/ (accessed 5 October 2022).
[20] Thomas Jefferson to George Logan (12 November 1816). Available at: https://founders.archives.gov/documents/Jefferson/03-10-02-0390 (accessed 5 October 2022).

1816. In 1972, Salvador Allende stated that "corporations are global organizations that do not depend on any state and whose activities are not controlled by, nor are they accountable to any parliament or any other institution representative of the collective interest".[21] TNCs operate free of any encumbrance or oversight by any global regulatory body – a situation that has given rise to governance challenges.[22]

Botha correctly states that "globalisation has had an impact on how corporations conduct themselves when they do business".[23] In an earlier period, companies conducted their business largely in one country, and they were bound by national boundaries and governed by national laws. Thus, they adhered to the applicable labour rights, working conditions, or environmental regulations, which may cut into profit margins. Globalisation, facilitated by inexpensive and efficient transportation, removed the guardrails that home-state laws set when corporations moved their production sites to low-cost countries. In these countries, they can do business differently with national laws enabling larger profit margins because workers' rights, labour conditions or concern with environmental impacts are less important to local governments.[24]

Generally, TNCs are owned by shareholders with the chief engine of their actions being profit maximisation and not community well-being.[25] Societal well-being is the interest in the quality of life of people and communities, yet it is easily disregarded because the actions of globally operating entities that cause harm to local communities seldom result in such corporations taking responsibility or offering redress to local communities.[26] Big tech, such as Facebook (Meta) and manufacturing companies that produce in low-cost countries are not the only parties who pursue profits to the detriment of human rights. Ruggie[27] asserts that profit-driven extractive companies that operate in natural resource-rich environments in conflict-torn countries have contributed to the causes of conflict by encroaching on indigenous peoples' living spaces against their will.[28]

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[21] Speech delivered by Dr Salvador Allende President of the Republic of Chile, before the General Assembly of the United Nations (4 December 1972). Available at: https://www.marxists.org/archive/allende/1972/december/04.htm (accessed 5 October 2022).
[22] Ruggie (2013).
[23] Botha 2.
[24] Ruggie (2013), also see Sobel-Read 2014 *Transnatl Leg Theory*; Miller 1998 *Global Order: Values and Power in International Politics* ch 9; Amao *Corporate Social Responsibility: Human Rights and the Law: Multinational Corporations in Developing Countries*.
[25] Miller (1998) 264.
[26] Ruggie (2013). Also see Amnesty International no date Corporations.
[27] The UN Secretary-General as Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises.
[28] *Ibid*.

Human rights issues are viewed as impediments to achieving the economic goals of companies.[29] From the literature it is clear there is an ever-growing intersection between human rights and business. Although it is clearly discernible, politicians and corporations seem unable to appreciate that business intersects with human rights on more than just the periphery, resulting in companies often acting with impunity when it comes to human rights violations.[30] Unsurprisingly, human rights activists are critical of companies and their dominant role in modern capitalist societies.[31] It is submitted that keeping companies accountable for human rights violations has become a Sisyphean task for civil society organisations (CSOs) who regard it as their mission to make corporations answerable to society.[32]

At the supranational level, the level at which TNCs operate, states have been able to address the human rights responsibilities of corporations using soft law instruments.[33] Many of the most important of soft law instruments regarding business and human rights are the product of the International Labour Organization (ILO). The ILO is the only tripartite United Nations (UN) agency with government, employer, and worker representatives, and is associated with establishing labour standards and rights at work.[34] Although the ILO has been in existence for more than 100 years, violations of fundamental rights in the workplace remain a reality.[35] The ILO's declarations are consistent with general human rights principles, yet workers' rights are still "being ignored at the workplace level".[36] The ratification process required in order for states to apply the principles articulated in ILO Conventions means that "corporations' legal responsibilities under the conventions remain indirect, while states remain the direct duty bearer".[37]

The World Trade Organization (WTO) is the international organisation that deals with the global rules of trade,[38] and it has the potential to concretise fundamental rights in trade agreements. However, the organisation operates from the premise that "there is no need directly to address

[29] Katzew 2011 *SALJ* 687.
[30] Ruggie (2013). Also see Amnesty International no date Corporations.
[31] Katzew 2011 687.
[32] See Ruggie (2013) ch 1.
[33] *Idem* ch 2. Also see para 2.3.1 below.
[34] About the ILO. Available at: https://www.ilo.org/global/about-the-ilo/lang--en/index.htm (accessed 20 May 2022).
[35] Hepple no date *Rights at Work* 1.
[36] Hilgert (2013) "Conclusion: The Future of Labor Rights in the Working Environment" 167.
[37] Ruggie (2013).
[38] WTO "About us". Available at: https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 20 October 2022).

the human rights impact of international trade on the protection and promotion of human rights because it is in the very nature of the existing trade regime to enhance human rights protection".[39]

Given that the ILO is responsible for labour standards and the WTO focuses on trade issues, the international business environment has developed into what can be described as the "Wild West". The absence of shared standards and of effective implementation mechanisms, as mentioned earlier, has resulted in human rights abuses by international corporations. An example in history of this type of abuse is the Oregon-based company Nike, which at one time was "synonymous with slave wages, forced overtime and arbitrary abuse".[40] Under the pressure of threats of boycotts from non-governmental organisation (NGOs), Nike rehabilitated its image and "learnt to manage the human rights challenges in its supply chain".[41] Conversely, the extractive company Shell, whose presence in Nigeria has resulted in civil unrest, has, according to Amnesty International, spent "millions greenwashing their image, while tens of thousands of people continue to suffer from their pollution and negligence".[42] Shell was sued in the US Supreme Court because of land, water, and air pollution. However, according to Grear and Weston, the court afforded foreign corporations "immunity from US pursuit of human rights violations against foreign nationals in foreign countries".[43]

The inability to hold corporations accountable for their actions in foreign countries is what Ruggie defines as the governance gap "between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences" in global trade.[44] In an environment where the WTO facilitates corporate activities in a globalised world and the ILO fails to regulate such activities effectively, action was needed, hence the UN Guiding Principles on Business and Human Rights (UNGP).[45] The UNGP and the role it plays is the focus of this thesis.

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[39] Harrison 2007, discussed by Joseph in *Blame it on the WTO? A Human Rights Critique* 1.
[40] Cushman "Nike Pledges to End Child Labor and Apply U.S. Rules Abroad" (13 May 1998).
[41] Report Amnesty International 2020 No Clean Up, No Justice: Shell's Oil Pollution in the Niger Delta.
[42] *Ibid*.
[43] Kiobel v. Royal Dutch Petroleum Co. 569 U.S. 108 (2013). For summary and timeline *see* Shell lawsuit (re executions in Nigeria, Kiobel v Shell, filed in USA). Available at https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-nigeria-kiobel-wiwa-2/ (accessed 20 May 2022). For discussion see Grear and Weston 2015 *Hum Rights L Rev.*
[44] Ruggie (2013).
[45] See paras 2.3.1 and 2.3.2 below.

Before proceeding to the theoretical framework that underpins this study, it is necessary to take a cursory look at how corporations operate in a globalised world. It has been argued that Fordism, the organisation of mass production, characterised the 20th century, while the fragmentation of production in a myriad of locations has characterised production since the beginning of the 21st century.[46] With increased international trade, the fragmentation of production allows companies to enter new countries that permit low labour costs, thus companies are able to decrease their total production costs.[47]

Global trade allows corporations to maximise profit by moving production lines from high-wage countries to low-wage countries.[48] The "slicing up" of whole production chains makes it possible for companies to minimise inefficiencies within their production processes.[49] Sobel-Read indicates that profit is the product of the full range of activities pursued by a company and, by minimising inefficiencies, profit is maximised.[50] Through outsourcing and offshoring, production is coordinated in several localities.[51] Offshoring refers to geographical relocation,[52] while outsourcing refers to a system of organisational hiring that can lower legacy wage costs.[53] These measures have been called "the greatest organizational and industry structure shifts of the century".[54] Moving not only manufacturing but also services have "reduced the burden of support activities and [have] allowed firms to focus on their core business".[55] At the same time, fragmentation holds an inherent risk that the products of corporations are produced by suppliers who operate in poor labour conditions or who cause environmental harm. For example, Sobel-Read highlights the history of Nike, a company sourcing product from various locations. Although the company started as an importer of athletic shoes from manufacturers in Japan, it became an innovator in design and later went on to achieve phenomenal global success by selling branded products that it does not produce itself.[56] By 2000, Nike sourced footwear from 68 factories around the world and owned no factories except the single "air-ball" production plant in

[46] See Watson 2019 *Labor History*. Also see Sobel-Read 2014.
[47] Belussi and Sedita 2010 *Adv Int Manag* 2.
[48] *Ibid*.
[49] *Ibid*.
[50] Sobel-Read 2014 12.
[51] Belussi and Sedita 2010 2.
[52] Sobel-Read 2014 15.
[53] *Idem* 32.
[54] *Ibid* Fn 45.
[55] *Idem* Fn 44.
[56] Sobel-Read 2014 20.

Oregon.[57] In 2020, a staggering 112 factories in twelve countries supplied Nike's footwear components, accounting for more than 9% of branded footwear sold globally, without Nike owning a footwear production factory.[58]

The current global market, which allows companies to produce in places where profits are highest, results in what Ruggie calls "governance gaps", which the UNGP seeks to address.[59]

1.2. Theoretical Framework

The framework for this thesis is international human rights law – a supranational system of rules, principles, practices, structures, and processes (that is, outside the legal order of nation states) that are influential but not directly binding unless nations enact them in their national legislation.[60] In its role of safeguarding peace and security, the UN presents a view that peace and human rights are closely connected.[61] UN representatives formulated the instruments that now constitute the international human rights regime: The Universal Declaration of Human Rights[62] and the two UN Covenants – one for civil and political rights and the other for economic, social, and cultural rights.[63]

Since the 1970s, the UN has been trying to negotiate a code of conduct for corporations. In 1990, the UN Sub-Commission on the Promotion and Protection of Human Rights started work on producing a document, called the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms), which was presented to the Commission on Human Rights in 2003.[64] The Norms impose on companies the same human rights obligations as states; the only difference being that the obligation is limited to the "sphere of influence" of corporations.[65] The Norms resonated with advocates of human rights as they supported the idea of promoting and securing the fulfilment of respect and protecting human rights, such that it is binding on companies under international law.[66] However,

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[57] *Ibid*.
[58] Ye "How does Nike's supply chain work?" (12 May 2020).
[59] See Ruggie (2013).
[60] Cassese (2005) 1–9.
[61] Tomuschat "Protection of Human Rights under Universal International Law" (December 2016).
[62] Adopted by the UN General Assembly in 1948.
[63] International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Adopted in 1966.
[64] Succeeded by the UNHRC.
[65] Weissbrodt and Kruger 2003 *Am J Int L* 912. See para 2.3.3 below.
[66] *Idem*.

the global business community responded negatively and viewed the Norms as a "privatisation of human rights".[67] Objections to placing the obligation on companies won the day, when the Commission on Human Rights declined the Norms and passed a resolution declaring the Norms had no legal standing.[68]

The absence of an international "standard of appropriate behaviour"[69] for global corporations and the satisfaction of the demand for human rights clearly does not mean that the need for a standard no longer exists. The Commission on Human Rights requested that a special representative look into the issue of human rights and transnational companies.[70] In 2005, the then UN Secretary-General, Kofi Annan, appointed John Ruggie as Special Representative and tasked him with having to:

- identify or clarify standards of corporate responsibility and accountability regarding human rights;
- elaborate on what role states play in adjudicating the role of TNCs and human rights;
- clarify the terms "complicity" and "spheres of influence";
- develop methodologies for undertaking human rights assessment of activities; and
- compile a compendium of best practices of state, TNCs and other business enterprises.[71]

The Norms were to be the basis for the Special Representative's work. However, Ruggie decided that the Norms were too flawed to build on and embarked on a process that he called an "evidence-based approach in search of practical solutions"[72] to navigate the quandary of multinational corporations and human rights. In 2008, Ruggie proposed the Protect, Respect and Remedy Framework to the Commission on Human Rights, which forms the basis for the UNGP and articulates that states have a duty to protect, companies have the responsibility to respect, and that those who are harmed enjoy some form of redress.[73] After a six-year process,

[67] Ruggie (2013).
[68] *Ibid*.
[69] Katzenstein 1996 discussed in Finnemore and Sikkink *Int Org* 891.
[70] About the mandate: Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises.
[71] Resolution 2005/69.
[72] Ruggie (2013).
[73] See para 2.4 below.

the UNGP on Business and Human Rights was formulated and endorsed by the UN Human Rights Council (UNHRC) in 2011.[74]

As a normative text that governments did not negotiate themselves, the UNGP "constitute the only official guidance the UNHRC and its predecessor, the Commission on Human Rights, have issued for states and business enterprises on their respective obligations [concerning] … business and human rights".[75] As a rule, internationally binding standards call for an international treaty or practices to gradually become part of customary international law standards.[76] Ruggie's text is different as it was the first document not to be negotiated; however, because of the UN's endorsement, it has become the expression of shared international standards that provide policy guidance for states, corporations, and human rights advocates.[77] In the ten years of its existence, the UNGP has served as a road map for navigating the perilous space where corporate governance and human rights intersect.[78] Given the rate at which governments passed national action plans (NAPs) or legislation[79] based on the UNGP, it can be argued that there has been slow acceptance that corporations cannot simply pursue profit maximisation in a vacuum. As a result of the persistent pressure exerted by CSOs and human rights advocates, there has been slow and gradual acknowledgement that it is necessary to reinterpret the business philosophy that Milton Friedmann articulated in the 1970s.[80] With the UNGP, there seems to be an acceptance that corporations can no longer just utilise resources and engage in activities that are designed to increase their profits exclusively for the benefit of their shareholders. Ostensibly, the UNGP is not considered to fall under the ambit of civil and political rights,[81] nor is it construed as involving economic, social, or cultural rights;[82] strictly speaking, it is an expansion of rights through the adoption of a non-binding political act.[83]

[74] Ruggie (2013).
[75] Ruggie and Sherman 2017 *EJIL* 921.
[76] Ruggie (2013).
[77] See Ruggie and Sherman 2017 921–928. Also see Sherman 2020 Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights.
[78] See ch 2 and 3.
[79] See paras 2.4.3. and 3.1 below.
[80] Friedman (13 September 1970).
[81] Domaradzki *et al*. 2019 *Hum Rights Law Rev* 425–426.
[82] *Ibid*.
[83] Karadzhova 2002 discussed in Domaradzki *et al*. 2019 *Hum Rights Rev* 427.

1.3. The UN Guiding Principles

As a framework, the UNGP (also known as the Ruggie Principles) is a non-binding instrument with the aim of attaining responsible global corporate practice.[84] The UNGP falls within international law and is meant to give guidance to states as well as globally operating business enterprises on how to navigate the environments in which they conduct business – specifically, as it relates to the human rights of people who find themselves affected by corporate activities. As mentioned previously, the non-binding UNGP is an example of soft law.[85] International law consists of conventions, procedures and monitoring bodies that individually and collectively provide a means, at an international level, of holding especially governments accountable as to how they treat their citizens.[86] Human rights law is a subset of international law and has its origins or legitimacy from states' agreement and consent.[87] Ratification of treaties binds states to uphold provisions that they negotiated and to which they agreed,[88] resulting in what is known as hard law. There is no agreement, yet at international level, it is a legally binding instrument dealing with the issue of business and human rights. However, discussions in this regard are underway, and have been since 2015, in terms of Resolution 26/9, which the UNHRC passed in 2014.[89]

TNCs are not participants in international law nor are they subjects of international law.[90] According to Amao, this circumstance results in a failure to find a working framework for corporations to act responsibly when operating in non-home-state countries.[91] This was the situation until the UNGP on Business and Human Rights. At the time of its endorsement by the UNHRC, the UNGP was widely criticised by CSOs as being too vague and not providing enough guidance to states and businesses, thereby failing to address the "governance gap" that globalisation creates.[92] The situation has now changed.[93] In its 31 principles and commentaries, the UNGP proposes that the home states of global businesses play a more significant role and enable and support the promotion of human rights in corporate supply chains through laws and

[84] Ruggie (2013).
[85] Choudhury 2018 *Int'l and Comp LQ* 962.
[86] Egan 2017 The Doctrinal Approach in International Human Rights Scholarship 8.
[87] *Ibid*.
[88] Bolintineanu 1974 *Am JIL* 672–686.
[89] See para 2.6 below.
[90] Amao *Corporate Social Responsibility: Human Rights and the Law: Multinational Corporations in Developing Countries* 24.
[91] *Ibid*.
[92] Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights 2011.
[93] See para 3.5 below.

regulations.[94] In theory, the UNGP should achieve what the 180 conventions passed by the ILO that form a "normative foundation for labor rights [which addresses]… core worker rights in a wide variety of areas, including freedom of association, collective bargaining, non-discrimination, and the eradication of forced labor and child labor, has been unable to achieve".[95]

In 2016, despite extensive criticism of the UNGP, participants at the five-year commemorative event concluded that the framework provides "a requisite common language for business, civil society, and host and home States alike".[96] The UNGP has established a common ground for parties with diverse interests to address human rights issues in businesses' supply chains. According to Zerk, a soft law instrument has the potential to develop into hard law because it is possible to galvanise support from various stakeholders.[97] Given the timing of the UNGP, it could be argued that the UNGP provided the impetus for the proposal[98] to the UNHRC for the formation of an intergovernmental working group tasked with the negotiation of a treaty instrument, which has led to the international treaty-making process that is currently in progress.[99] This thesis comments on whether the UNGP in fact is an inspiration for a treaty on business and human rights.

The UNGP has generated a range of research, and a perusal of academic research indicates that even though studies describe the evolution of the UNGP and analyse the theoretical underpinnings of the business and human rights framework, each study has a different focus area. For example, an examination of the "legal impact of human rights on business enterprises under national law" with specific reference to South Africa and the mining industry.[100] Another example investigates "whether and how an environmental due diligence system could be created for German or European companies, obliging them to check compliance with environmental standards in their supply chain".[101] Mpya's study on the enforcement of human rights standards against TNCs in the African context is of interest as he considers the complexity of imposing

[94] Ruggie "Business and Human Rights: Towards a Common Agenda for Action" (2 December 2019).
[95] Peksen and Blanton 2017 *Rev Int Organ* 76.
[96] Aizawa and Blackwell "Where have the UN Guiding Principles Taken Us and Where Do We Go Next?" (20 June 2016).
[97] Zerk (2006) 70.
[98] Proposed by Ecuador in 2013 and adopted in 2014.
[99] See Ruggie "The past as prologue? A moment of truth for UN Business and Human Rights Treaty" (8 July 2014). Also see "Ruggie "Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors" (9 September 2014).
[100] Bijlmakers (2020) *Corporate Social Responsibility, Human Rights, and the Law.* Also see Verdonck *The international legal framework on business and human rights and its domesticoperationalisation: Strategic litigation on mining and a healthy environment in South-Africa*.
[101] Walker Environmental Due Diligence: Protection of the extraterritorial environment by regulation of European businesses.

human rights standards on TNCs, specifically given that globalisation benefits those who can harness the advantages of a globalised world, which often takes place to the detriment of the vulnerable.[102]

The UNGP can change how businesses operate globally only when governments elect to implement its principles into national policy. To this end, this study discusses how three selected countries (France, Germany, and South Africa) and a regional organisation, the European Union (EU), have responded to the UNGP.

1.4. Comparative Study

The thesis compares how France, Germany, the EU, and South Africa have responded to a singular soft law instrument. In 2017, France created a duty of care along the supply chain for companies operational in France, making France the first country to pass a law addressing companies' supply chains and thereby transforming soft law into hard law.[103] In December 2016, Germany opted to follow the voluntary route by drawing up a NAP, which all companies were encouraged to follow.[104] However, the disappointing number of companies that bothered to implement the NAP has forced the German government to pass supply chain legislation in 2021. In other words, after first making implementation voluntary, legislation was passed making it obligatory for certain companies to implement human rights due diligence along their supply chains.[105] It is interesting that despite South Africa having companies successfully operating worldwide, the South African government has been dilatory, opting to pursue a path of creating a binding instrument that could take years to negotiate, and may still not reach consensus. In doing so, the South African government is maintaining the status quo for South African TNCs.[106]

The EU is a regional organisation and home to many companies operating in all sectors of the economy.[107] EU companies not only have suppliers within the EU but also in Third World countries, forming a part of complex value chains, where it is conceivable that they are

[102] Mpya *Enforcement of "human rights" standards against multinational corporations* 452.
[103] See para 3.2.
[104] See paras 3.3.1, 3.3.2, and 3.3.3.
[105] See para 3.3.6.
[106] See paras 4.5, 4.6, 4.7 and 4.8.
[107] Zamfir "Towards a binding international treaty on business and human rights" (April 2018).

confronted with risks regarding human rights or negative environmental impacts.[108] The European parliament, the Council of the EU, and the European Commission (hereafter the Commission) have made a commitment to require member states to update or implement national legislation on human rights and environmental due diligence so that companies are able to better identify and mitigate against adverse human rights and environmental impacts in their value chains.[109] In February 2022, the Commission published a draft proposal on corporate sustainable due diligence.[110]

This thesis explores the divergent ways in which the UNGP has been implemented in France, Germany, and the EU, as well as the different path chosen by South Africa to establish the effect that the UNGP has had on the national and regional levels. This thesis fills the gap in establishing the role of the UNGP and ascertaining how consequential the UNGP has been. In short, this research establishes what effects the UNGP has had on three selected countries and the EU.

1.5. The Negotiation of a Treaty on Business and Human Rights

Another consequence of the UNGP's endorsement by the UNHRC in 2011 was the submission of a proposal for the negotiation of a treaty on business and human rights in 2013.[111] South Africa, together with Ecuador and others, submitted a proposal that the UNHRC adopted in 2014, which initiated the treaty-making process for an internationally binding instrument regarding business and human rights. The intergovernmental process that met for its eighth session at the end of October 2022 necessitates a discussion.

Conventions require ratification by host states that also wish to grow their economies by attracting global corporations and offering low production costs; nevertheless, the UNHRC has accepted a resolution that initiated the process of negotiating a treaty on business and human rights a mere three years after endorsing the UNGP. It is well established that states do not often

[108] Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF (accessed 20 May 2022).
[109] *Ibid*.
[110] *Ibid*. See para 3.4 below.
[111] Human Rights Council Resolution 26/9 OEIGWG 2014. Available at: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc (accessed 20 May 2022).

ratify conventions because they do not want to lose their competitive advantage.[112] Regardless of whether an agreement is reached on the Third Revised Draft of the internationally binding instrument on business and human rights, it is essential for this thesis to examine the negotiation process and the prospects for the realisation of a treaty. This is especially important because France and Germany have already enacted national legislation based on the UNGP. This legislation forces TNCs to take steps to reduce the possibility of human rights abuses along their supply chains and in other business activities.

1.6. Research Problem and Modus Operandi

TNCs enable the exchange of goods and services across country borders, and this international trade expands a country's markets because goods and services that are not available domestically are accessed or forced to become competitive. In other words, it is possible to procure both services and goods from the cheapest supplier. Thus, international trade results in greater competition, and more competitive pricing brings a more affordable product or service to the consumer.[113] Cheaper prices, however, may come at the cost of violating human rights along the supply/value chains.

While countries can ensure human rights in the workplace through their national legislation, there is still a concern in international trade over ensuring workers' rights along the supply chains of TNCs.[114]

The primary research question that needs investigation is:

What role does the UNGP play in ensuring that human rights are respected during global trade?

The main inquiry of the thesis is to explore the issue of TNCs having supply chains that extend across national borders and, therefore, that are not bound by specific national legislation. This lack necessitates establishing a supranational framework, which the soft law UNGP is, but this framework can be enforced only through national legislation.

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[112] See Boockmann 2000 The Ratification of ILO Conventions: A Failure Time Analysis. Also see Samwer 2017 *SSRN*.
[113] US Chamber of Commerce 2021 "A Business Guide to International Trade and Investment" (15 September 2021). Available at: https://www.uschamber.com/international/a-business-guide-to-international-business (accessed 20 May 2022).
[114] *See* Ruggie (2013); also see Mosley 2017 *Glob Trends*.

The research question will be answered by examining the origin of the UNGP, what it is, and how selected countries, such as France, Germany, and South Africa, have responded to the UNGP. At the regional level, the analysis of the EU's draft initiative to deal with the issue of creating a "just and sustainable economy"[115] by laying down rules for companies to respect human rights and the environment in global value chains further answers the research question.

In this research, the following issues will be addressed:

(1) The history and purpose of the UNGP to ensure responsible global corporate practices, that is, the context and content of the UNGP at a supranational level. In addition, the evolution of a treaty on business and human rights is examined by discussing the different versions of the draft treaty and the prospects of an internationally binding treaty materialising soon.[116]

(2) Selected nations' uptake of the UNGP, specifically the responses to the non-binding UNGP by France, Germany; that is, the consequences of the UNGP at the national level. It can be argued that how the UNGP has been responded to in China should form part of this discussion, especially given the role that the Chinese government is playing in the negotiating process for a treaty on business and human rights as well as its role in the global economy. Additionally, at regional level, the EU proposal is examined as a regional initiative affecting several nation states has issued a proposed corporate sustainability due diligence directive based on the UNGP.[117]

(3) At national level, the South Africa's action regarding business and human rights is of interest and is compared to the actions taken by European states. South Africa's African National Congress (ANC)-led government has not yet assigned any government department to consider the UNGP.[118] South African academics and civil society have encouraged the effort to develop a NAP and thus the UNGP.[119]

(4) China is an important player in a globalised world and must form part of any discussion on human rights and international corporations. For this reason, an examination is offered

[115] Statement European Commission Statement (23 February 2022).
[116] See ch 2.
[117] See ch 3.
[118] See ch 4.
[119] National Action Plans on Business and Human Rights "South Africa" (16 November 2017).

of the role China is playing in the treaty-making process and how a Chinese government's interpretation of the UNGP may affect the competitiveness of European companies.[120]

The following *modes operandum* is followed:

- This thesis starts from a broad view by looking at the UNGP, its features and how it came about. It also investigates whether the UNGP, in fact, effectively expands rights through the adoption of a non-binding political act.[121] This aim is fulfilled by analysing Germany, France, and the EU's responses to the UNGP. South Africa's approach to the soft law instrument will also be examined and discussed. Furthermore, as a comparative study of two jurisdictions that have implemented the UNGP and one that has not, namely South Africa, this thesis engages in a "high level of abstraction to make sense of the differences and similarities"[122] between the compared legal approaches. The actions taken by France, Germany, the EU and South Africa could not have been more different: Germany passed a NAP and then supply chain legislation,[123] France passed a duty of vigilance legislation,[124] whereas the EU issued a draft directive on corporate sustainability and due diligence, and the South African government, together with Ecuador, tabled a resolution[125] at the UNHRC that initiated proceedings towards formulating a legally binding instrument.[126] The delegation from China also voted in favour of the resolution. The divergent approaches to the same instrument suggest that the requirements and grievance mechanisms established by the UNGP for corporations are not universally considered an effective remedy for human rights violations.[127]

In 2014, when the UNHRC accepted Resolution 26/9,[128] a process towards establishing a treaty on business and human rights was initiated. The Open-Ended Intergovernmental Working Group

[120] See ch 5.
[121] Karadzhova 2002 discussed in Domaradzki *et al*. 2019 *Hum Rights Rev* 427.
[122] Paris (2016) "The Comparative Method in Legal Research: The Art of Justifying Choices" 3.
[123] *Nationaler Aktionsplan Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte* 2016–2020. Available at: https://www.auswaertiges-amt.de/blob/297434/8d6ab29982767d5a31d2e85464461565/nap-wirtschaft-menschenrechte-data.pdf (accessed 20 October 2022).
[124] Code de Commerce [C. com.] [Commercial Code] Art L. 225-102-4. Available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000035181820/ (accessed 30 October 2022).
[125] Passed in June 2014 Resolution 26/9 UN Doc. A/HRC/RES/26/9. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9
[126] Yeates and Pillinger (2019) *International Health Worker Migration and Recruitment: Global Governance, Politics and Policy*.
[127] Albin-Lackey HRW Without Rules: A Failed Approach to Corporate Accountability.
[128] Sponsored by Ecuador. Bolivia, Cuba, South Africa, and Venezuela co-sponsored the resolution.

on Transnational Corporations and Other Business Enterprises Concerning Human Rights (OEIGWG) was mandated to articulate a legally binding instrument to assist victims of corporate-related human rights and environmental abuses in accessing justice.[129] The Intergovernmental Working Group chaired by Ecuador has a "mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights".[130] According to Ruggie, the given mandate is weak and, as a result, the "treaty sponsors have the thinnest of political mandates".[131] Despite this flaw, Resolution 26/9 set into motion the process that should result in a binding treaty that is based mainly on the principles of the UNGP. Notwithstanding the belief that a treaty is the only way to "produce the necessary international regulatory framework to ensure that the pursuit of commercial activity does not conflict with and enhances fundamental human dignity and development",[132] generally speaking, industrialised nations did not support the resolution, instead choosing to reaffirm the normative status of the UNGP in a separate resolution accepted during the same session.[133] Accordingly, a review is conducted of the Chair-Rapporteur's report and the submissions made by states and CSOs at the seventh and eighth sessions of the OEIGWG negotiating the proposed binding treaty on business and human rights to assess whether a treaty will materialise.

1.7. Research Methodology and Chapter Division

This research aims to explore the UNGP at three levels. Firstly, the international level, by examining the essence of the UNGP (that is, what it is) and its history (that is, how the UNGP came about). At international level, a process is underway for a binding treaty regarding business and human rights since 2014. As a treaty will impact the future of the voluntary UNGP, this thesis deals with the treaty-making process and the current situation. I explore the arguments in favour of the treaty and discuss the prospects of success of the proposed treaty. Secondly, the UNGP's effect at the national level is considered by reviewing how three countries responded to the UNGP, namely France, Germany, and South Africa. Thirdly, at regional level, the EU's response is reviewed.

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[129] UN Doc. A/HRC/RES/26/9. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 (accessed 20 October 2022).
[130] *Ibid*.
[131] Ruggie (9 September 2014).
[132] Choudhury 2017 *U PA J Int'l L* Fn 76.
[133] UN Doc. A/HRC/RES/26/22 15 July 2014. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/22 (accessed 20 October 2022).

This thesis focuses on the selected countries because of the divergent ways the respective national governments responded to the UNGP, which is a voluntary instrument and not negotiated by states. Even before the EU engaged with the issue of corporate sustainability and due diligence, France passed legislation trying to make French corporations accountable for their actions and, as such, endeavoured to "stand out as a white knight".[134] France passed a law that imposed liability and, by so doing, boldly moved beyond other international initiatives that traditionally approach the issue by requiring voluntary compliance based on the "name and shame" principle.[135] Germany is interesting because the German Federal Government started the process to pass a supply chain law in 2015, but eventually shied away and instead conducted stakeholder consultations for a NAP. In 2020, a quantitative survey showed that only 13% to 17% of the 455 German companies surveyed had submitted a valid response, thus met the government's requirements and, because of this disappointing result, the government enacted supply chain legislation in 2021.[136]

France and Germany acted without any directive from the EU, and in 2022, the EU Commission published a proposed Directive on Corporate Sustainability Due Diligence, which aims to promote sustainable and responsible corporate behaviour throughout the global value chains of European companies. Using this broad approach, the Commission wants to provide transparency for consumers and investors and ultimately bring legal certainty and a level playing field for businesses.[137]

South Africa is home to many corporations operating and competing internationally, yet the ANC-led government does not have a government department to consider the UNGP, which, as mentioned earlier, provides a framework for states to bridge the gap between the impact of companies' business activities and the adverse consequences on society that may flow from it.[138] In South Africa, corporate governance is informed, among others, by statute (Company

[134] Barsan 2017 *ECFR* 404.
[135] *Ibid*.
[136] Germany: "Monitoring of the National Action Plan on Business and Human Rights" (14 August 2020). Available at: https://www.business-humanrights.org/en/latest-news/germany-monitoring-of-the-national-action-plan-on-business-human-rights/ (accessed 20 October 2022).
[137] Statement European Commission Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains 23 February 2022.
[138] See paras 4.6 and 4.8 below.

Act)[139] and voluntary measures such as[140] the Institute of Directors of Southern Africa's (IoDSA) Code of Corporate Practices and Conduct, which has been reviewed three times, the current version being the King IV Report on Corporate Governance for South Africa 2016.[141] The Code deals with issues such as ethical leadership, the organisation in society, corporate citizenship, sustainable development, stakeholder inclusivity, integrated thinking and integrated reporting.[142] Another voluntary measure is the Code for Responsible Investment in South Africa (CRISA) which was published in 2011 of which IoDSA again was the originator.[143] CRISA provides guidance to institutional investors regarding the execution of investment analysis and investment activities, as well as exercising rights promoting sound governance by investee companies.[144] This thesis highlights whether these voluntary measures suffice. An examination is conducted into whether there are efforts to prevent human rights violations within the borders of South Africa through laws that are passed ensuring the most fundamental tenet of our constitutional democracy.[145] The South African government's reluctance to engage with the UNGP is examined and reasons are posited as to why South Africa is so singularly focused on the treaty-making process rather than taking steps to pass business and human rights legislation.

No discussion of business and human rights can be complete without a discussion of China and the role it plays in the EU and in the UN-led business and human rights treaty-making process. China voted in favour of the resolution that initiated the treaty-making process, and this makes a review of China's approach to business and human rights crucial. Initially, the Global North voted against Resolution 26/9. If the treaty is to come to fruition, the Global South will have to vote together. This study examines the possible prospects of passing a legally binding instrument, especially because "China has shown all the signs of dominance in the global market, especially on the African continent".[146] In September 2021, China published a human rights action plan, setting the objectives and tasks of respecting, protecting, and promoting human rights in the period from 2021 to 2025.[147] Despite this, the Danish Institute for Human

[139] See para 4.2 below.
[140] Locke "Corporate Governance in South Africa" (September 2020).
[141] First released in 1994.
[142] See para 4.2 below.
[143] *Ibid*.
[144] Locke (September 2020).
[145] See paras 4.5 and 4.8 below.
[146] Mpya 449.
[147] Document is titled: "Full Text: Human Rights Action Plan of China (2021–2025)" and was released by The State Council Information Office.

Rights, which monitors the implementation of NAPs, does not have an entry (to date) for China with regard to its activity relating to the UNGP.[148] Moreover, research conducted by Cheng in 2019 is the first work of research that explores the role and function of the UNGP in supply chains in China.[149] To highlight China's response, I shall draw on Cheng's research to establish China's response to the UNGP.

1.8. Division of Chapters

Chapter 1:

In this chapter, an overview is given of the context in which the UNGP came about. The primary research question is articulated, and the issues discussed in this thesis are outlined.

Chapter 2:

This chapter deals with the UNGP, how it came about, what it is, and what monitoring and accountability mechanisms it proposes.[150] The UNGP encourages members of multilateral institutions to promote business respect for human rights, and this chapter thus examines regional initiatives undertaken by the EU, African Union, and the Southern Africa Development Community (SADC) regarding the UNGP.[151] The resolution[152] adopted by the UNHRC in 2014 that established the OEIGWG mentions the UNGP. The 2015 report of the first session held by the OEIGWG noted the adoption of the UNGP as being an "important step" and the intergovernmental treaty-making process as a "complementary step" that is not in conflict but rather a means of improving the protection of human rights and the accountability of corporations.[153] Thus, this chapter examines the process of negotiating a binding instrument for business and human rights because of Resolution 26/9.[154]

[148] National Action Plans on Business and Human Rights "Countries" (no date).
[149] Cheng 6.
[150] See paras 2.1, 2.2, 2.3,2.4.1, 2.4.2 and 2.4.3 below.
[151] See paras 2.5, 2.5.1, 2.5.2 and 2.5.3 below.
[152] UN Doc. A/HRC/RES/26/9 Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 (accessed 20 October 2022).
[153] Espinosa 2016 Report on the First Session of the OEIGWG.
[154] See para 2.6 below.

Chapter 3:

This chapter conducts a comparative analysis of how the UNGP was dealt with in France, Germany, and the EU and what these jurisdictions expect from their TNCs.[155] For the sake of completion, I include China's response to the UNGP in this chapter.[156]

Chapter 4:

The South African government seemingly refuses to engage with the UNGP, and Chapter 4 discusses South Africa and its relation to the UNGP. This chapter includes a discussion of the observation that while the rest of the world's governments are engaging with business and human rights, South Africa still focuses on corporate social responsibility (CSR). In fact, South Africa has its own term for CSR, namely corporate social investment, which seeks to improve the lives of disadvantaged people.[157] In so doing, the South African government continues to not hold corporations accountable for their actions.

Chapter 5:

Chapter 5 deals with China. Forbes reported in 2014 that Europe was losing competitiveness in global value chains to China.[158] This chapter examines China and the role it plays in a globalised world. In 2021, China was the largest trade partner for EU imports of goods,[159] which makes the Commission's undertaking to place a ban on imported goods associated with forced labour most interesting. Especially, given the 2021 Human Rights Watch report that there is "increasing evidence of forced labor, broad surveillance, and unlawful separation of children from their families" against the Uyghurs and other Turkic Muslims in China.[160] Moreover, since the start of the UN treaty-making process, representatives from the Chinese government have been actively participating in the process and making proposals for amendments. Reports from the seventh session of the treaty-making process which was held in 2021, highlighted that delegates from, South Africa "tried to strengthen the text, […] while representatives from Brazil, US and China

[155] See paras 3.2, 3.3, 3.4 and 3.6 below.
[156] See para 3.6 below.
[157] See paras 4.6 and 4.7 below.
[158] Rapoza "Globalization's Old 'Race to the Bottom' Finds Unlikely Winners" (19 August 2014).
[159] "China-EU – international trade in goods statistics" 31 March 2022. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=China-EU_-_international_trade_in_goods_statistics (accessed 3 October 2022).
[160] Human Rights Watch 2021 Break Their Lineage, Break Their Roots: China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims.

attempted to curtail the rights of victims".[161] Therefore, it is imperative this thesis examines China's approach in this context as well.[162]

Chapter 6:

This chapter draws together the literature review of how home states of internationally operating companies implemented the UNGP. In this chapter, my conclusions based on the research are discussed and recommendations are made for policymakers, CSOs, and researchers in South Africa for future research.[163]

1.9. Sources of information

Information for this thesis was collected through primary and secondary sources, including policy documents, relevant academic literature, and position papers. The primary sources encompassed the policy documents, transcripts of parliamentary debates, and legal texts adopted by the UN and the EU, as well as at a national level regarding business and human rights. In addition, the UNGP, French and German supply chain legislations, the German NAP, and the EU proposed sustainability due diligence directive constitute the core documents for the analysis. However, as no ethical clearance was obtained from the Ethics Committee of the University of Pretoria, no interviews were conducted. To integrate the different perspectives, especially from CSOs, first-hand reports published on organisational websites were consulted. The sources were critically evaluated given their purpose, and great effort was made to ensure that the information was current, relevant, authoritative, and accurate. The information was corroborated through cross-referencing with other sources. This type of information was complemented by secondary sources, such as academic literature, scholarly articles, newspaper articles, and press statements regarding business and human rights, especially the debates surrounding the UNGP and the national statutes. Position papers and reports by CSOs about human rights abuses and business were consulted while conducting this research. The online database of the Business and Human Rights Resource Centre forms an integral part of this thesis. Regarding China, as far as is possible, this thesis refers to statements and speeches

[161] ECCJ "Familiar fault lines on full display as talks on binding treaty continue" (27 October 2021). Available at: https://www.business-humanrights.org/en/latest-news/familiar-fault-lines-on-full-display-as-talks-on-binding-treaty-continue/ (accessed 3 October 2021.
[162] See para 5.4 below.
[163] See paras 6.3 and 6.4. below.

published on the website of the Ministry of Foreign Affairs, as well as the English versions of government White Papers that were found on the State Council's website. Secondary sources were also consulted.

1.10. Delimitations of the Study

The thesis involves interpretative and qualitative analysis based on desktop research. The interpretative analysis is complemented by comparing how different jurisdictions responded to the same international soft law instrument. Initially, a comparative study at the local trading level was envisaged to determine how the German NAP was implemented by German Discounters. This proved difficult as the websites of retailers change frequently, and the previous versions of the sites are not archived. Moreover, this research area of business and human rights is rapidly evolving, and this study needed to respond to the changes. The German government itself conducted a survey of companies' compliance to its NAP, which was analysed. The German parliament passed a supply chain due diligence law during the research process because not enough German businesses implemented the voluntary NAP.

The topic is current and the constantly developing nature of the topic resulted in two more additions that were not envisaged at the start of the research:

(1) The EU published a proposal directive dealing with corporate sustainability at the European level. The proposed directive must still be debated in the European parliament. Nevertheless, the draft directive forms part of this study, and as a result:

(2) The role of China regarding the prospect of success of a future treaty. In addition, given that the Commission envisages that it intends to "foster sustainable and responsible corporate behaviour throughout global value chains",[164] the failure to address the role of China in this context amounts to ignoring 'the elephant in the room', especially considering how differently China defines human rights.

This study does not attend to what corporations are or the purpose they serve. Other doctoral theses expertly deal with corporations, their history, and how their construct under law leads to

[164] EU Just and sustainable economy: Companies to respect human rights and environment in global value chains Factsheet 23 February 2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/fs_22_1147 (accessed 20 October 2022).

them failing to "equally promote and protect peoples".[165] Another example focuses on how best to hold TNCs accountable under international law.[166] Also, this thesis does not deal with the theoretical foundations on which the UNGP is founded or its character or functionality in advancing corporate accountability.[167] Critiques of the UNGP are found elsewhere.[168] Further, this thesis does not analyse the UNGP's effectiveness by considering Third World approaches to international law.[169] This thesis looks at the UNGP, what it is, and the purpose it endeavours to fulfil. An analysis of the responses to the UNGP of three selected countries, namely France, Germany, and South Africa is presented. The EU's initiative is also discussed. The work of the OEIGWG following Resolution 26/9 was in response to the unanimous acceptance of Ruggie's Guiding Principles and therefore the treaty-making process is also discussed. The role of China is examined only insofar as it helps to assess the possible realisation of the OEIGWG's negotiated treaty. China is mentioned only to assess the possible effect China's desire to create global "stable, modern and competitive production and supply chains as well as economic development along value chains"[170] will have on the EU's proposed directive, which is a distant prospect of being adopted by the European parliament. An in-depth analysis and contextualisation of the UNGP in TNCs in China has been researched and is discussed elsewhere.[171]

The business and human rights issue is extremely current despite its origins in the 1970s. At present, there are many moving parts to the debate since there are constant developments. This research study attempts to look at these developments and interpret what they could mean or subsequently could lead to. Interviews could have added value, yet without ethical clearance, it was not possible. The topics covered in this thesis evolved considerably from when it was stated to when it was completed.

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[165] Mpya.
[166] Mnyongani *Accountability of multinational corporations for human rights violations under international law*.
[167] Bijlmakers (2020). Also see Bijlmakers *The legalization of corporate social responsibility: towards a new doctrine of international legal status in a global governance context*.
[168] Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights January 2011.
[169] Andersen *Businesses and human rights: A comparative study of the United States, England and Denmark using Third World approaches to international law*; also see Mpya.
[170] Stiftung Arbeit und Umwelt der IG BCE and Merics 2020 *Chinas Streben nach Dominanz in globalen Zuliefer- und Wertschöpfungsketten: Auswirkungen auf Europa*.
[171] Cheng *Corporate human rights accountability: Contextualising the United Nations Guiding Principles on Business and Human Rights in multinational corporation supply chains in China.*

This research covers developments up to 26 November 2022. Additional information was added in September 2023, but not regarding developments.

1.11. Key Terminology

An explanation is required to clarify the different terminologies used in business and human rights.

1.11.1. Transnational Corporations and Multinational Corporations

When dealing with the issue of business and human rights, it is necessary to clarify some of the terminology used, for example, in the UN and in the context of international initiatives and policies, the term TNCs is mostly used. This use covers both TNCs and multinational corporations, which are corporations that are transnational in character and operate in more than one country. The UN Conference on Trade and Development defines corporation as "incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates".[172]

The UNGP references any kind of corporation "regardless of their size, sector, location, ownership, and structure".[173] In this thesis, the terms TNCs, multinational enterprises, multinational corporations, international corporations or corporations, and international companies or companies as well as businesses, business enterprises, or any combination thereof are used interchangeably.

1.11.2. Business and Human Rights and Corporate Social Responsibility

In 2010, Ruggie stated: "[t]he era of declaratory CSR is over […and…] corporate responsibility to respect human rights cannot be met by words alone: it requires specific measures by means of which companies can 'know and show' that they respect rights".[174] Ruggie made this statement because fourteen of the 31 guiding principles directly address business.[175] Although

[172] Transnational Corporations and Foreign Affiliates. Available at: https://unctad.org/system/files/official-document/gdscsir20041c3_en.pdf (accessed 20 October 2022).
[173] Guiding Principle 14. Available at: https://globalnaps.org/ungp/guiding-principle-14/ (accessed 20 October 2022).
[174] Ruggie (2013) ch 3.
[175] *Ibid.*

CSR and business and human rights are interrelated, the "often wide and proactive focus of CSR contrasts with and complements the binding character of human rights obligations".[176]

Ramasastry calls CSR and business and human rights two close cousins as they are "intertwined concepts focused on companies engaging in responsible and socially beneficial activities".[177] Business and human rights and CSR "share the common starting point of corporations having responsibilities beyond their shareholders, …[there is a difference with regards to]… the normative basis of corporate responsibilities, the nature and extent of these responsibilities, the process of identifying individuals and communities to whom responsibilities are owed, and the modus operandi of enforcing corporate responsibilities in cases of non-compliance".[178]

According to Deva, business and human rights means "at the minimum: first, the relevant duty holders have corresponding legally binding obligations, and second, the rightsholders can seek effective remedies for violations of such a right… [and therefore] … corporations must have legally binding and enforceable human rights obligations as a precondition for doing business".[179]

CSR, on the other hand, refers to companies' impact on society, including social, ecological, and economic aspects.[180] CSR places "the primary responsibility upon the voluntary actions of "good" companies rather than developing a regulatory framework".[181] According to Wettstein, CSR allows for the development of "social and environmental strategies 'for themselves within a language of their own choosing'" because it is framed in the language of "private responsibility, rather than public accountability".[182] In other words, CSR involves corporate voluntarism that can range from "corporate philanthropy to stepping in to provide aid when governments fail to act, because it is good for business".[183]

In contrast, business and human rights involve private sector activities as well as the business of states to oversee whether companies' activities display respect for human rights, and thereby

[176] Wettstein 2012 *Bus Ethics Q* 740.
[177] Ramasastry 2015 *J Hum Rights* 237.
[178] Deva and Birchall (2020) *Research Handbook on Human Rights and Business* 1.
[179] *Idem* 11.
[180] Reference documents: UN Global Compact, ILO 2022 Declaration of Principles on Business and Social Policy, the OECD Guidelines for Multinational Enterprises, ISO 26000.
[181] Wettstein 2021 *Bus Hum Rights J* 7.
[182] *Ibid.*
[183] Ramasastry 2015 237.

brings corporate activity into the "realm of binding law, state sponsored oversight, and […] access to remedy as a measure of corporate accountability".[184] The UNGP is the founding document for business and human rights, while CSR is based on the UN Global Compact, which aims to help build a more sustainable and inclusive global economy.[185] CSR is a voluntary strategic policy initiative and, different to business and human rights, which is mandatory because of corresponding legislation.[186]

1.11.3 Difference Between Due Diligence and Companies' Duty of Care

Originally introduced by the UNGP, the concept of due diligence has been used in various international instruments and standards.[187] According to Rühmkorf and Walker, there are national differences and different terms are used in the "existing laws aimed at improving greater corporate accountability".[188] In German law, the term *Sorgfaltspflicht* is used; under English law, duty of care and due diligence are prevalent, while vigilance is the term used in French law, and as such, these terms have different functions and meanings in different contexts.[189] Thus, the tort law concept duty of care, which is based primarily in case law, requires that the victim of a tort brings a claim against the tortfeasor.[190] As tort falls under private law, enforcement will depend on the victim's financial ability to bring a claim, thus making access to justice a little more than challenging.[191] In short, a duty of care relates to the civil liability aspect of an obligation to act diligently regarding human rights and would require companies to undertake due diligence procedures.[192] Duty of vigilance, on the other hand, relates to a special type of duty of care and is used in the French Vigilance law.[193] The term is associated with the civil liability that is created when there is a breach of the vigilance obligations that are articulated in the French corporate accountability legislation. However, the French law does not create a new or independent

[184] *Idem* 238.
[185] Comparative table explaining the key differences between the UN Global Compact and the UN Guiding Principles on Business and Human Rights. Available at: https://media.business-humanrights.org/media/documents/files/documents/Comparative_UN_Global_compact_and_UNGP.pdf (accessed 20 October 2022).
[186] *Ibid*.
[187] See para 2.3.3 below.
[188] Rühmkorf and Walker 2018 *European Institutions Office.*
[189] *Ibid.*
[190] *Ibid*.
[191] *Ibid*.
[192] *Ibid*.
[193] *Ibid.*

concept and can be described as mandatory human rights due diligence and civil liability, [194] because individuals who are harmed can bring a civil lawsuit, that is based on French tort law, in which they can seek damages which resulted from a company failing to comply with its vigilance obligations.[195]

For Ruggie, corporate responsibility to respect means "to do no harm",[196] and Ruggie's term, "human rights due diligence", has been widely accepted across the EU and the world.[197] Human rights due diligence does not necessarily include corporate liability, but it has a broader scope than duty of care and goes beyond tort law as it is not based on private enforcement alone.[198] A 2020 study stated that "[d]ue diligence as a legal standard or duty of care requires companies to exercise the care required to prevent and address external harms, regardless of whether these are harms beneficial, detrimental or neutral to the company's performance in the long or short run".[199]

1.11.4. UNGP Human Rights and China's Human Rights

Countries supporting the UNGP agree that "human rights are not mere abstract aspirations; rather, they are vital to the dignity and development of real human beings".[200] The UNGP gives concrete expression to what human rights require in the business context. The UNGP references "internationally recognised human rights", which, at a minimum, are rights articulated in the International Bill of Human Rights, that is, the rights in the Universal Declaration of Human Rights, as codified in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as the principles concerning the rights in the ILO's Declaration on Fundamental Principles and Rights at Work, freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination in respect of employment and occupation.[201]

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[194] *Ibid*.
[195] France's Duty of Vigilance Law. Available at: https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/ (accessed 5 October 2022). Also see paras 3.2.1–3.2.12 below.
[196] Ruggie 2008 Promotion and Protection of all Human Rights, Civil Political, Economic, Social and Cultural Rights, including the Right to Development.
[197] Smit *et al*. 2020 Study on Due Diligence Requirements through the Supply Chain.
[198] *Ibid*.
[199] Smit *et al*. 2020.
[200] Deva and Birchall (2020) 11.
[201] Ruggie (2013).

The government in China views development as central to its capacity to solve major problems. As such, the "right to subsistence and (economic) development are paramount human rights, rising above the civil/political rights"[202] of individuals. The Chinese government articulates human rights with their "own intentions and use their own language".[203] A government White Paper published in 1991 dealing with Human rights in China states:

> Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country. Therefore, a country's human rights situation should not be judged in total disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region.[204]

1.11.5. Supply Chain and Value Chain

The German Supply Chain Due Diligence Act refers to companies' supply chains, whereas the European Commission's proposal references value chains. This confusion necessitates clarification of the terms "value" and "supply chains". Traditionally, multinational corporations have been seen, individually or through one-to-one supplier relationships, as those who create, manufacture, and sell a given product.[205] A supply chain is when firms are primarily organised so that nearly all production-related activities for a specific good are owned and operated by a single firm.[206] It is also possible for companies to contract with third-party firms to perform some of those activities instead of retaining ownership of all production-related activities.[207]

In contrast, global value chains are coordinated chain components that include the research, design, production, and retail of products systemically across multiple firms – from a few to a few thousand.[208] In other words, the global value chain "describes the full range of activities that are required to bring a product or service from conception, through the intermediary phases of production (involving a combination of physical transformation and the input of various producer services), delivery to final consumers, and final disposal after use".[209] Thus, a company's value

[202] Cheng 55.
[203] *Idem* 20.
[204] Human Rights in China 1991. Available at: http://www.china.org.cn/e-white/7/index.htm (accessed 20 October 2022).
[205] Sobel-Read 2014 1.
[206] *Ibid* 14.
[207] *Idem* 15.
[208] *Ibid* 7.
[209] *Ibid* 18.

chain is embedded in a more significant stream of supply chain activities and is called the value system.[210]

It must be noted that in a globalised market, global supply chains sometimes also include subcontractors in order to operate more economically.[211] The supply chains that form a hierarchical socio-economic dependency network constitute a logistical, economical or productive chain where parts of a production process are "outsourced to external legal entities, often small firms or even the self-employed – depending on the sector".[212] A subcontracting chain is created through contractual and employment relations between the supply chain actors because the principal contractor hires additional individuals or companies to assist in finishing a project.[213] Subcontracting is, at times, undeclared work and currently enforceable regulations do not exist.[214] Subcontracting can be a fertile environment for human rights and environmental violations, which is something to be borne in mind.

1.11.6. Global South/North vs Developing/Developed Countries

The countries of the Global South have been defined as such since the 1960s, and terms such as "developing countries", "Third World", and "Global South" are used interchangeably.[215] The terms based primarily on an economic categorisation are "developing countries" or "poor countries", whereas the political position in global power relations is represented in the terms "Third World" and "Global South".[216] In contrast, "Global North" refers to "developed countries" and includes the wealthiest countries, and scholars from the "Global North" emphasise economic aspects and advanced technology.[217] This thesis uses the term Global South, except when quoting a source directly.

This thesis uses British English spelling, except when quoting directly.

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[210] Brown "Value Chains, Value Streams, Value Nets and Value Delivery Chains" April 2009.
[211] Holubová and Kahancová 2022 Tackling Undeclared Work in Supply Chains 1.
[212] *Ibid*.
[213] *Ibid*.
[214] *Idem* 4.
[215] Freeman 2017 *Glob South* 71.
[216] *Idem* 72.
[217] *Ibid*.

CHAPTER 2 – UNGP ON BUSINESS AND HUMAN RIGHTS

> *"While the corporation is a hugely important and successful engine of wealth creation, it can also be an amoral behemoth that fouls the environment, worsens political and economic inequalities, and takes advantage of horrible injustices for its own financial gain".*[218]

2.1. Introduction

In this chapter, the UNGP is discussed, specifically the nature of the UNGP (what it is) and the application of the UNGP (what it does).[219] The UNGP addresses relations between business and human rights and is the first dealing with this subject to be endorsed by the UN.[220] The UN's endorsement of the UNGP created the context for demands for "cold hard law".[221] The Human Rights Watch, for example, called on governments to display courage and to make it mandatory for corporations to respect human rights wherever they operate, as opposed to treating it as "just a nice idea".[222] In 2014, the UNHRC accepted Resolution 26/9, which started the process of bringing forward a treaty. The process of drafting a legally binding instrument regarding business and human rights is dealt with in this chapter.

The UNGP address a basic problem: multinationals are legally responsible and accountable for their actions in their home states, but the laws of the home states do not cover actions in a foreign country. As a result, corporations are not accountable for rights violations in multiple countries in their supply chains.[223] This chapter first places the UNGP in an international context. The UNGP and its three pillars – protect, respect, and remedy – as well as the changes the framework and guiding principles have effected to establish its acceptance by society are examined. This chapter concludes with a discussion of the drafts for a legally binding instrument and the current treaty-making process.

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[218] Greenfield 1999 *Georgia L Rev* 3.
[219] See Ruggie (2013); also see para 2.4 below.
[220] *Ibid*.
[221] Batesmith "HRW vs. Ruggie: How Valid is the Criticism of the UNGPs?" (8 February 2013).
[222] Albin-Lackey 11.
[223] Kiani 2016 Rights to Freedom of Peaceful Assembly and of Association: Note by the Secretary-General United Nations.

2.2. The Global Context and the Problem of Business and Human Rights

The Westphalian international legal order that established state sovereignty does not hold corporations accountable for human rights violations. Corporations are decentralised, organised and operate globally,[224] and economic globalisation occurred without too many controls being placed on companies as economists have argued a global trading system will produce worldwide prosperity and a means to end poverty.[225] Globalisation has given rise to an increase in worldwide economic productivity and wealth, as well as contributed to a dramatic increase in the power of large multinational corporations.[226] An ability to regulate international business entities has proved difficult.[227]

From the 1990s onwards, corporations have been following the advice of consulting firms that advised executives to "face the fact that cost migration is a competitive necessity".[228] Companies needed to migrate suppliers and work sites from high-cost countries, for example, Germany or the US, to low-cost countries such as Hungary, Mexico, China, or Malaysia.[229] This is how companies could achieve cost savings of 20% to 60%. Companies view migrating to low-cost countries as a matter of economic survival.[230] In other words, for companies to lower costs and gain competitive advantage, they need to mitigate risk and accelerate the time it takes to get goods to market.[231] This way of doing business not only pitted high-wage countries against low-wage countries but also meant that low-wage countries competed against one another.[232] The quest for ever-greater cost-cutting gave rise to what is called the "race to the bottom"; a process described as "the 'treadmill' that ensnares developing countries […]. If they attempt to boost wages or allow workers to organize unions or begin to deal with social concerns like health or the environment, the system punishes them … [because] … factories move to some other country where those costs of production do not exist".[233] Corporations view the reduction of

[224] Brune (2020) *Menschenrechte und Internationale Unternehmen* 14–15.
[225] Kiani 2016.
[226] *Ibid*.
[227] *Ibid.*
[228] Vestring *et al*. 2005 Making the Move to Low-Cost Countries 1.
[229] *Ibid*.
[230] *Ibid*.
[231] *Idem* 2.
[232] Greider "A new giant sucking sound" (31 December 2001).
[233] *Ibid*.

inefficiencies and lowering opportunity costs as the core concerns, and products produced in one country are exported to another, enabling consumers to buy at the lowest price.[234]

Corporations are regarded as "champions" of individual national economies but have "shaped an increasingly global economy".[235] Although economic output and the productivity of corporations have increased,[236] inequality has risen with the "fruits of that growth going primarily to the wealthiest".[237] Corporations that operate in an international political and social context rely on the essential role that workers play in a corporation's activities, which is central to the success or failure of the enterprise.[238] Working conditions are regulated by the national laws of the countries in which the corporations operate. According to the UN, the traditional labour tools for protecting rights have been significantly weakened across the globe; a situation that effectively allows the global supply chain to override sovereign democracy.[239]

To address the protection of rights in a global economy regarding international products or services, the then UN Secretary-General, Kofi Annan, appointed the Special Representative for Business and Human Rights, John Ruggie, to investigate ways to address the problem, which Ruggie articulated as:

> Each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates. Yet States, […], may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so […] Home States of transnational firms may be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters.[240]

Corporations, in their global operations, evade international human rights requirements and expectations. Human rights are historically a civil right defence against states that exercise power arbitrarily.[241] As a consequence of globalisation, states and non-state international organisations are no longer the only actors on the international stage capable of having an impact on human rights. In a globalised world, corporations also exert power and "unconstrained

[234] Joseph (2013) *Blame it on the WTO? A Human Rights Critique* 12.
[235] Ballor and Yildirim 2020 *Bus Politics* 574.
[236] Greenfield 1999 6.
[237] Raja 2016 *Third World Econ*.
[238] Greenfield 1999 6.
[239] Kiani 2016.
[240] Ruggie (2013).
[241] Brune (2020) 15.

power, whether public or private in origin, is a critical threat to the protection of human rights".[242] TNCs have the expertise and financial muscle that enable them to exercise political power to achieve commercial interests, and this use of power can result in rights violations by corporations either directly or indirectly through aiding or abetting violations, thus, being "silently complicit".[243]

Ruggie calls these circumstances "governance gaps" that he sees as the "root cause of the business and human rights predicament".[244] These governance gaps in the international system allow TNCs to operate without the threat of sanction as the TNCs are not answerable to any authority.[245] Ruggie asserts these governance gaps "provide the permissive environment for wrongful acts by companies of all kinds without adequate sanction or reparation".[246] Before examining the UNGP, which is based on research, consultations, and practical experimentation that Ruggie calls "principled pragmatism",[247] this chapter deals with the international legal context that led to the "protect, respect, remedy" framework and later to the UNGP. According to Ruggie, the UNGP does not create new international law obligations, instead, it expounds on the implications of existing standards and practices for states and businesses, thereby integrating them in a single, logically coherent, and comprehensive template.[248]

2.3. The International Legal Landscape

Much has been written regarding the history of corporations,[249] corporations, and human rights[250] or about holding corporations accountable.[251] This research study focuses on the UNGP and how countries responded to the soft law instrument; therefore, there is only a cursory discussion of the instruments that make up the legal landscape with regard to TNCs.[252]

[242] Kiani 2016.
[243] Kobrin 2009 *BEQ* 351.
[244] Ruggie 2008.
[245] Brune (2020) 14.
[246] Ruggie 2008.
[247] Ruggie 2013 *Just Business: Multinational Corporations and Human Rights* (Kindle Version) Ruggie (2013).
[248] Ruggie 2011 Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework.
[249] Muchlinski (2007) 18–19.
[250] See Deva (2012) *Regulating Corporate Human Rights Violations: Humanizing Business*; also see Stephens 2002 *Berkeley J Int Law*; Cassel 2001 *BEQ*.
[251] Stringer and Michailova 2018 *MBR*.
[252] For a detailed discussion on business and human rights instruments see Mpya.

2.3.1 International Labour Organization

For more than a 100 years, working conditions have been on the international agenda.[253] Yet, the issue of business and human rights is still a matter of concern.

The ILO was created as part of the Treaty of Versailles in 1919 and brought together representatives of governments, employers, and workers in tripartite organisation executive bodies.[254] The ILO was conceived out of security, humanitarian, political, and economic considerations.[255] It seeks to improve working time and labour safety regulations, prevent unemployment, provide adequate living wages, and provide social protection for workers, children, young persons, and women.[256] When the UN was formed in 1946, the ILO became a specialised agency. In 1948, the ILO adopted the Freedom of Association and Protection of the Right to Organise Convention (No. 87). The UN adopted the Universal Declaration of Human Rights that same year.[257] The Universal Declaration of Human Rights is important to the work of the ILO because of its promotion and defence of human rights.[258] In the 60-plus years of the ILO's existence, workplace conditions and labour standards have remained an ongoing campaign.

In 1998, the Declaration on Fundamental Principles and Rights at Work and its follow-up to promote the implementation of these principles and rights were adopted. However, for ILO standards to be implemented effectively in the workplace, states must ratify conventions and pass national legislation.[259] The ILO's governing body has identified eleven fundamental instruments; however, of the 187 member states, only eighteen countries have ratified all fundamental conventions.[260] France and Germany have ratified ten of the eleven fundamental instruments, South Africa nine, and China seven.[261]

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[253] See para 1.2 above.
[254] ILO "History of the ILO" (no date). Available at: https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (accessed 20 April 2022).
[255] *Ibid*.
[256] *Ibid*.
[257] Anon 1998 *Int Labour Rev.*
[258] Swepston 1989 *Int Labour Rev* 169.
[259] Von Potobsky 1998 *Int Labour Rev* 196.
[260] ILO Conventions and Recommendations.
[261] Ratifications of fundamental instruments by number of ratifications. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:::NO:10001:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:2,F (accessed 20 October 2022).

For the most part, corporations in high-income countries adhere to the labour standard regulations that play a vital role in protecting workers by "ensuring safe workplaces, fair pay as well as protecting workers' rights to organize and join a union so they can bargain collectively with their employers".[262] However, adherence to labour standards comes at a cost to corporations and, in a globalised world, they can seek out places where working conditions can be compromised to reduce costs. For some states, labour standards are "a form of 'hidden' protection that would prevent developing countries from legitimate competition in an area where they have the greatest comparative advantage".[263] Corporations have moved operations to states that do not take worker protection in the form of labour standards regulations seriously. Corporations have found an opportunity in states that compromise on labour standards because they fear "the risk of suffering competitive disadvantages in international markets".[264]

The ILO, as a standard-setting organisation, periodically receives reports on states' progress in implementing adequate provisions into law.[265] Independent supervisory bodies review the reports and recommend areas for improvement and may address workers' or employers' complaints, thereby having an impact on countries' legal and business environments.[266] In its global role, the ILO's best practice benchmarks are considered aspirational, especially considering the varying stages of development of many countries.[267] The ILO focuses on labour and workers in a global economy[268] with initiatives such as the Decent Work Agenda, which it defines as "the understanding that work is not only a source of income but more importantly a source of personal dignity, family stability, peace in community, and economic growth that expands opportunities for productive jobs and employment".[269] Despite the ILO's ability to adapt to a changing world,[270] its efficacy continues to be questioned,[271] and rightfully so. In 2016, Amnesty International reported that asylum seekers and refugees in Turkey (now Türkiye), who

[262] McNicholas *et al*. 2018 Workers' Health, Safety, and Pay are among the Casualties of Trump's War on Regulations: A Deregulation Year in Review.
[263] Palley 2004 *Camb J Econ* 22.
[264] Baccini and Koenig-Archibugi *LSE* 32.
[265] Walter "Introducing the ILO's Business and Human Rights Framework" (19 March 2019).
[266] *Ibid*.
[267] Biffl and Isaac 2002 How Effective are the ILO's Labour Standards under Globalisation?
[268] Kott "ILO: Social Justice in a Global World? A History in Tension" (2019).
[269] ILO: Decent work. Available at: https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (accessed 10 October 2022).
[270] Jakovleski *et al*. "The ILO's Role in Global Governance: Limits and Potential" (2019). http://www.jstor.org/stable/10.1163/j.ctvrxk4c6 (accessed 10 October 2022).
[271] Biffl and Isaac 2002.

work in the informal economy, are often exploited, discriminated against, and harassed.[272] Also, in June 2022, the Clean Clothes Campaign, a global network of over 235 organisations operating in over 45 countries,[273] reported that in Türkiye, 1.5 million workers earn "poverty pay which leaves them struggling to survive",[274] even though these garment workers produce items for global fashion brands.[275] In May 2021, research conducted in India[276] showed evidence of "increased risks of human rights and labour rights violations in the […] textile industry".[277]

In a global economy, the ILO has been "unable to avoid the increasing commodification of labour, which […] entails high levels of insecure working conditions and low levels of pay for the most vulnerable people".[278] This is so despite the EU paying more attention to human rights through requirement of the ratification of some ILO Conventions or labour clauses in free trade agreements (FTAs). The EU has been "including labour rights provisions systematically in its bilateral FTAs for over a decade".[279] However, ratification is not a condition for the conclusion of FTAs and therefore not all EU FTA partners have ratified the fundamental ILO Conventions.[280] This has motivated the consideration whether the EU should not require "ratification of all ILO fundamental conventions before the conclusion of the agreement … [as] … a condition for its conclusion, […] in future negotiations".[281] In 1999, the EU and South Africa concluded a Trade, Development and Cooperation Agreement, and in June 2016, the EU and South Africa – together with Botswana, Lesotho, Mozambique, Namibia, and Swaziland – signed the Southern African Economic Partnership Agreement (SADC EPA) that regulates trade in goods between the two regions, thereby replacing the trade-related provisions of the Trade, Development and Cooperation Agreement.[282] However, a safety and health at work provision such as the

[272] Amnesty International "No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey" (2 June 2016) 29–32. Available at: https://www.amnesty.org/en/documents/eur44/3825/2016/en/ (accessed 12 October 2022).
[273] Clean Clothes Campaign Available at: https://cleanclothes.org/about (accessed 12 October 2022).
[274] Report: Turkey's garment industry profile and the living wage. Available at: https://cleanclothes.org/file-repository/turkeys-garment-industry-report.pdf/view (accessed 12 October 2022).
[275] Including Adidas, Banana Republic, Benetton, Boohoo, C&A, Esprit, GAP, G-star, Hugo Boss, H&M, Inditex – Zara, Levi's, Marks and Spencer, Next, Nike, Puma, Primark, Urban Outfitters, and VF. Available at: https://cleanclothes.org/file-repository/turkeys-garment-industry-report.pdf/view (accessed 12 October 2022).
[276] SOMO investigates multinationals and Arisa, an independent human rights organisation.
[277] Overeem *et al*. 2021 Spinning Around Workers' Rights: International Companies Linked to Forced Labour in Tamil Nadu Spinning Mills.
[278] Carbonnier and Gironde (2019) "The ILO @ 100: In Search of Renewed Relevance" 5.
[279] Zamfir "Labour rights in EU trade agreements – Towards stronger enforcement" (3 January 2022).
[280] *Idem* 4.
[281] *Idem* 5.
[282] EU trade relations with South Africa. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/south-africa_en (accessed September 2023).

"commitment to strive to ensure a high level of protection" is not present in the SADC EPA.[283] This suggests that FTAs are not a panacea for business and human rights matters.

The ILO is not the only organisation exerting influence on the effective integration of global markets. The WTO also plays a role in the global market and, although trade liberalisation encourages economic development and thereby increases prosperity, the WTO has been criticised for ignoring the consequences of trade conditions under which people labour.[284] What follows is a discussion of the WTO.

2.3.2. The World Trade Organization

Considered "one of the most important achievements of international economic cooperation in the post-war period", the WTO is a platform that facilitates multinational negotiations to improve access to markets and countries' exports and establish legally binding trade rules and disciplines.[285] In the words of Sarah Josephs, "[t]he underlying rationale of the WTO is to preside over the reduction of trade barriers between nations, thereby promoting global free trade … [because] … alongside a peaceful and authoritative procedure for settling disputes [it] will promote more harmonious international relations".[286]

The WTO, which was created outside the auspices of the UN, has 164 members[287] and was founded in 1995 as a successor to the General Agreement on Tariffs and Trade, which came into force in 1948.[288] The WTO removes barriers to the free trade of goods to facilitate cross-border trade and create greater economic efficiencies.[289] Therefore, liberalising the markets to facilitate trade is the primary focus of the WTO, whose membership accounts for about 98% of global trade in goods.[290] Even though members have equal rights, each having one vote in the central organs of the organisation, the politically and economically strong states have been able to assert their interests.[291] Although the WTO aims to raise living standards and sustainable

[283] Zamfir "Labour rights in EU trade agreements – Towards stronger enforcement" (3 January 2022) 8.
[284] Titievskaia and Zamfir with Handeland Study: European Parliamentary Research Service (March 2021). Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689359/EPRS_BRI(2021)689359_EN.pdf (accessed 10 October 2021).
[285] Drabek (2010) *Critical Essays on the Multilateral Trading System* 1.
[286] Joseph (2013) 12.
[287] Since 29 July 2016.
[288] WTO "What is the World Trade Organization?"
[289] Joseph (2013) 12.
[290] WTO „*World Trade Organization Bundeszentrale für politische Bildung*".
[291] *Ibid*.

development,[292] it is often decried for ignoring the direct consequences of trade liberalisation on labour standards and human rights.[293] In 1996, the WTO reiterated that it has no competence to enforce labour rights and that the ILO is the body competent to set these standards.[294] At that time, most low-wage countries supported the rejection of the idea of a social clause relating to labour standards out of fear that labour rights-based sanctions would limit their export capacities.[295]

Global supply chains have experienced their fair share of high-profile human rights violation scandals dating back to the 1990s[296] despite the presence of the ILO and WTO. The ILO's inability to prevent such violations is due to its weak control mechanisms and its dependence on the political will of member states to abide by their international commitments.[297] The WTO not only sets rules, not just general "standards", but also draft dispute-specific solutions.[298] Despite the organisation's robust enforcement mechanisms, it seems unwilling to ensure that rules governing trade include prohibiting human rights violations.[299] It has been said that because of the WTO "domestic economic management [… became …] subservient to international trade and finance rather than the other way around".[300] The WTO's dispute settlement procedure is compulsory and binding and, as in a domestic court, the WTO can impose sanctions, an option not available to most other international bodies.[301] In comparison, the ILO depends on an international labour code that is voluntary and a supervisory system that is based on the logic of persuasion that makes it appear "rather weak".[302]

Human rights and labour rights remain explicitly outside the WTO mandate; hence, the ILO is the international body dealing with labour standards. Despite international trade being a "core characteristic of the globalised world",[303] and although it has become common practice to include labour rights provisions in trade agreements, such inclusion has "not materialised" in the rules

[292] Included in the Preamble to the Agreement establishing the WTO.
[293] Titievskaia and Zamfir with Handeland 2021.
[294] *Ibid*.
[295] *Ibid*.
[296] Nike, Bhopal in India, Shell in Nigeria, Yahoo in China, Apple supplier Foxconn Technology in China; see Ruggie (2013).
[297] Vinković *J Money Laund Contro*l 99.
[298] Howse and Mutua 2000 *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* 11.
[299] *Ibid*.
[300] Rodrik (2011) *The Globalization Paradox: Why Global Markets, States, and Democracy can't Coexist* 76.
[301] *Idem* 79.
[302] Reynaud 2018 The International Labour Organization and Globalization: Fundamental Rights, Decent Work and Social Justice 2.
[303] Smit and Botha 2022 "Labour Standards and International Trade Regulation" 1.

of the WTO.[304] The tensions between trade and human rights norms (labour rights are human rights according to the ILO)[305] continue because of the divergent interpretations of development that underpin the two organisations.[306] Smit and Botha articulate the situation as, on the one hand, the primary purpose of labour provisions being to address the imbalance of power between employers and employees, to fight the injustices found in the world of work, while mitigating failures in labour markets and facilitating economic production and, on the other hand, the objective of trade policy, which regulates cross-border flows of goods and services, is connected with raising efficiency, income and providing more consumption possibilities.[307] Ostensibly, both organisations, the ILO responsible for labour and the WTO for regulating trade, seem unable to influence corporate governance in such a way that human rights violations do not happen.

2.3.3. International Initiatives Dealing with Business and Human Rights

Several initiatives have been undertaken to align business with human rights. For example, in the 1970s, negotiations began to formulate the United Nations Code of Conduct on Transnational Corporations, which was to be a comprehensive multilateral instrument aimed at establishing which rules should govern the behaviour of TNCs in the countries in which they operate.[308] Unfortunately, by 1992, it became clear that no consensus was going to be reached that would make it possible to draft the code.[309] This effort was followed by the drafting of a treaty-like document called the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereafter, the Norms) by the UN Sub-Commission on the Promotion and Protection of Human Rights.[310] In an endeavour to "address corporate human rights responsibility in an exclusive manner and by means of international law",[311] the Norms imposed direct obligations on corporations to protect human rights, which business associations vigorously opposed. Ultimately, the Commission on Human Rights rejected the Norms.[312] Although the Norms had been intended to "build the basis of what was to

[304] *Idem* 2.
[305] ILO "International labour standards and human rights". Available at: https://www.ilo.org/resource/international-labour-standards-and-human-rights (accessed 28 November 2022).
[306] Titievskaia and Zamfir with Handeland 2021.
[307] Smit and Botha 2022 1.
[308] Sauvant 2015 *J World Invest Trade* 12.
[309] *Idem* 55.
[310] See para 2.3.3 below.
[311] Wettstein "The History of 'Business and Human Rights' and Its Relationship with Corporate Social Responsibility" 29; Deva and Birchall (2020).
[312] Global Policy Forum 2014 New Working Paper: Corporate Influence on the Business and Human Rights Agenda of the UN.

become a legally binding global framework on corporate human rights responsibility",[313] the Commission on Human Rights declared it to be without any legal standing.[314] Ruggie states that the Norms would have "imposed on companies, within their 'sphere of influence', the same human rights duties that states have accepted for themselves under treaties they have ratified".[315] Corporations' direct obligation under international law proved to be a bridge too far for most states and the majority of the business community.[316] Those who opposed the Norms emphasised that there should be no departure from the traditional international law principles that highlight the condition that the state is a legal subject of public international law.[317] Scholars and advocates of human rights, on the other hand, heralded the Norms as a "ground-breaking initiative" that could succeed in bringing an end to corporate abuses of human rights.[318] International human rights organisations insisted that the Norms be "built on" and further implemented when Ruggie began a process of consultations with civil society and business.[319] However, as stated earlier, Ruggie viewed the document "deeply flawed".[320] The UNGP is discussed later in this chapter. Other international texts that garnered support and became the frame of reference regarding business conduct are now briefly discussed.

The ILO is expected to regulate working conditions and social protection at a global level.[321] Its success is based on the trust that its 187 member states will apply the standards to which they agree. In contrast, the Organisation for Economic Co-operation and Development (OECD) is an international organisation made up of 38 member countries that collaborate on global economic issues, thereby fostering opportunities for more prosperity.[322] In addition to advising on public policy, the OECD sets international standards enabling members to cooperate and reach shared objectives.[323] The organisation has drafted the Guidelines for Multinational Enterprises, which are "a set of recommendations addressed by states adhering to the OECD Declaration on

[313] Wettstein "The History of 'Business and Human Rights' and Its Relationship with Corporate Social Responsibility" 29; Deva and Birchall (2020).
[314] Deva (2020) "From 'Business or Human Rights' to 'Business and Human Rights': What Next?" 4; Deva and Birchall (2020).
[315] Ruggie (2013).
[316] Macchi and Bright (2019) "Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation" 9.
[317] *Ibid* 9.
[318] *Idem* 8.
[319] Ruggie (2013).
[320] *Ibid*.
[321] Carbonnier and Gironde 2019 4.
[322] OECD "Who we are". Available at: https://www.oecd.org/about/ (accessed 12 October 2022).
[323] OECD "Information". Available at: https://www.oecd.org/general/Key-information-about-the-OECD.pdf (accessed 12 October 2022).

International Investment and Multinational Enterprises to multinational enterprises operating in or from these states",[324] which were drawn up in 1976. These guidelines set up national contact points "for undertaking promotional activities, handling inquiries and contributing to the resolution of issues that arise relating to the implementation of the OECD Guidelines", which have been mandatory for member countries since the 2000 revision.[325] Revised again in 2011, the OECD Guidelines added a chapter on human rights that corresponded to the language of the UNGP.[326] The document outlines standards of good practice, which means that companies must respect human rights and must refrain from infringing on the rights of others and address any negative impacts on human rights in which they have a share.[327] The OECD Guidelines are recommendations that go beyond the policies of companies since it stipulates that if a company becomes aware of any risk that may have a negative impact "in the context of the supply chain", that company should stop it or prevent it.[328] This stipulation is viewed as an affirmation of adopting a responsible approach towards business partners, subcontractors, and suppliers.[329]

In 1977, the ILO drafted the Tripartite Declaration of Principles on the Multinational Enterprises and Social Policy (Declaration). It was revised in 2006. This text encourages states and social partners to respect the human rights set out in the Universal Declaration of Human Rights of 10 December 1948. Although the Declaration is non-binding, it is the first ILO document to formalise the convergence of different stakeholders and the need to guarantee human rights in the business world across borders in the context of globalisation.[330] This instrument, which addresses labour-related human rights, was revised in 2017, and this version aligned the provisions for due diligence with the UNGP.[331]

In July 2000, the UN Global Compact was adopted on the initiative of the then Secretary-General, Kofi Annan. The undertaking brought together 12,000 organisations as signatories from more than 145 countries.[332] The UN Global Compact is the first comprehensive and cohesive

[324] OECD no date National Contact Points.
[325] *Ibid*.
[326] *Ibid*.
[327] OECD circa 2022 Declaration on International Investment and Multinational Enterprises.
[328] Potier Report: *Loi de Vigilance*.
[329] *Ibid*.
[330] Potier Report: *Loi de Vigilance*.
[331] Walter "Introducing the ILO's Business and Human Rights Framework" (19 March 2019).
[332] In 2022, 16,000+ from over 160 countries available at: https://www.unglobalcompact.org/participation.

CSR initiative that focuses directly on corporations. [333] It encourages companies to promote and respect international human rights in their areas of influence and adopt, support, and apply a set of core values in that sphere.[334] The initiative was seen as an attempt to "give a human face to the global market",[335] and the signatories joined by undertaking to align their operations and strategies with ten universally accepted principles relating to human rights, labour standards, the environment, and the fight against corruption.[336] Of the then UN Global Compact principles, the first two relate to human rights: Principle 1 requires companies to respect and support the protection of internationally proclaimed human rights, while Principle 2 requires companies to ensure that they are not complicit in human rights abuses.[337] A 2014 report indicated that the UNGP reinforces its human rights principles and that it provides an authoritative framework with conceptual and operational clarity for participants of the UN Global Compact regarding the policies and processes they should implement in order to ensure that they meet their responsibility to respect human rights.[338]

The UN Global Compact is voluntary.[339] The UN General Assembly explicitly supported a voluntary approach in several subsequent resolutions[340] because the UN Global Compact encourages companies to create a culture of integrity across their entire businesses, from strategy to operations.[341] Those companies that commit to the guidelines have to implement them and, as "the archetype of voluntarism",[342] the UN Global Compact enables companies to do good and talk about it.

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[333] The Ten Principles of the UN Global Compact available at: https://www.unglobalcompact.org/what-is-gc/mission/principles.
[334] *Ibid*.
[335] United Nations "Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos" (1 February 1999).
[336] UN Global Compact: Finding Solutions to Global Challenges. Available at: https://www.un.org/en/un-chronicle/un-global-compact-finding-solutions-global-challenges (accessed 12 October 2022).
[337] The Ten Principles of the UN Global Compact. Available at: https://www.unglobalcompact.org/what-is-gc/mission/principles (accessed 12 October 2022).
[338] The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments July 2011 (Updated June 2014). Available at: https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FResources%2FGPs_GC+note.pdf (accessed 12 October 2022).
[339] The Ten Principles of the UN Global Compact available at: https://www.unglobalcompact.org/what-is-gc/mission/principles.
[340] General Assembly Resolutions available at: https://www.unglobalcompact.org/about/government-recognition/general-assembly-resolutions.
[341] UN Global Compact. Available at: https://www.unglobalcompact.org/participation/join/commitment (accessed 12 October 2022).
[342] Ruggie (2013) ch 1.

Another voluntary measure derives from the International Organization for Standardization (ISO), which determines standards that are based on a set of rules. This is similar to the practice of the WTO that sets "a code of good practice for preparation, adoption, and application of standards".[343] International standards are important to facilitate trade as they promote the spread of knowledge, enable the sharing of technological advances, and create common management practices.[344] These well-established ISO standards deal with several issues including social responsibility and sustainable development.[345] The ISO 2600 gives guidance on social responsibility and was published in November 2010.[346] According to Ruggie, the ISO guidelines incorporate the second pillar of the Framework that he issued in 2008.[347] Although the ISO guidelines are a muti-stakeholder-agreed standard, they are considered to be inadequate in effecting social and environmental change because of a lack of focus and because they address social responsibility only in a broad sense.[348] Therefore, the ISO's guidance standards are not viewed as an effective means to "drive social and environmental change".[349]

The measures undertaken to make businesses more accountable regarding human rights and the social impact of their activities were all developed as voluntary initiatives and, given how ubiquitous environmental and human rights violations have been since these voluntary initiatives were first implemented, they have not been significantly successful. The governance gaps created by global trade necessitate that governments play a role in addressing these issues; hence, Ruggie adopted the "principled pragmatism" approach when he drafted the UNGP.[350] The UNGP consisting of 31 guidelines was embarked on at a time when states, businesses, and civil society had blunted international attempts to include corporate conduct in the international human rights regime.[351] Through these guiding principles, Ruggie was able to create a common platform with authoritative benchmarks against which progress can be assessed. The following part of the chapter elaborates on these principles.

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[343] Balzarova and Castka 2012 *J Bus Ethics* 276.
[344] *Idem* 265.
[345] ISO 2010 ISO 26000: Social Responsibility.
[346] *Ibid.*
[347] Ruggie (2013) ch 3. See 2.4 below.
[348] Balzarova and Castka 2012 277.
[349] *Ibid*.
[350] *Ibid*.
[351] Ruggie "Progress in Corporate Accountability" (4 February 2013).

2.4. The United Nations Guiding Principles for Business and Human Rights

The Protect, Respect and Remedy Framework and Guiding Principles aim to establish a global common platform and policy guidance for business and human rights.[352] In 2008, Ruggie first published the Framework. The Framework establishes foundational principles and lays down markers for the complex and, at the time, relatively new issues in the human rights field.[353]

2.4.1. The Protect, Respect and Remedy Framework

2.4.1.1. The states' duty to protect

The Framework articulates five ways for states to promote corporate respect for human rights and prevent corporate abuses of human rights. According to Ruggie, there is a "diverse array of policy domains through which states may fulfil this duty with regard to business activities, including how to foster a corporate culture respectful of human rights at home and abroad".[354] Ruggie identifies four categories of preventive policy measures through which states can try and influence business operations:

- The first policy cluster are the international investment agreements that are necessary for TNCs to enter host countries – the state-to-state bilateral investment treaties that set out the protection that countries give investors that bring their capital into the country for projects, as well as investor-state contracts for specific investment projects such as the delivery of water services or oil and mining concessions.[355] Governments compromise on human rights considerations, social justice, or environmental concerns in order for their states to be attractive for investors.[356] Ruggie believes that such agreements could be made with greater transparency and include provisions that ensure host states discharge their human rights obligations, especially given that these agreements set out the terms for dispute settlement.[357]
- The second policy cluster involves corporate law and securities regulation as these are the laws that direct what companies have to do, for example, directors' duties,

[352] *Ibid*.
[353] Ruggie (2013) ch 3.
[354] *Ibid*.
[355] *Idem* ch 2.
[356] Ruggie 2008.
[357] *Ibid.*

reporting requirements, and incorporation and listing requirements. These regulations could incorporate human rights aspects.[358] According to Ruggie, not many governments or stock exchanges prior to 2008 encouraged companies to include policies that specifically referred to human rights.[359] Subsequently, this situation has changed as many have promulgated voluntary CSR guidelines.[360]

- The third policy cluster is the conflict areas where businesses operate where the home states of TNCs can play a greater role.[361] Ruggie believes that states should have policies in place that guide and advise companies that operate in territories where there are disputes about the control of resources or of the government as these can help businesses avoid involvement in human rights violations.[362]
- The fourth category is the fragmentation of domestic policy that affects decisions made at the various multilateral institutions.[363] Ruggie highlights that different government departments pursue different policies when participating in international organisations such as the Human Rights Council, where policy is set mainly by foreign ministries, and the World Bank, where policy is determined by treasury departments.[364] The various government departments reflect quite different institutional interests and priorities, in other words, the same country can follow different policies that are inconsistent in an international arena.[365] States bear a duty to involve business in human rights issues and not only focus on economic factors, it is essential policy in government departments and agencies should be in alignment.[366]

2.4.1.2. The corporations' responsibility to respect

The Framework articulates corporate responsibility to respect human rights across all business activities and relationships.[367] Corporations must act with due diligence not to infringe on the rights of others and, when they do, they must address that harm. Ruggie believes that companies

[358] Ruggie (2013).
[359] *Ibid*.
[360] *Ibid.*
[361] *Ibid.*
[362] *Ibid.*
[363] *Ibid.*
[364] *Ibid.*
[365] *Ibid.*
[366] Ruggie 2008.
[367] *Ibid.*

have a legal duty in relation to human rights and must comply with legislation so that they can "obtain and sustain their legal license to operate".[368] In the case of TNCs, this duty includes the laws of host states. Since not all states are able or willing to enforce obligations, Ruggie regards corporations to have an independent corporate responsibility to respect human rights.[369] This view is considered as changing how human rights issues are discussed, and Pillar II forms the centrepiece of the Framework.[370] By using the word "responsibility", which refers to social norms and not to a legal duty, Ruggie expresses what "ought" to be done, in a sense, what is expected of the corporations that operate in any society.[371] As it is a social norm, corporate responsibility to respect human rights, according to Ruggie, has become "near-universal" in the globalised world in which TNCs operate, and practically all industries have CSR initiatives that acknowledge this corporate responsibility:[372] the corporate responsibility to respect human rights that Ruggie conceptualises as existing independently of and yet complementary to the state duty to protect.[373] Corporate respect for human rights means not infringing on the rights of others in the course of conducting businesses or in the business relationships connected to those activities and, in the event of harm, the business must address the matter.[374] In order to monitor the risk of the "actual or potential adverse human rights impacts by an enterprise", Ruggie brought in the concept of human rights due diligence.[375] Due diligence is a concept utilised by companies when they satisfy themselves that there are no hidden risks in potential mergers or acquisitions.[376] Human rights due diligence is a way for companies to identify, prevent, mitigate, and address the adverse impacts of their activities on human rights.[377] Under the Framework, there is an obligation not to cause harm or to infringe on human rights, as well as a responsibility to conduct due diligence to mitigate and remediate if harm occurs in the context in which companies and those with whom they have relationships operate.[378] Through Pillar II of the Framework, corporations must demonstrate they "know and show" that they do not infringe on the rights of

[368] Ruggie (2013).
[369] *Ibid.*
[370] *Ibid.*
[371] *Ibid.*
[372] *Ibid.*
[373] Ruggie (2013).
[374] *Ibid.*
[375] *Ibid.*
[376] *Ibid.*
[377] *Ibid.*
[378] *Ibid.*

others, which they can ensure only if there is continuing and meaningful engagement with those affected by their activities.[379]

2.4.1.3. Access to remedy

In the event of human rights abuses, the Framework specifies that states must ensure that those affected have access to effective remedy through judicial, administrative, legislative, or other appropriate means.[380] Pillar III of the Framework deals with the ability of those who have their rights violated to enjoy some form of redress.[381] The injunction is directed at states and requires steps be taken to investigate, punish, and redress corporate-related violations or abuses that occur in their territory and/or jurisdiction, as well as consider ways of reducing practical and legal barriers that prevent those harmed from accessing courts in a company's home country.[382] For Ruggie, the state's duty to protect includes establishing grievance mechanisms that are effective and are able to adjudicate on corporate-related human rights violations and enable those harmed to win redress and gain access to compensation that includes restitution, guarantees of non-repetition, changes in relevant law, and the public an apology.[383] The concept of state-based, non-judicial mechanisms, such as regulatory agencies, is introduced, and these should operate alongside the judicial processes.[384] To strengthen these processes, the Framework articulates non-state grievance mechanisms, which could be industry-based, or multi-stakeholder initiatives that work towards facilitating member's compliance with standards.[385]

The Framework describes what should be done, while the Guiding Principles deal with how to do it.[386] In 2011, the Guiding Principles, which incorporate and build on the Framework, were published and endorsed by the UNHRC.

2.4.2. UNGP – Foundational and Operational Principles

The soft law instrument sets out 31 principles with a commentary on each to assist states and companies to implement the Protect, Respect and Remedy Framework.[387] Corporations are

[379] *Ibid.*
[380] *Ibid.*
[381] *Ibid.*
[382] *Ibid.*
[383] Ruggie 2008.
[384] *Ibid.*
[385] *Ibid.*
[386] *Ibid*.
[387] Ruggie (2013) ch 3.

addressed in fourteen principles, of which each component is essential and interrelated, forming a dynamic preventive and remedial measures system.[388] The core elements on which the principles rest are that businesses should make policy commitments to respect human rights and the commitment must be approved by senior management and cover all business operations.[389] Additionally, businesses must implement human rights due diligence as to identify, prevent, mitigate, and account for how business addresses adverse human rights impacts.[390]

- Guiding Principles 1–10 articulate states' duty to protect against human rights abuses by third parties including business enterprises, through appropriate policies, regulation, and adjudication.[391] Pillar I consists of two foundational and eight operational principles.
- Guiding Principles 11–24 deal with the corporate responsibility to respect human rights; business enterprises should act with due diligence to avoid infringing on the rights of others and address adverse impacts in which they are involved.[392] Pillar II has five foundational and nine operational principles.
- Guiding Principles 25–31 formulate the need for greater access by victims to an effective remedy, judicial and non-judicial.[393] Pillar III has one foundational and six operational principles.

Unlike the Norms that attempted to make corporations "bear responsibility for the human rights affected by business activities, in their sphere of influence",[394] the Framework and UNGP's point of departure, as discussed previously, is the duty of states to protect against business-related human rights abuse. The first ten guidelines suggest ways for states to discharge this duty effectively.[395] In international law, there is a general agreement that a "state's duty to protect is a standard of conduct, not result".[396] Put differently, when it comes to corporations, states are not intrinsically responsible when a business enterprise commits a human rights abuse;

[388] *Ibid*.
[389] *Ibid*.
[390] *Ibid*.; also see paras 2.4.1 and 2.4.2 above.
[391] Ruggie 2011.
[392] *Idem* 13.
[393] *Idem* 27.
[394] Ruggie (2013) ch 2.
[395] *Idem* ch 3.
[396] *Ibid*.

however, states may be in breach of their international human rights law obligations if they fail to take appropriate steps to prevent any abuse and, when it happens, to investigate, punish, and redress it.[397] Generally speaking, states do not regulate the extraterritorial activities of businesses incorporated in their jurisdiction; nevertheless, if there is a recognised jurisdictional basis, states can act when their nationals commit abuses or if abuses are committed against a country's nationals.[398]

As the Guidelines deal with the "how" of business and human rights, Ruggie demonstrates that states can protect against abuse by a third party (that is, including business enterprises domiciled in a state's territory), by:

- enforcing laws that are aimed at or have the effect of requiring business enterprises to respect human rights and periodically assess the adequacy of such laws and address any gaps;
- ensuring that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- providing effective guidance to business enterprises on how to respect human rights throughout their operations; and
- encouraging and, where appropriate, requiring, business enterprises to communicate how they address their human rights impacts.[399]

As mentioned, Ruggie insists that states are the primary duty bearers under international human rights law and they should, thus, consider a smart mix of measures – national and international, mandatory and voluntary – that motivate businesses to respect human rights, whether these are public entities, entities that are owned or controlled by the state, or entities that receive substantial support and services from the state.[400] As the voluntary measures that already exist have not resulted in preventing human rights or environmental risk violations, Ruggie views it as imperative that legislation, already directly or indirectly regulating business to respect human rights, be enforced effectively, thereby creating clarity and giving guidance to business.[401]

[397] *Ibid*. Also states themselves may bear some responsibility for the acts of state-owned enterprises.
[398] Meron 1995 *Am J Int Law* 80.
[399] Guiding Principle 3. Available at: https://globalnaps.org/ungp/guiding-principle-3/ (accessed 10 July 2022).
[400] Guiding Principle 4. Available at: https://globalnaps.org/ungp/guiding-principle-4/ (accessed 10 July 2022).
[401] Guiding Principle 3. Available at: https://globalnaps.org/ungp/guiding-principle-3/ (accessed 10 July 2022).

Additionally, the Guidelines propose that states provide incentives for businesses to communicate how they address their human rights impacts, whether through specific or annual reports – businesses must be encouraged to announce publicly whether their activities have an impact on the rights of others.[402] Furthermore, because the risk of human rights abuses increases when operating in conflict-affected zones, the Guidelines articulate that home states should provide additional support to companies to ensure that businesses are not involved in human rights abuses.[403] It is contemplated that states give guidance on issues such as adopting appropriate methods on how to conduct human rights due diligence and how to effectively consider issues of gender, vulnerability, and/or marginalisation.[404] The reason for this guidance is that the UNGP recognises the specific challenges that "indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families" may face.[405] In other contexts such as conflict-affected zones, the Guidelines stipulate states should "develop early-warning indicators to alert government agencies and business enterprises to problems … [but also to]… attach appropriate consequences to any failure by enterprises to cooperate".[406] Additionally, states must be aware of and consider human rights obligations as they fulfil their mandate through governmental departments, other agencies, and state-based institutions.[407]

The second pillar of the UNGP is about the responsibilities of every type of business entity. The Framework formulates corporate responsibility as noninfringement on the rights of others.[408] The UNGP articulates, first, that companies consider the country context in which their business activities take place to be aware of the specific human rights challenges working in that context may raise.[409] Second, businesses must assess the human rights impacts that their activities may have in that context and, finally, whether, through their relationships that are connected to their activities, they might contribute to abuse.[410] Therefore, businesses are instructed to be cognisant

[402] Guiding Principle 16. Available at: https://globalnaps.org/ungp/guiding-principle-16/ (accessed 10 July 2022).
[403] Guiding Principle 7. Available at: https://globalnaps.org/ungp/guiding-principle-7/ (accessed 10 July 2022). Ruggie 2011.
[404] UNGP Commentary to Guiding Principle 3. Available at: https://shiftproject.org/resource/un-guiding-principles-on-business-and-human-rights/state-duty-to-protect/ (accessed 10 July 2022).
[405] *Ibid*.
[406] UNGP Commentary to Guiding Principle 7. Available at: https://shiftproject.org/resource/un-guiding-principles-on-business-and-human-rights/state-duty-to-protect/ (accessed 10 July 2022).
[407] UNGP Commentary to Guiding Principle 8. Available at: https://shiftproject.org/resource/un-guiding-principles-on-business-and-human-rights/state-duty-to-protect/ (accessed 10 July 2022).
[408] Ruggie (2013).
[409] Ruggie 2011.
[410] *Ibid*.

of the challenges they face when operating in a particular country and context, and to monitor whether their own activities and those of third parties, with whom they have a relationship, adversely impact on human rights.[411] To achieve this level of cognisance, the Guiding Principles foresee that companies put mechanisms in place that prevent or mitigate risks so that their activities do not result in sweatshop conditions, in having indigenous communities displaced without adequate consultation or compensation, in children labouring on plantations, in security forces of mining companies committing violations, or even by providing access to user information, which can be used by government agencies to harm political opponents.[412] The company's responsibility to respect human rights is to avoid causing or contributing to adverse human rights impacts and to address such impacts when they occur.[413] This responsibility includes seeking to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships, even if they have not contributed to those impacts.[414]

The Guidelines set out the steps that companies must take to discharge their responsibility to respect human rights. These include:

- making a policy commitment to meet their responsibility to respect human rights;
- putting in place a human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights; and
- setting up processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[415]

Ruggie, through the concept of human rights due diligence, introduces a novel approach to ensure that business activity does not negatively impact on the rights of others.[416] UNGP 16 to 24 articulate the human rights due diligence that companies have to conduct to identify, prevent, mitigate, and address adverse impacts on human rights.[417] Unlike any other instrument, the UNGP goes beyond simply requiring businesses to identify and manage the material risks of the company's activities but includes those of entities with which it has relationships that may pose

[411] Ruggie (2013).
[412] *Ibid.*
[413] Guiding Principle 13. Available at: https://globalnaps.org/ungp/guiding-principle-13/ (accessed 10 October 2022).
[414] Ruggie 2011.
[415] *Ibid*.
[416] Ruggie (2013).
[417] *Ibid*.

risks to the rights of individuals and communities.[418] Moreover, effectively conducting human rights due diligence means engaging meaningfully with rights holders or others who legitimately represent them.[419] For example, if a business is conducted in a country where the host country restricts rights, the UNGP recommends that companies honour internationally recognised human rights principles.[420] In terms of the UNGP, corporate responsibility to respect human rights exists independently of and yet complements the state's duty to protect.[421]

As part of the responsibility to respect human rights, companies must express their commitment in a policy statement that has to be approved by the most senior level of management of a business. This policy must be informed by relevant internal and/or external expertise as well as outline what the company expects from its employees, business partners, and other parties directly linked to its operations, products, or services. [422] The Guidelines envisage that the human rights policy statement is made publicly available, communicated internally and externally, and is reflected in operational policies and procedures throughout the business enterprise.[423]

By conducting due diligence, business entities identify the adverse human rights that may impact its own or others' operations, products, or services.[424] Given the many types of business operations, it is conceivable that due diligence varies in complexity depending on the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.[425] This obligation is not a once-off exercise but should be an ongoing concern because human rights risks change.[426]

As remarked on above, the UNGP is the first international text that introduces the concept of human rights due diligence that a business enterprise conducts to meet and discharge its corporate responsibility regarding human rights. This human rights due diligence is at the heart of the Guiding Principles.[427]

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[418] *Ibid*.
[419] Guiding Principle 18. Available at: https://globalnaps.org/ungp/guiding-principle-18/.
[420] Guiding Principle 12. Available at: https://globalnaps.org/ungp/guiding-principle-12/.
[421] Ruggie (2013).
[422] Guiding Principle 15. Available at: https://globalnaps.org/ungp/guiding-principle-15/.
[423] *Ibid*.
[424] Guiding Principle 17. Available at: https://globalnaps.org/ungp/guiding-principle-17/.
[425] *Ibid*.
[426] *Ibid*.
[427] Bonnitcha and McCorquodale *Eur J Int Law* 900.

The third Pillar is access to remedy. Entailed in this set of guidelines is the idea that if corporate-related human rights harm should occur, the state, as part of its duty to protect human rights under international human rights law, must take steps to investigate, punish, and redress corporate-related abuse of individuals' rights in their territory or jurisdiction.[428] Without these measures, the duty to protect is rendered weak or meaningless.[429] Therefore, the Framework establishes that states should ensure access to effective judicial remedies for human rights abuses committed in their territory and/or jurisdiction and consider lowering the legal and practical barriers to access.[430] Ruggie views corporate responsibility to respect human rights as including establishing or participating in effective grievance mechanisms for individuals and communities that may be adversely impacted without prejudice to legal recourse.[431] The grievance mechanisms articulated, through which remedy may be sought, are judicial, state-based, non-judicial, and nonstate-based mechanisms.[432] It is recommended that companies establish or participate in operational-level grievance mechanisms to avoid a company judging its own actions, provided the mechanisms are dialogue-based or use third-party mediation.

In light of the above, it is important to remember that grievance mechanisms are effective only when those they are intended to serve know about them, trust them, and are able to use them.[433] Therefore, the UNGP's Principle 31 directs that state-based and non-state-based grievance mechanisms should be legitimate, accessible, predictable, equitable, and transparent.[434] Furthermore, the rights that give rise to a remedy must be rights that are compatible with internationally recognised human rights and must be a source of continuous learning, thereby improving the mechanism and preventing future grievance or harm.[435] Businesses cannot set up operational-level mechanisms unilaterally but should engage stakeholders through dialogue and consultation.[436]

[428] Guiding Principle 25. Available at: https://globalnaps.org/ungp/guiding-principle-25/.
[429] Ruggie (2013).
[430] Guiding Principle 26. Available at: https://globalnaps.org/ungp/guiding-principle-26/.
[431] Ruggie (2013).
[432] *Ibid*.
[433] Ruggie 2011.
[434] Guiding Principle 31. Available at: https://globalnaps.org/ungp/guiding-principle-31/.
[435] *Ibid.*
[436] *Ibid*.

2.4.3. National Action Plans

Once the UNHRC had endorsed the UNGP, the UN Working Group (UNWG) on Business and Human Rights was established. It consists of five independent experts appointed to promote the UNGP and identify best practice recommendations.[437] In 2016, the UNWG published recommendations on developing, implementing, and updating NAPs.[438] NAPs are defined as a "strategy developed by a [s]tate to protect against adverse human rights impacts by business enterprises in conformity with the Guiding Principles on Business and Human Rights".[439]

The four essential criteria considered to be indispensable for effective NAPs are:

- NAPs need to be founded on the UNGPs;
- NAPs need to be context-specific and address actual and potential business-related human rights abuses;
- NAPs need to be developed in inclusive and transparent processes; and
- Those processes need to be reviewed and updated regularly.[440]

The UNWG on Business and Human Rights recommends states follow a five-phase process composed of fifteen steps.[441] Phases 1 to 3 are the development of an initial NAP, whereas Phases 4 and 5 involve the continuous cycle of implementation, monitoring, and updating of successive versions of the NAP.[442] Furthermore, guidance is given regarding the substance of a NAP despite there being no one-size-fits-all approach to NAPs. Nevertheless, UNWG recommends that NAPs are structured along four sections:

- an introductory section in which the government commits to protect against adverse business-related human rights impacts;
- a second section to provide context;

[437] Working Group on Business and Human Rights: Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Available at: https://www.ohchr.org/en/special-procedures/wg-business (accessed 10 October 2022).
[438] Guidance on National Action Plans on Business and Human Rights UN Working Group on Business and Human Rights (November 2016). Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf (accessed 10 October 2022).
[439] *Idem* 3.
[440] *Idem* 3–5.
[441] *Ibid.*
[442] *Ibid*.

- a third section that highlights the government's priorities in addressing adverse business-related human rights impacts; and
- a fourth section in which governments specify the ways of monitoring and updating.[443]

It is widely considered that the significance of the UNGP lies in its influence on organisations, institutions, and public policy, as well as the possibilities that are created when the principles are applied by a government or business.[444] In order to strengthen the UNGP's aim to further incorporate human rights accountability, the UNGP Reporting Framework (GPRF) was established in 2015 through an extensive multi-stakeholder consultation process.[445] The reporting tool represents a "milestone in human rights reporting and [is] the first and only comprehensive guide for corporations and stakeholders to communicate their human rights performance following the UNGPs".[446] Framed as "a 31 'smart' questions guide", it is a practical resource to assist companies through the steps needed to manage and report on the human rights risks they face.[447]

The UNGP has been criticised for not imposing a duty on businesses and placing too great an emphasis on the duty of the state to protect, especially because some states are incapable or unwilling to protect human rights.[448] Ruggie recognises the problem and encourages TNCs to respect and not violate rights, given that the UNGP spells out "authoritatively" how exactly this responsibility is to be met.[449] Regardless of the critique that the instrument is least effective in "less than ideal" circumstances and, therefore, widening the governance gaps rather than narrowing them,[450] the UNGP remains the only authoritative reference point for states, companies, and civil society.[451] Thus, for multinational institutions, the UNGP has become that reference point. The regional initiatives that incorporate the principles are highlighted below.

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[443] *Idem* 2.
[444] Briefing Note for Trade Unionists: United Nations "Protect, Respect, Remedy" Framework for Business and Human Rights and the United Nations Guiding Principles for Business and Human Rights 2012 4.
[445] UN Guiding Principles Reporting Framework February 2015.
[446] Cheng 259.
[447] UN Guiding Principles Reporting Framework February 2015.
[448] Brune (2019) 49.
[449] *Ibid*.; Ruggie (2013) ch 3.
[450] Brune (2019) 49.
[451] New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council Business and Human Rights 16 June 2011. Available at: https://www.ohchr.org/en/press-releases/2011/06/new-guiding-principles-business-and-human-rights-endorsed-un-human-rights (accessed 20 August 2022).

2.4.4 Regional Initiatives

Principle 10 of UNGP articulates that the members of multilateral institutions encourage these institutions to promote business respect for human rights.[452]

2.5. The European Union

The EU Strategic Framework on Human Rights and Democracy sets out the principles that underpin all aspects of the internal and external policies of the EU.[453] For example, the then 28-member political and economic entity known as the EU has been grappling with the issue of business and human rights since 2001 when it published a Green Paper on corporate social responsibility.[454] While the document sought voluntary engagement by companies, it was revisited after the endorsement of UNGP in 2011, when the Commission adopted a "paradigm shift"[455] and referred to "the responsibility of enterprises for their impacts on society".[456] This shift meant the Commission made European policy to promote CSR entirely consistent with the "core set of internationally recognised principles and guidelines".[457] The Commission recognised a number of instruments, including the "updated OECD Guidelines for Multinational Enterprises, the ten principles of the UN Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles on Business and Human Rights"[458] as the framework that companies should consult when seeking guidance on their corporate social responsibilities.[459] These instruments set standards or principles that encourage businesses and other organisations to respect human rights in their ordinary everyday activities.[460]

In 2013, the Commission issued sector guides on implementing the UNGP for employment and recruitment agencies, information and communication technology companies, and oil and gas

[452] Guiding Principle 10.
[453] Council of the European Union 25 June 2012.
[454] *Ibid*.
[455] Noack 2012 EuroCommerce Position Paper: A Renewed EU Strategy 2011–14 for Corporate Social Responsibility 2–3.
[456] European Commission: A Renewed EU strategy 2011–14 for Corporate Social Responsibility 25 October 2011 3.
[457] *Idem* 6.
[458] *Ibid*.
[459] Bijlmakers *et al*. 2015 The EU's Engagement with the Main Business and Human Rights Instruments 1.
[460] *Ibid*.

companies.[461] In 2020, the Commission updated the European definition of small- and medium-sized enterprises (SMEs). Although the use of the definition is voluntary, the Commission invites its members to apply it. [462] The updated definition is in line with the commentary to Guiding Principle 14, which indicates that the manner "[a] business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size".[463] Although SMEs have less capacity than large companies, their activities can still have severe human rights impacts and, regardless of their size, require corresponding measures.[464]

In 2014, the EU Directive on disclosing non-financial and diversity information by certain large undertakings and groups[465] was seen as having taken "a pivotal step towards opening up a public debate on how reporting on the sustainability impacts of business".[466] In an attempt to facilitate responsible investment, the proposed Directive was aimed at ensuring that the largest listed EU companies have to disclose what impact their activities had on environmental, social and employee matters, respect for human rights, anti-corruption, and bribery matters.[467] The Non-Financial Reporting Directive is said to be a first step in incorporating into EU law the corporate responsibility to respect human rights and the environment as articulated in the UNGP and OECD Guidelines for Multinational Enterprises.[468]

2.5.1. EU Implementation of the UNGP's Human Rights Due Diligence

Known as the Conflict Minerals Regulation, the EU Regulation 2017/821[469] that came into force on 1 January 2021 is seen as the legislative initiative that aims to "sever the links" between the minerals trade, conflict dynamics, and human rights abuses.[470] The regulation constitutes one of the few existing regulatory initiatives imposing binding due diligence requirements on companies aimed at fighting the trade in conflict minerals. In passing this regulation, the human

[461] Faracik 2017 Implementation of the UN Guiding Principles on Business and Human Rights 37.
[462] Guiding Principle 14 Commentary.
[463] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU.
[464] Monciardini *et al*. 2020 *De Gruyter Account Econ Law* 5.
[465] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU.
[466] Monciardini *et al*. 2020 5–6.
[467] Recital 3 of Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU.
[468] ECCJ "Assessment of the EU Directive on the disclosure of nonfinancial information by certain large companies" 2014.
[469] EU 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas OJ L 130 19 May 2017 1–20.
[470] Macchi 2021 *Journal of Human Rights Practice* 271.

rights due diligence concept articulated in the UNGP is partially implemented.[471] Despite the Conflict Minerals Regulation applying only to four specific minerals and metals, namely tin, tungsten, tantalum and gold, the EU, through this regulation, requires companies to make sure they import from responsible and conflict-free sources and to put mechanisms in place for conducting supply chain due diligence.[472] The regulation also allows for independent third-party audits of supply chain due diligence that should address impacts that are environmentally harmful.[473] In addition, the Commission envisages that the due diligence provisions will apply to value chains of additional minerals that create adverse impacts on human rights, climate and the environment despite these not being covered in the Conflict Minerals Regulation.[474]

Another indication of the EU moving towards supply chain accountability is that proposed in a regulation that establishes the Directorate-General for Environment published on 17 November 2021.[475] The EU Timber Regulation[476] proposal regulates deforestation-free supply chains because the Commission aims to reduce the impact of EU consumption and production on deforestation and worldwide forest degradation.[477] The Directive on corporate sustainability prohibits certain commodities – palm oil, beef, timber, coffee, cocoa, and soy – and derived products such as leather, chocolate, and furniture if a due diligence cannot confirm that that they are "legal" and "deforestation free".[478] Moreover, the prohibition applies to all companies, EU and non-EU, irrespective of their legal form or size.[479] The EU Timber Regulation and Directive complement each other with regard to value chain due diligence because there are "activities that are not covered by the Regulation on deforestation-free products but might be directly or indirectly leading to deforestation".[480] The legislative initiative on sustainable corporate governance is referred to in this thesis as the proposed Directive on Corporate Sustainability and is discussed in Chapter 3.[481]

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[471] *Ibid*.
[472] European Parliament 2021 Corporate Due Diligence and Corporate Accountability Resolution.
[473] *Ibid.*
[474] European Parliament 2021 Resolution.
[475] Proposal on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 1.
[476] Regulation (EU) No 995/2010. On 28 June 2022, the Council of the EU adopted the proposal's general approach. On 13 September the plenary of the European Parliament adopted a negotiating position.
[477] *Ibid*.
[478] *Ibid.*
[479] *Idem 5.*
[480] *Idem 3*.
[481] See para 3.4 below.

Since 2006, the EU has been working towards minimising the environmental impact of batteries and battery waste, which are regulated in the EU under the Batteries Directive.[482] An update of the framework is needed to keep up with socio-economic conditions, technological developments and markets, with a proposal for the regulation concerning batteries and battery waste.[483]

The proposal for a new Batteries Regulation[484] has specific objectives:

- Reducing environmental, climate and social impacts throughout all stages of the battery life cycle, strengthening the functioning of the internal market, and ensuring a level playing field through a common set of rules.
- Requiring economic operators to place industrial or electric vehicle batteries (including incorporated in vehicles) larger than 2 kWh on the Union market to establish supply chain due diligence policies.
- Focussing on those raw materials of which a significant amount of the global production goes into battery manufacturing may pose social or environmental adverse impacts (cobalt, natural graphite, lithium, and nickel).
- Forcing economic operators to submit compliance documentation for third-party verification by notified bodies.

On 10 March 2022, the European parliament adopted the draft legislation that prescribes new rules for batteries in the EU.[485]

After the UNGP became the UN's authoritative standard for business and human rights, the EU conducted a study on the implementation of the UNGP in 2017.[486] The study concluded that the voluntary development of NAPs to implement the Guiding Principles by EU member states was "far too slow".[487] The presentation of legislation on sustainable corporate governance and corporate human rights due diligence was discussed for the first time in early 2020. A resolution

[482] Directive 2006/66 – Batteries and accumulators and waste batteries and accumulators. Available at: https://www.eumonitor.eu/9353000/1/j4nvk6yhcbpeywk_j9vvik7m1c3gyxp/vitgbgikliz3 (accessed 20 October 2022).
[483] Proposal for a Regulation of the European Parliament and of the Council concerning batteries and waste batteries. Available at: https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2020/0798/COM_COM(2020)0798_EN.pdf (accessed 20 October 2022).
[484] *Ibid.*
[485] Statement New rules on batteries: MEPs want more environmental and social ambition (10 March 2022).
[486] Conducted by the European Parliament's Directorate-General for External Policies.
[487] Faracik 2017 8.

on the matter was passed in March 2021[488] with a draft proposal that was initially scheduled to be published in summer 2021 but was later postponed to early 2022.[489]

It is anticipated that the proposed directive that currently is being debated by the European Parliament will give rise to a final directive that will deal more extensively with human rights in the value chains of corporations.[490] In Chapter 3, the proposed directive is discussed.

In September 2022, the Commission published its proposal for a regulation that would ban products produced by forced labour from the EU market. The proposal covers all products that are extracted, harvested, produced, or manufactured under forced labour. [491] Without specific companies or industries being targeted, all products made in the EU for domestic consumption and export, as well as imported goods, must be free of association with forced labour.[492]

2.5.2. The African Union

The African Union is the largest regional body in Africa and comprises 55 member states. Its role is to negotiate and draft treaties, conventions, and frameworks, including those relevant to human rights, which the member states are encouraged to adopt and implement.[493] Africa is forecast to be the fastest-growing continent economically; the combined GDP of African countries is expected to rise over the next decade with increasing foreign direct investment.[494] Africa is a foremost provider of mineral exports to the rest of the world.[495]

There are many multinational investment projects, but the result is many communities being "paid and continue to pay a heavy toll" due to the actions of corporations.[496] Directly or indirectly, TNCs are at the intersection between human rights violations and business activities, such as

[488] European Parliament 2021 Resolution.
[489] "The EU's new supply chain law – what you should know" (22 July 2021).
[490] Human Rights Watch "Germany: New Supply Chain Law a Step in the Right Direction Law's Gaps Should be Fixed by Next Government" (11 June 2021).
[491] Proposal for a regulation on prohibiting products made with forced labour on the Union market COM(2022) 453. Available at: https://single-market-economy.ec.europa.eu/document/785da6ff-abe3-43f7-a693-1185c96e930e_en (accessed 30 September 2022).
[492] *Ibid.*
[493] African Union: The African Union Organises Stakeholders Validation Workshop on the Draft AU Policy Framework on Human Rights and Business March 2017.
[494] *Ibid*.
[495] *Ibid.*
[496] Zouapet "Binding instrument for multinationals and human rights: Why and how Africa must engage" (1 November 2017).

underpaying workers and exposing them to unhealthy working conditions.[497] Further examples relate to the financing of operations[498] and marketing gold as Togolese when it was mined, using child labour[499] or the dumping of toxic waste affecting the health of thousands.[500]

The African Union's departure point for advancing human rights is the African Charter on Human and People's Rights (the Charter).[501] The Charter does not cover business and human rights. Mpya claims the African Charter is well placed to deal with rights abuses by any persons, whether natural or juristic[502] – TNCs are juristic persons with rights and duties. Africa is not economically autonomous, and there is little evidence of compliance with the Charter's provisions that aim to guide African Union member states how to dispose of and protect their natural resources as well as their citizens.[503] According to Mujyambere, the Charter's Article 7(1) "provides that 'every individual shall have the right to have his cause heard, including a right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by convictions, laws, regulations, and customs in force. In its decisions, the African Commission on Human and Peoples' Rights (ACHPR) has repeatedly interpreted Article 7(1) of the African Charter to include the right of access to an effective remedy".[504]

In 2014, the African Union, with the support of the EU, started developing a Business and Human Rights Policy based on the UNGP, which has the objective to promote the implementation of the UNGP in Africa and to cultivate and encourage opportunities between the two regions.[505] Although the UNWG on Business and Human Rights announced a report of the first African Regional Forum on Business and Human Rights in May 2015, no report is available as of November 2022.[506]

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[497] Téllez-Chávez Interview with B Schwarz "A Toxic Mix of Abuses on Congo's Oil Palm Plantations How European Development Banks Fail the very People they Claim to Assist" (25 November 2019). Available at: https://www.hrw.org/news/2019/11/25/interview-toxic-mix-abuses-congos-oil-palm-plantations (accessed 30 October 2022).
[498] Berne Declaration 2015 A Golden Racket: The True Source of Switzerland's "Togolese" Gold.
[499] *Ibid*.
[500] "Ten years on, the survivors of illegal toxic waste dumping in Côte d'Ivoire remain in the dark 10th anniversary of the 'Probo Koala incident'" (19 August 2016).
[501] African Commission on Human and Peoples' Rights came into force 21 October 1986.
[502] Mpya 139.
[503] African Charter on Human and People's Rights Art 21(1)–21(3), Art 1.
[504] Mujyambere *GroJIL* 256.
[505] Business & Human Rights Resource Centre "African Union and EU hold meeting to promote UN Guiding Principles on Business and Human Rights" (12 September 2014).
[506] *Ibid*.

The UNGP, although soft law, is the authoritative global standard in the field of business and human rights. Since TNCs are accused of involvement in human rights abuses, the lack of action on the part of the African Union member states is of concern.[507] This disregard of obligations under the African Charter and indifference to the UNGP, the "blueprint for the steps all States and businesses should take to uphold human rights",[508] is more than troubling and has left victims of violations facing many barriers to accessing effective remedies in domestic jurisdictions.[509] The African Union's approach to engaging with the UNGP is lacklustre, yet previously, the African Union has utilised a soft law instrument to develop and adopt the first legally binding regional treaty on internal displacement.[510] The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted in 2009, directly and substantially is based on the UN Guiding Principles on Internal Displacement.[511] This means that the African Union has not found the codification of soft law instruments to be problematic. African Union member, Uganda, has published a NAP on the 31 July 2021,[512] and a NAP was presented to the Kenyan parliament in July 2021.[513]

Up to 2017, cases were brought before the TNCs' home jurisdictions or other foreign domestic jurisdictions without success.[514] However, two recent cases give reasons to hope that those negatively affected by the activities of TNCs will find redress; these are the 2019 *Vedanta case* in the UK[515] and the 2021 *Royal Dutch Shell* case in the Netherlands.[516]

2.5.3. The Southern Africa Development Community

SADC a regional economic community comprising sixteen states. SADC focuses on regional integration and poverty eradication in southern Africa.[517] In 2015, SADC produced a Draft Report on Forced Labour and Human Trafficking in the SADC. In the draft report, the SADC refers to market deregulation and supermarket consolidation as leading to agricultural value chains being

[507] Mujyambere *GroJIL* 256.
[508] Sherman 2020 4.
[509] Mujyambere *GroJIL* 256.
[510] ICRC 2018 The Kampala Convention: Key Recommendations Ten Years On 5.
[511] Abebe 2010 *Refugee Surv Q* 42.
[512] National Action Plans on Business and Human Rights "Uganda" (no date).
[513] National Action Plans on Business and Human Rights "Kenya" (no date).
[514] Mujyambere *GroJIL* 256.
[515] Detailed discussion in Van Ho 2020 *Am J Int'l L* 110–116.
[516] Detailed discussion in Roorda and Leader 2021 *Bus Hum Rights J* 368–376.
[517] Debevoise & Plimpton 2021 UN Commissioned Report "UN Guiding Principles on Business and Human Rights at 10" 33.

controlled by international retailers.[518] According to the report, this consolidation has resulted in forced labour and other forms of slavery-like practices in global value chains.[519] Therefore, it is considered necessary for governments to create a regulatory framework that ensures transparency in supply chains through business due diligence.[520] The UNGP would provide a regulatory framework that emphasises the responsibility of businesses to respect human rights and avoid adverse impacts through their operations and relationships.[521] Not a single SADC member state government has engaged with the UNGP or taken steps to develop NAPs. However, there have been non-state initiatives in four countries[522] despite the draft report mentioning a duty under the UNGP's Pillar III "to remediate human rights abuses".[523]

The SADC is an intergovernmental organisation aiming to strengthen socio-economic cooperation and integration, as well as political and security cooperation among the countries of southern Africa.[524] In 2017, Human Rights Watch called on the SADC to "recommit to Human Rights Protection" as little progress has been made in its 25-year existence.[525] Despite recording some efforts, Human Rights Watch indicated that violations – child marriages, political violence, restrictions on independent media, and xenophobic violence – still occur in member states and demanded that the SADC leadership "vigorously implement regional and international human rights standards".[526]

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[518] SADC Draft Report on Forced Labour and Human Trafficking in the Southern African Development Community (17 November 2015) 96.
[519] *Ibid*.
[520] *Ibid.*
[521] *Ibid*.
[522] **Tanzania**: Commission for Human Rights and Good Governance developed a National Baseline Study on Business and Human Rights with technical support from the Danish Institute for Human Rights (DIHR). The National Baseline Assessment was released on 9 November 2017. Available at: https://globalnaps.org/country/tanzania/ (accessed 28 November 2022); **Mozambique** efforts by civil-society thus far, next steps: a baseline assessment on extractives and security-the two issues in focus, the National Human Rights Commission of is interested in the process. Available at: https://globalnaps.org/country/mozambique/ (accessed 28 November 2022); **Zambia** Human Rights Commission, published a National Baseline Assessment on Business and Human Rights on 9 July 2016, with support from the Danish Institute for Human Rights (DIHR). Available at: https://globalnaps.org/country/zambia/ (accessed 28 November 2022); **South Africa**: a "Shadow" National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks released in 2016 by The Centre for Human Rights at the University of Pretoria, with support from the International Corporate Accountability Roundtable. Available at: https://globalnaps.org/country/south-africa/ (assessed 28 November 2022).
[523] SADC Draft Report on Forced Labour and Human Trafficking in the Southern African Development Community (17 November 2015) 96.
[524] Southern African Development Community (SADC). Available at: https://au.int/en/recs/sadc (accessed 22 September 2022).
[525] Human Rights Watch "SADC: Recommit to Human Rights Protection Little Progress as Regional Body Marks 25th Anniversary" (7 August 2017).
[526] *Ibid.*

Of the sixteen SADC member states, South Africa's economy is three times larger than that of Angola and almost seven times larger than that of Tanzania, the second- and third-largest economies, respectively.[527] Regional imbalances have led to accusations that South Africa is a "bully" or "arrogant", and that South Africa does not contribute or show sufficient leadership.[528] South Africa has been called on to make human rights promotion in the region the focus of its legacy, but the South African government has not taken steps to implement business and human rights initiatives[529] (discussed in Chapter 4).

The SADC's failure to engage with human rights and corporations is perplexing, especially considering that about 10% of SADC's GDP and 20% of national government revenues are generated by extractive industries.[530] Extractive industries often exacerbate inequality and poverty, especially because there are "limited mechanisms to promote public participation along the value chain, from contract negotiation/licensing and free prior informed community participation leading to conflict and evictions, corruption and state capture, unfair taxation, illicit financial flows and smuggling".[531] Despite these factors, the SADC has not taken steps to encourage companies to conduct human rights due diligence after the UNHRC's endorsement of the UNGP. The COVID-19 pandemic exacerbated the crisis of extremely high levels of inequality that already characterise SADC societies.[532] For many years, mining companies and governments have turned a blind eye to the extractive industries' devastating environmental, social, and economic effects and avoided or discouraged a discussion of these impacts.[533] The SADC has followed South Africa's lead in not dealing with the impact of, especially, the mining sector in the region and has instead focused on the process of a legally binding treaty that is currently unfolding and which is discussed below.

2.5.4. Discussion

The UNGP is a success because states, business, and a significant segment of civil society provided input and therefore "felt a sense of ownership in them".[534] Business and human rights

[527] Louw-Vaudran "Power and influence: identifying champions of change in SADC" (25 April 2019).
[528] *Ibid.*
[529] Human Rights Watch (7 August 2017).
[530] Martin 2022 Research Paper: The Crisis of Extreme Inequality in SADC: Fighting Austerity and the Pandemic.
[531] *Ibid.*
[532] *Idem 46.*
[533] Coumans 2019 *Extr Ind Soc* 676.
[534] Ruggie (9 September 2014).

comprise a complex set of issues,[535] yet the UNGP succeeded in progressively "hardening" their impact through domestic-level legislation in several jurisdictions.[536]

When Kofi Annan started his campaign to "give a human face to the global market",[537] it could not have been predicted how accepted human rights norms for businesses would become. Now it is a prerequisite to ensure there is corporate respect and corporate accountability for human rights.[538] Arguably, the UNGP acceptance by states is due to the following reasons: (1) the UNGP used the language that businesses understood and (2) did not articulate duties that applied to states as directly applicable to TNCs. In doing this, the UNGP took an issue that was a nonstarter for corporations off the table. This means:

(1) Speaking a language that business understands – the Norms was an example of what a binding framework for corporate human rights obligations that are based on international law principles could look like and which corporations were vehemently against.[539] The Norms further developed existing international norms, which resulted in inherent contradictions and vagueness,[540] thus it was easy for TNCs to find reasons to object to the text. Through the Norms, corporations found out what they do *not* want. The UNGP, in contrast, articulated that companies had to respect human rights by conducting due diligence, which is a transactional practice that companies long have undertaken in order to ascertain whether there are hidden risks in a prospective merger or acquisition.[541] By formulating measures to be set up that would add internal controls to manage risks that companies could face because of their actions,[542] Ruggie "spoke" the language that businesses understand. In short, where the Norms referred to "spheres of influence", the UNGP articulated it as accounting for and managing risks that may arise because of a company's activities.[543] By framing companies' responsibilities in terms that corporations understand, the UNGP could not stay just

[535] *Ibid*.
[536] Macchi and Bright (2019).
[537] Statement Secretary-General global compact on human rights, labour, environment, in address to World Economic Forum in Davos 1 February 1999.
[538] Deva (2020) 3; Deva and Birchall (2020).
[539] Ruggie (2013).
[540] Bachmann and Miretski 2011 *Deakin L Rev* 10.
[541] Ruggie (2013).
[542] *Ibid.*
[543] *Ibid.*

another voluntary code if TNCs did not want to come across as callous and recalcitrant when evidence of human rights abuses abound worldwide.

(2) Reminding states of their duty – the UNGP reiterated that states were the ones that must protect human rights, which directly derives from international human rights law. The Norms muddied the waters between international public and private legal frameworks by making corporations the addressees of obligations concerning human rights under international law.[544] The UNGP, on the other hand, affirmed that states had to ensure that companies, founded in terms of their national laws, do not violate the rights of people through their activities in other states that have lax human rights laws. Taking this approach was not without risk, especially considering that the rise of corporate power has led to corporations increasingly exerting more undue influence on politics and the state.[545]

Despite the implementation of UNGP at national level, human rights violations through corporate activities continue. Finding a solution to the problem of holding TNCs accountable when they violate human rights, directly or indirectly, has not been an easy endeavour. This is not surprising given, according to Amnesty International, that of the 100 largest economies globally, 51 are corporations whereas only 49 are countries.[546] The world has seen a rise in corporate power since the 1970s and states have granted corporations privileges and exemptions that made them free to operate in pursuit of profit.[547] The efforts to establish rules to govern the behaviour of TNCs started in 1970 but remained unsuccessful until the UNGP. Despite the UNGP being a voluntary instrument, Ruggie managed to bring the issue of human rights to the attention of corporations by using a language known and understood by businesspeople. By framing human rights in terms of a risk faced by TNCs and using the concept of due diligence, which involves collecting and analysing information to assess risk, Ruggie created the vocabulary by which businesses could understand human rights.

[544] Bachmann and Miretski 2011 10.
[545] Jessen "The Corporate State" (30 January 2020).
[546] Amnesty International no date Corporations.
[547] Jessen (30 January 2020).

2.6. A Business and Human Rights Treaty

As discussed earlier in this chapter, the UNGP on Business and Human Rights has been widely praised as it is seen as "uniquely different and sufficiently robust when compared with the limitations and shortcomings of other governance regimes".[548]

This thesis examined the UNGP as a set of global standards that aim to address and prevent business activity from adversely impacting on human rights.[549] At the time of its endorsement, it was clear that the UNGP was not the same as the Norms, which remained popular with human rights advocacy organisations who advocated in favour of the Norms, specifically because they proposed making obligations binding on companies directly under international law.[550] The UNGP was viewed as "woefully inadequate".[551] The UNGP was claimed to have the potential to "entrench a dominant paradigm among companies and many governments" because they prefer rules and regulations that are voluntary and largely unenforceable when it comes to holding companies accountable for adverse impacts on human rights.[552] The UN's endorsement of the UNGP unleashed a chorus of calls for the creation of hard law and there were even calls for the establishment of an overarching international body to which all states and all companies would be subject.[553] Originally intended to complement the UNGP,[554] proponents of a legally binding instrument proposed to abandon the "protect, respect, remedy" framework.[555]

The reason a treaty was considered desirable is that the UNGP deals too cautiously with the issue of exterritoriality. De Schutter suggests that in a new internationally binding instrument, states and parties could impose on parent corporations that are domiciled in that state an obligation to comply with human rights wherever they operate and impose compliance with such provisions on the different entities it controls (its subsidiaries or, even in certain cases, its business partners). [556] Despite extraterritoriality arising because the home state would impose on a parent corporation certain obligations to control its subsidiaries or to monitor their supply

[548] Addo 2014 *Hum Rights Law Rev* 146.
[549] See para 2.4 above.
[550] Ruggie (2013).
[551] Albin-Lackey 4.
[552] *Ibid*.
[553] Batesmith "HRW vs. Ruggie: How Valid is the Criticism of the UNGPs?" (8 February 2013).
[554] Espinosa 2016.
[555] McBrearty 2016 *Harv Int Law J* 12.
[556] De Schutter 2015 *Bus & Hum Rights J* 47.

chains, which impacts on situations located outside the national territory, it is seen as necessary.[557] While the UNGP includes a human rights due diligence requirement, the extent to which this requirement "imposes a responsibility on a corporation to ensure that other corporate entities with which it has an investment link comply" is unclear.[558] In TNCs, the parent (controlling) corporation and its (controlled) subsidiary form distinct legal entities, each with a legal personality, as well as a policy of limited liability. A company cannot be held liable for the debts of the other company beyond the amount of their investment.[559] This situation makes it difficult for victims impacted by the activities of the subsidiary to pursue recompense by filing a claim against the parent company before the national jurisdiction of the home state of that company. Therefore, De Schutter opines that a treaty would address this issue as well as clarify the scope of the duty that states hold to protect human rights by regulating TNCs, and would define with greater precision the requirement that "victims of transnational harms have access to effective remedies".[560]

The UN Special Representative, Ruggie, believed it "highly improbable" that a treaty on business and human rights would be adopted and stated that a treaty would "not deliver all that its advocates hoped for and expected".[561] From the outset, civil society viewed the UNGP as a squandered opportunity that did not take meaningful action to curtail business-related human rights abuses.[562] CSOs viewed the UNGP's failure to create mechanisms that would ensure the basic steps to protect human rights and put them into practice as a flaw.[563] Since its endorsement, the UNGP has been targeted to be replaced by something else, especially because they were seen as taking a regressive approach.[564] In June 2014, South Africa, together with Ecuador, Bolivia, Cuba, and Venezuela, submitted a draft resolution for an international legally binding instrument on TNCs and other business enterprises concerning

[557] *Ibid*.
[558] *Ibid.*
[559] *Ibid.*
[560] *Idem* 54.
[561] Ruggie (2013).
[562] Human Rights Watch "UN Human Rights Council: Weak Stance on Business Standards Global Rules Needed, Not Just Guidance" (16 June 2011).
[563] *Ibid*.
[564] Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights 2011.

human rights to the UNHRC.[565] The UNHRC adopted Resolution 26/9 and the OEIGWG was established.[566] The rest of this chapter discusses the treaty-making process and its prospects.

2.6.1. The Argument for a Binding International Instrument

Once the UNGP became the authoritative soft law instrument for business and human rights, it galvanised CSOs and their supporters into action, and the proposed treaty is seen as an indirect result of the UNGP.[567] Bilchitz presents the argument in favour of a legally binding instrument, and this thesis draws on his as well as Deva's writings on the topic.

Bilchitz argues that a treaty is necessary because the UNGP is incorrectly based on the notion that international human rights law "does not directly bind business entities".[568] Bilchitz views this notion as illogical because if under international law states are required to ensure that third parties (including corporations) comply with binding human rights obligations, then third parties themselves are obliged to comply with such requirements.[569] In other words, if third parties are "not be bound by international law to comply with [human rights] requirements, then there would be no reason for the state to ensure that they do so".[570] Bilchitz asserts that a treaty is required because an internationally binding instrument would expressly recognise and clarify that businesses have legal obligations that are based in international human rights treaties.[571] An obligation in law is needed if those harmed by corporations' activities are to have access to redress.[572] Bilchitz maintains that the absence of exactly what obligations corporations bear when it comes to fundamental rights means that those who have their rights violated do not have access to remedy against a private corporation.[573]

Furthermore, the expressed articulation of what human rights obligations are borne by corporations is an articulation of the nature and extent of such obligations.[574] The UNGP indicates that corporations have a general responsibility to respect human rights, meaning they

[565] UN Doc. A/HRC/RES/26/9 14 July 2014. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 (accessed 20 October 2022).
[566] *Ibid.*
[567] McBrearty 2016 *Harv Int Law J* 11.
[568] Bilchitz 2016 *Bus Hum Rights J* 207.
[569] *Ibid*.
[570] *Ibid.*
[571] *Ibid*.
[572] *Idem* 209.
[573] *Idem* 210.
[574] *Ibid.*

"should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved".[575] This wording means the UNGP describe negative obligations.[576] According to Bilchitz, corporations should have a positive obligation to protect human rights and should not have a positive obligation only when a company voluntarily assumes responsibility or undertakes a public function, as the UNGP envisages.[577] In other words, a treaty is needed to clarify the nature and scope of the obligations that TNCs have regarding human rights.[578] A mechanism would develop what the "international standards" are by clarifying as well as developing persuasive interpretations of companies' human rights obligations.[579]

Bilchitz' argument is simple: international commerce and trade created the international trade regimes that govern free trade across borders, thus an international instrument is required.[580] By entering into bilateral, sometimes multilateral, investment treaties, states aim to gain work for their citizens and for economic development and, therefore, more often than not "confer strong rights on corporate investors".[581] These binding legal initiatives that govern international trade also provide mechanisms to settle disputes.[582] Though investment treaties "could address human rights concerns either by directly imposing obligations on investors or by referring to state duties",[583] reference to these concerns is practically non-existent.[584] Trade and business investment regimes have developed separately from human rights law.[585] A treaty on business and human rights, according to Bilchitz, places obligations on businesses regarding human rights as part of international law.[586] Moreover, a binding treaty would form a sound basis for corporations to harmonise commercial rights and obligations with their obligations arising from fundamental rights.[587] A treaty would strengthen the case for corporations to consider their human rights obligations when entering international investment agreements.[588]

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[575] Guiding Principle 11.
[576] Bilchitz 2016 211.
[577] *Idem* 212.
[578] *Ibid*.
[579] *Ibid*.
[580] *Idem* 214.
[581] *Ibid.*
[582] Guiding Principle 11.
[583] Jacob 2010 International Investment Agreements and Human Rights 9.
[584] *Idem* 11.
[585] Bilchitz 2016 215.
[586] *Idem* 216.
[587] *Ibid.*
[588] *Ibid.*

Finally, Bilchitz highlights as a "key concern" the ability of victims to gain access to remedies when companies violate their rights.[589] He identifies three stumbling blocks to gaining access.[590] First, international law provides that states have jurisdiction over their internal affairs.[591] When a TNC fails to meet human rights obligations in more than one jurisdiction, a claim for remedy usually is brought in the state where the harm was caused.[592] Second, the national legal nature of corporations means TNCs operate across borders as separate legal entities with limited liability.[593] The company against which a human rights violation claim can be brought is the entity inside the country, thus the deep-pocketed parent company remains out of reach.[594] The reality is an "accountability gap" that results from "weak governance zones" where laws are not diligently enforced and courts lack independence, thus gaining access to a remedy, once rights are violated, is practically impossible.[595] Third, the corporate structure itself is problematic as they are commonly treated as separate legal entities with limited liability and the fact that there are "multiple separate corporations each constituted in different countries".[596] Therefore, according to Bilchitz, creating an international structure to adjudicate on claims against corporations would mean that in the event that a corporation's activities violate fundamental rights, it will be held accountable – corporations that operate in a number of jurisdictions even where judicial systems do operate effectively will have to account for their actions.[597] Thus, Bilchitz believes the only option is a collective agreement in a treaty on business and human rights.[598]

Despite the cogent argument for an internationally binding instrument, the treaty-making process has been contentious since its inception in 2014, with some states receiving the treaty initiative rather "frostily".[599] Nevertheless, the process is currently in progress and the rest of this chapter deals with that process.

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589 *Ibid*.
590 *Idem* 220.
591 *Ibid*.
592 *Ibid*.
593 *Ibid*.
594 *Ibid*.
595 *Idem* 217.
596 *Ibid*.
597 *Ibid*.
598 According to Bilchitz, countries have proven that it is possible to come together and impose obligations on corporations with the United Nations Convention against Corruption.
599 Mares 2022 *Int J Hum Rights* 1524.

2.6.2. The Treaty-Making Process

When the UNHRC's Resolution 26/9 was adopted, the OEIGWG started work to fulfil its mandate of elaborating on an internationally binding instrument that would regulate the activities of corporations and other business enterprises despite the resolution being contested.[600] A day later, the UNHRC reaffirmed the UNGP and resolved to focus on strengthening domestic measures through its implementation and to improve access to remedies for victims of business-related abuses.[601] The resultant Resolution 26/22, which is the strengthen-the-UNGP-resolution, was accepted by consensus.[602] Resolution 26/9 that started the treaty process enjoyed support that was "divided along the lines of developing states and civil society organisations […] in favour and developed states and big businesses against".[603] The resolution was passed three years after the UNHRC adopted the UNGP, and there was growing frustration at the slow pace of the instrument's implementation, as it was viewed as a sign that states did not prioritise them and that the UNGP lacked effectiveness.[604]

Regardless of the fear that a broad call for an "international legally binding instrument" on business and human rights would subsume the corporate accountability agenda in an amorphous business and human rights agenda,[605] the OEIGWG, chaired by Ecuador, started discussions towards creating a binding treaty in the field of business and human rights in July 2015.[606] At its first session, only ten states sent delegations, the EU walked out, China and Brazil made statements that were called "circumspect", and Russia indicated that it did not support a treaty "at this time", thus it was clear that creating a treaty regarding business and human rights would be a conflicted and drawn-out undertaking.[607] At the time of writing, the proposed binding treaty on business and human rights is in its eighth year of negotiation.

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[600] Simons 2017 "The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises: Moving Forward Strategically" 48. In Deva and Bilchitz (2013) *Building a Treaty on Business and Human Rights: Context and Contours*.
[601] United Nations Human Rights Office "Resolutions and decisions on business and human rights of the Human Rights Council" (no date).
[602] Simons 2017 50; Deva and Bilchitz (2013).
[603] *Idem* 48.
[604] Frankental "Business and Human Rights Treaty? We shouldn't be afraid to frighten the horses" (9 June 2014).
[605] Taylor "Treaty on Business and Human Rights" (4 June 2014).
[606] Pitts "'Ready, Steady, Debate!': Treaty Talks Begin at UN" (3 July 2015).
[607] Ruggie "Get real or we'll get nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty" (22 July 2015).

Two years after discussions were started, the Elements for the Draft legally binding instrument was issued.[608] The Elements is a "comprehensive document" touching on relevant issues such as general principles, the obligations of states, TNCs and other business enterprises.[609] The document further deals with corporate legal liability, jurisdiction, access to remedy, international cooperation, international monitoring, and options for international tribunals for corporations. In Lopez's view, the drafters of the Elements adopted a "kitchen sink" approach by including as many elements as possible and allowing the "maximum room to manoeuvre in future negotiations".[610] A discussion follows of all the draft versions of the legally binding instrument.

2.6.3. Zero Draft

The Elements was followed by the Zero Draft[611] and its draft Optional Protocol. [612] In July 2018, the OEIGWG released the Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Zero Draft).[613] The Zero Draft was viewed as having the potential to promote and advance human rights.[614]

In October 2018, during the fourth session of the OEIGWG meeting in Geneva, stakeholder input was explored in relation to the Zero Draft.[615] Nearly 300 CSOs participated in this session and the Draft was considered a good start that required significant improvement.[616] At the fourth session, a strong majority of governments from the Global South supported the treaty, whereas the governments of states where many multinationals are headquartered, were "more reluctant".[617] The EU took part, despite indicating they were not ready to engage formally in negotiations.[618]

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[608] Binding treaty: A brief overview 2019. Available at: https://www.business-humanrights.org/en/big-issues/binding-treaty/ (accessed 20 October 2022).
[609] Lopez "The elements for the treaty on business and human rights: Is it a step forward?" (24 October 2017).
[610] *Ibid*.
[611] Binding treaty: a brief overview 2019.
[612] Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises (no date).
[613] Human Rights Council Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises Zero Draft proposed on 16 July 2018.
[614] Bialek 2019 *GoJIL* 535.
[615] Binding treaty: a brief overview 2019.
[616] Zorob "New business and human rights treaty takes shape" (11 December 2018).
[617] *Ibid*.
[618] *Ibid*.

The Zero Draft used the language of the UNGP and its concept of human rights due diligence, thus focusing on the prevention of and effective remedy for business-related human rights violations.[619] Accordingly, in this version, states would ensure that companies are held civilly and criminally liable for their business activities.[620] At the same time, liability under this draft would be prompted when companies failed to comply with legal requirements to conduct human rights due diligence.[621]

To prevent TNCs from violating human rights unhindered and without legal consequences, the Zero Draft pursued several sub-goals such as international cooperation, the mutual legal assistance of states, and obligations to protect and effective remedies.[622] As a way to achieve its primary goal, which is the protection of victims, the Zero Draft provided for uniform international standards in the form of a corporate duty of due diligence.[623] Rather than define which corporations are included, the focus was on the activity itself and not on the characteristics of an enterprise.[624]

With regard to the territorial scope of application of the prospective treaty, there is a view that the obligations imposed on states "[…] within such State Parties' territory or otherwise under their jurisdiction or control […]", does not give rise to "control", as an alternative to the criterion of jurisdiction, but rather to specify what the term "jurisdiction" entails.[625] The Zero Draft foresaw that through mutual legal assistance and international cooperation – even if applied only territorially – the protection gap still will be closed effectively,[626] leaving the primary responsibility for preventing and penalising human rights infringements with states.[627] The Zero Draft did not refer to any specific human rights to which it will apply.[628] As effective protection of victims is crucial, the Zero Draft included remedial mechanisms to compensate and indemnify victims or surviving dependents, in addition to regulating procedural costs and how to treat victims.[629]

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[619] German Institute for Human Rights 2018 Position Paper: OEIGWG has Come in from the Cold. Will the EU Do the Same? 3.
[620] *Idem* 4.
[621] *Ibid*.
[622] Bialek 2019 512–513.
[623] *Ibid* 513.
[624] *Idem* 514.
[625] *Idem* 517.
[626] *Idem* 517.
[627] Zero Draft, Preamble para. 4; Art 9(1), Art 10.
[628] Bialek 2019 517.
[629] *Ibid* 518–519.

After the fourth session in 2018, a Revised Draft was published in 2019.[630]

2.6.4. The Revised Draft

The Revised Draft was welcomed as a crucial step forward in the process of establishing a legally binding instrument.[631] Despite there being many aspects and provisions that required greater refinement, this version was clear and comprehensive enough to be the subject of serious negotiations.[632] The 2019 session that discussed the Revised Draft was characterised by many hearing oral statements, as well as written inputs and written submissions, which were put forward in informal consultations.[633] In 2020, the Second Revised Draft was published, incorporating submissions made during the 2019 session.[634]

2.6.5. The Second Revised Draft

The OEIGWG held a discussion of the Second Revised Draft[635] in 2020 "amid major global uncertainties".[636] The COVID-19 crisis was considered as an unparalleled opportunity to better regulate supply chains and to protect human rights and the environment, thus leveraging the required socio-economic recovery to have the result of not leaving anyone behind.[637] The Second Revised Draft aimed to fill the gaps in international law, broaden the protection of victims, promote access to justice, clarify obligations states have as well as the responsibilities of business, and facilitate mutual legal assistance and international cooperation.[638] The Revised Draft was viewed as better aligned with the UNGP, yet the scope, direct obligations of businesses, and the issue of extraterritorial jurisdiction remained contentious issues.[639]

In the OEIGWG's sixth session, 30 member states participated in person while many CSOs, trade unions, and other stakeholders joined the discussions virtually[640] and no negotiations took place.[641] According to Emilio Izquierdo Miño, the Chairperson-Rapporteur from Ecuador, the

[630] OEIGWG 2019 Chairmanship Revised Draft.
[631] Binding treaty: a brief overview 2019.
[632] Lopez "The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking improvements and brighter prospects" (2 October 2019).
[633] Izquierdo Miño 2020 Report on the Fifth Session of the OEIGWG.
[634] OEIGWG 2020 Chairmanship Second Revised Draft.
[635] *Ibid*.
[636] ECCJ "UN Treaty Negotiations Kick Off Amid Major Global Uncertainties" 27 October 2020.
[637] Ecuador's Minister of Foreign Affairs and Human Mobility, Luis Gallegos.
[638] Tapia Boada 2021.
[639] ECCJ 27 October 2020.
[640] *Ibid*.
[641] Izquierdo Miño 2021 Report on the Sixth Session of the OEIGWG.

treaty is an "opportunity to improve accountability and access to an effective remedy for victims of corporate abuse".[642] Deva considered the Second Revised Draft as politically feasible because it struck a balance between the competing interests of states, companies, and CSOs.[643]

In line with the UNGP, the Second Revised Draft does not limit the scope of a company's duty of care in respect of other companies along its supply chain with which it has a contractual relationship and thus the draft still included all of a company's business relationships.[644] The Second Revised Draft provides that TNCs and other business enterprises, including state-owned enterprises, fall under the scope of the proposed agreement.[645] It allows states to assist and to facilitate compliance in their obligations for SMEs according to their size, nature, sector, location, operating context, and severity of risk.[646]

Most of the discussion focused on suggesting changes to the language in the text of the Second Revised Draft of the treaty.[647] Submissions included references to children's rights, conflict-affected areas, and the importance of prioritising human rights over trade and investment treaties.[648] The use of the word "victim" was questioned, and alternatives were suggested such as "rights-holder" or "affected individuals and communities". [649] The terms "environmental rights" and "state-owned enterprises" were widely queried, and some delegations requested they be removed.[650] Stakeholders' delegations encouraged explicit reference to the "transnational character" of the activities of business.[651] There were submissions that requested provisions be strengthened by adding more vulnerable groups, including indigenous peoples. [652] Also, this version addressed the issue of access to remedy and specifically the doctrine of *forum non-conveniens,* asserting that states must ensure it is not used by their courts to dismiss victims'

[642] ECCJ 27 October 2020.
[643] Deva "BHR Symposium: The Business and Human Rights Treaty in 2020 – The Draft Is "Negotiation-Ready" But Are States Ready?" 8 September 2020.
[644] Seitz 2021 Report on the Sixth Session of the OEIGWG ("Treaty").
[645] Second Revised Draft 2020 Art 3.
[646] Second Revised Draft 2020 Art 3(2).
China, India, South Africa, Pakistan, Cuba, Venezuela, Mozambique, and the Philippines called for limiting the treaty to transnational corporations. While Ecuador, Panama, Mexico, Namibia, and the EU favoured a scope of application to all corporate activities.
[647] Izquierdo Miño 2021.
[648] In the Preamble of the Second Revised Draft 2020.
[649] Tapia Boada 2021; dealing with art 1, the definition section.
[650] *Ibid.*
[651] Tapia Boada 2021; Art 2 is the Statement of Purpose.
[652] *Ibid*.

legitimate claims.[653] Additionally, and consistent with the rule of law requirements, states should enact laws that reverse the burden of proof so that victims' right to access to remedy is fulfilled.[654] However, this provision was considered an encroachment on domestic law and state delegations objected vociferously, while CSOs strongly supported the provisions as they were considered essential, if victims were to have access to justice.[655] Many stakeholders viewed criminal liability an imperative in assuring access to justice, but this demand was heavily criticised by state delegations.[656] Many stakeholders called for further reference to civil liability on the reasoning that conducting human rights due diligence does not automatically absolve companies from liability when causing or contributing to human rights abuses.[657] The appropriateness of specific reference in Article 14(5) to trade and investment agreements was questioned by some delegations.[658] This draft referenced institutional arrangements for the creation of an international tribunal, otherwise that the "committee", which is referenced, be granted competence to adjudicate individual cases.[659] Regarding implementation, stakeholders suggested the explicit reference to child soldiers, occupied territories, as well as the worst types of child labour, including forced and hazardous child labour.[660] Additional calls were made for the inclusion of lesbian, gay, bisexual, transgender, and intersex persons; people of African descent; older persons; local communities; and the urban poor.[661]

Based on the 2020 discussions, the Third Revised Draft was published in 2021.[662]

2.6.6. Third Revised Draft

The seventh session of the OEIGWG was held from 25 to 29 October 2021. A Third Draft was the product of the discussions held during the sixth session of October 2020. The new Revised Draft was circulated to state and stakeholder delegations in July 2021, and delegates were

[653] *Ibid*.
[654] *Ibid*.
[655] *Ibid*.
[656] *Ibid*.
[657] Tapia Boada 2021; art 8 Second Revised Draft 2020.
[658] *Ibid*.
[659] *Ibid*.
[660] *Ibid*.
[661] *Ibid*.
[662] OEIGWG 2021 Chairmanship Third Revised Draft.

invited to participate in the negotiation process and contribute to the legal development of international human rights law.[663]

The positive changes in this version of the Revised Draft were seen as "mostly cosmetic, rhetorical and ineffectual" by the Treaty Alliance, a network of over 250 social movements, CSOs, trade unions, and communities affected by the activities of TNCs.[664] According to the group, the superficial changes would not solve the structural problems repeatedly highlighted by social movements and affected communities.[665] In contrast, the European Network of National Human Rights Institutions viewed the Third Revised Draft as making a significant contribution to tackling governance and protection gaps by strengthening the prevention of business-related human rights violations and improving access to remedy for victims of violations.[666] The Third Revised Draft is seen as being complementary to the UNGP and, therefore, able to build on the established international consensus.[667] In other words, the treaty does not lag behind the UNGP and, at the same time, it aims to go beyond the UNGP, thus, filling the gaps that exist.[668]

The purpose of the Revised Third Draft is the clarification and facilitation of effective implementation of states' obligation to respect, protect, fulfil, and promote human rights in the context of business activities, particularly those of a transnational character.[669] Accordingly, there are obligations on state parties to take steps that would ensure that businesses respect existing human rights, which is achieved through state parties regulating the activities of businesses that operate in their territory, jurisdiction or otherwise under their control, including TNCs and other business enterprises that undertake activities of a transnational character.[670] Regarding the type of regulation, the Third Draft foresees that states introduce legislation that makes human rights due diligence mandatory for businesses.[671] In contrast to the previous Revised Draft that required human rights due diligence only concerning the environment, this version extends due diligence to include "human rights, labor rights, environmental and climate

[663] Tapia Boada 2021.
[664] Global Campaign to "Reclaim People's Sovereignty, Dismantle Corporate Power and Stop Impunity" 17 March 2022.
[665] *Ibid*.
[666] ENNHRI statement to the OEIGWG (no date.).
[667] *Ibid.*
[668] *Ibid*.
[669] Art 2.1 of the Third Revised Draft 2021.
[670] Art 6.1 of the Third Revised Draft 2021.
[671] Art 6.3 of the Third Revised Draft 2021.

change impact assessments".[672] Furthermore, this version envisages states oblige companies to report on non-financial matters such as group structures and suppliers, policies, risks, outcomes and indicators regarding human rights, labour rights, health, environmental, and climate change standards.[673]

With regard to access to remedy, the Third Revised Draft articulates the view that states should provide access to remedies for business-related human rights abuse victims in their courts and via state-based non-judicial mechanisms.[674] Moreover, states must ensure that domestic law provides a comprehensive and adequate legal liability system for human rights abuses arising from legal and natural persons' business activities or business relationships.[675] The 2021 version further envisages that legislation is adopted that will ensure liability when businesses fail to prevent persons with whom they have a business relationship causing or contributing to human rights abuses, specifically when a business manages or supervises such persons or the relevant activity or should have foreseen a risk of human rights abuse.[676]

The 2021 session that discussed the Third Revision Draft was opened by the UN High Commissioner for Human Rights, who highlighted the transformation in the corporate space from corporate social responsibility to business human rights.[677] This change is seen as the result of the UNGP that articulated a way of transforming respect for human rights into legal duties.[678] Moreover, the High Commissioner praised the legislative initiatives undertaken by states to enforce mandatory human rights due diligence as a "smart mix of measures States should adopt to foster business respect for human rights".[679] The High Commissioner stressed that strengthening respect for and protection of human and environmental rights is vital and addressing the "urgent need to ensure access to justice and remedy for victims of abuses", especially given the triple planetary crisis of climate change, pollution and biodiversity loss.[680] There was an acknowledgement that those in the private sector should ensure respect for human

[672] Art 6.4(a) of the Third Revised Draft 2021.
[673] Art 6.4(e) of the Third Revised Draft 2021.
[674] Art 7 of the Third Revised Draft 2021.
[675] Art 8.1 of the Third Revised Draft 2021.
[676] OEIGWG 2021 Chairmanship Third Revised Draft.
[677] Izquierdo Miño Report on the Seventh Session of the OEIGWG 2021.
[678] *Ibid*.
[679] *Ibid*.
[680] *Ibid*.

rights, as well as for the planet, in their operations and their business relationships.[681] The treaty-making process is considered an opportunity to increase business' respect for human rights and paving the way for more principled, responsible, and accountable business operations.[682]

In the December 2021 report, Chair-Rapporteur Izquierdo Miño from Ecuador emphasised the improvements delivered by the Third Draft regarding issues such as scope, jurisdiction, gender, and human rights due diligence.[683] He acknowledged that despite the progress made, substantial work lay ahead and stated that if the process is to achieve its goal, "broad participation [… is needed …], including the active participation of civil society".[684] During the 2021 discussions of 69 states, twenty countries from Africa, Latin America and Asia participated actively in the negotiations and, for the first time since the start of the OEIGWG's work in 2014, the US made submissions.[685] The process focused on state-led negotiations following a procedure whereby the Chair-Rapporteur presented a draft article with the changes introduced in the Third Revised Draft.[686] At this session, the state delegates could respond to the suggested text either by supporting or not supporting or by proposing amendments.[687] These amendments were projected onto a screen showing who proposed such amendments, followed by clarification and general comments.[688] As in previous years, other specialised agencies, international organisations, national human rights institutions, and NGOs were given time to introduce their textual proposals.[689]

During this session, the US sent a delegation for the first time, yet they did not engage in line-by-line negotiations but opted instead for making general comments on various text elements and urging the working group to "take a step back and explore alternative approaches, binding or non-binding, in the form of a framework convention".[690] Prior to the session, several European NGOs were concerned that the EU would not participate actively and constructively in the negotiations, and their concern proved accurate as the EU limited its interventions to reiterating

[681] Izquierdo Miño 2021.
[682] *Ibid*.
[683] *Ibid*.
[684] *Ibid*.
[685] Mohamadieh "Negotiating a business and human rights treaty: Important steps forward yet a long way still to go" (2 November 2021).
[686] Izquierdo Miño 2021.
[687] *Ibid*.
[688] *Ibid*.
[689] *Ibid*.
[690] Mohamadieh (2 November 2021).

its support for the UNGP.[691] Maintaining its readiness to explore "a consensus-based instrument aligned with UNGPs", the EU proposed a reconsideration of the approach adopted by the OEIGWG.[692] The EU's participation during this session was referred to as "aloof".[693] The European delegation reiterated that it did not have a negotiating mandate from their member states.[694] Also, of 55 African countries, only twelve were present, a fact noted as "disappointing" because their "input is a necessity".[695]

The 2021 negotiations are seen as having taken a qualitative leap forward[696] despite criticism from CSOs that the "atmosphere for civil society wasn't exactly welcoming".[697] During previous sessions, the OEIGWG Chair held meetings with CSOs, yet consultations were dropped during this session.[698] In addition, CSOs were excluded from the informal discussions held by states on the final day.[699] Nevertheless, the modality adopted during this session was viewed as exceptionally positive as it was aimed at bringing transparency and encouraging states to take a position on the draft treaty's concrete language.[700] Also seen as positive was that this time the negotiations were attended by the "main home states of most of the world's transnational companies".[701] Hope remains that broad participation will give rise to a treaty that includes effective measures of protection, accountability and remedy for affected people.[702]

During this session, the participants discussed the many reasons for it being essential to address the issue of TNCs and other business enterprises. It was highlighted that various types of abuse are still taking place, particularly in respect of the environment and violence against individuals, communities, and human rights defenders.[703] Of particular concern was the differential impacts faced by indigenous peoples, people of African descent, persons with disabilities, children, women, lesbians, as well as gay, bisexual, transgender, and intersex persons.[704] It was noted

[691] *Ibid*.
[692] *Ibid*.
[693] Hautala *et al*. "Why is the EU still absent in UN negotiations on human rights rules for business?" (29 October 2021).
[694] *Ibid*.
[695] Dera "Same, same but different: a closer look at the latest UN negotiations towards a binding treaty on business and human rights" 14 December 2021.
[696] Global Campaign to "Reclaim People's Sovereignty, Dismantle Corporate Power and Stop Impunity" 17 March 2022.
[697] *Ibid*.
[698] *Ibid*.
[699] *Ibid.*
[700] *Ibid*.
[701] Renfrey "Five take-aways from the 2021 Binding Treaty negotiations" (22 November 2021).
[702] *Ibid*.
[703] Izquierdo Miño 2021 2.
[704] *Ibid.*

how the COVID-19 pandemic had exacerbated existing inequalities and disproportionately affected those in already vulnerable or marginalised situations.[705] According to the report on this session, many state delegations reaffirmed their commitment to protecting human rights in business activities, especially legislation on mandatory human rights diligence and other issues, NAPs on business and human rights and other efforts to implement the UNGP.[706] According to the OEIGWG Chair, despite these efforts being undertaken, an international legally binding instrument is necessary and timely.[707] A binding instrument is seen imperative to help ensure access to justice and remedy for those affected in business activities and to end corporate impunity, as well as fill gaps in legal protection, boost international cooperation, build upon non-binding norms and supplement and strengthen domestic legislation.[708] The importance of a binding instrument was stressed because it could build upon and be aligned with relevant standards such as the 2030 Agenda for Sustainable Development, the Sustainable Development Goals, and ILO standards.[709] During this session, the UNGP was considered by many state delegations as having to be the basis for discussions, whereas many NGOs stressed that binding standards must go beyond the UNGP.[710] Some parts of the draft were called too ambiguous and vague, while others were said to be overly prescriptive.[711] In addition, there were complaints that the text failed to appropriately consider differences in legal systems.[712] The appropriate scope of businesses to be covered under the instrument was a bone of contention as several delegations welcomed the fact that the draft text applied to all business activities, yet others considered the scope of businesses covered as overly expansive and, therefore, exceeding the mandate of Resolution 26/9 or, at least, going against the spirit of the resolution.[713] Notwithstanding, the Chair-Rapporteur's report concluded that all delegations were committed to constructively participating in the working group's deliberations.[714]

The Chair-Rapporteur introduced the formation of the Group of Friends of the Chair, which reflected a balanced regional representation of the five UN regional groups and that would

[705] *Ibid.*
[706] *Ibid.*
[707] *Ibid.*
[708] *Ibid.*
[709] *Ibid.*
[710] *Ibid.*
[711] *Ibid.*
[712] *Ibid.*
[713] *Ibid.*
[714] *Ibid.*

facilitate consultations during the inter-sessional period so that the work on the Third Revision Draft of the legally binding instrument can be advanced.[715] He invited a group of ambassadors in Geneva to act as Friends of the Chair.[716] It is envisaged that the Friends of the Chair (from Africa, Asia-Pacific, Latin America and the Caribbean, Western European and Others Group, and Eastern Europe) convene and lead consultations among states on the Revised Draft legally binding instrument, considering the concrete textual suggestions, comments, and requests for clarification that participants made during the seventh session.[717] This new way of continuing the process of negotiation during the inter-sessional period, has raised concerns about the risk of a loss of transparency in the process.[718]

The eighth negotiating session was held from 24 to 28 October 2022, and it was clear that the process of establishing binding human rights standards to regulate global corporate activity has gained momentum.[719] During the period between sessions, there were legislative developments at national and regional levels, specifically in the EU, and some argued the proposed binding treaty on business and human rights represents another possible tool that could help bolster corporate accountability for human rights abuses.[720] In contrast to previous years, this session had no new revised treaty text to consider and the Chair-Rapporteur indicated that the discussion in 2022 would be based on the concrete textual proposals that were submitted by states during the 2021 session.[721] The reason given for the delay was that the members of the Friends of the Chair were unable to meet because one representative from Africa could not confirm participation.[722] However, the Chair-Rapporteur supplemented the text by making an informal contribution aimed at advancing the discussions and facilitating the negotiations.[723] The suggested proposals that the Chair-Rapporteur circulated were reformulations of Article 1 (definitions), Article 6 (prevention), Article 7 (access to remedy), Article 8 (legal liability), Article 9 (adjudicative jurisdiction), Article 10 (statute of limitations), Article 11 (applicable law), and Article

[715] *Ibid*.
[716] *Ibid*.
[717] *Ibid*.
[718] Statement Global South States and Civil Society Keep Up Momentum to Regulate Transnationals Corporations under International Human Rights Law (2 November 2021).
[719] Aba "Proposed binding treaty on business and human rights: Taking stock 8 years into negotiations".
[720] *Ibid.*
[721] Chair-Rapporteur Statement: 8th Session of the OEIGWG 7 September 2022 Available at: https://www.ohchr.org/sites/default/files/documents/issues/business/2022-09-13/igwg-8th-letter-chair-rapporteur.pdf (accessed 15 October 2022).
[722] *Ibid.*
[723] *Ibid.*

12 (mutual legal assistance and international judicial cooperation).[724] The supplemented proposals were done to improve understanding of the text and to align the language more with that used in other international treaties.[725] The additional document caused Palestine and other states, including South Africa, to express their displeasure as they considered the supplementary document to be confusing, while Palestine suggested that inter-sessional negotiations be held because it is crucial to move the process forward.[726] The submissions made by the South African government at 2022 session suggested that the South African government is concerned about companies being reluctant or unwilling to abide by or to be bound by domestic laws of countries in the Global South, when these countries prescribe human rights norms, yet the companies comply with human rights standards set by countries in the Global North.[727] In its submission, the government mentions five key elements – scope, jurisdiction, rights of victims, prevention, and international cooperation – that they would want to focus on during negotiations.[728] France reminded the delegates that the reason for the treaty is the Rana Plaza tragedy and reiterated its support for the formulation of common rules to encourage companies to respect human rights throughout their value chains.[729] France expressed the wish that the draft instrument must be more realistic, balanced, sufficiently clear, and legally precise if it is to ensure future effectiveness.[730] Despite the EU not having a formal mandate from its member states to negotiate, they engaged in the process this time and mentioned the EU's recent legislative initiatives, the February 2022 proposal for a Directive on Corporate Sustainability Due Diligence, as well as its proposal to ban forced labour products from the EU market published in September 2022.[731] The EU expressed concern about how detailed and prescriptive the draft instrument is in areas such as civil and criminal liability, applicable law and

[724] *Ibid*.
[725] 3rd Meeting, 8th Session of Open-ended Intergovernmental Working Group on Transnational Corporations. Available at: https://media.un.org/en/asset/k11/k119zwozc3 at 11:40 of 02:56:10.
[726] *Ibid* at 40:01 of 02:56:10.
[727] South Africa Statement: 8th session of the OEIGWG 24 October 2022 Available at: https://www.business-humanrights.org/en/blog/reflections-on-the-binding-treaty-discussion-south-africa/ (accessed 15 October 2022). It is submitted the delegation reference is to the case Foresti v. South Africa which Ruggie explains as: "South Africa was shocked to learn that it had signed bilateral investment treaties that enabled mining interests from Italy and Luxembourg to sue the government for monetary damages under binding international arbitration because of certain provisions in the Black Economic Empowerment Act, perhaps the single most significant piece of human rights legislation adopted by the postapartheid government". See Ruggie (2013).
[728] *Ibid.*
[729] France Statement: 8th Session of the OEIGWG.
[730] *Ibid*.
[731] EU Statement: 8th session of the OEIGWG 24 October 2022 Available at: https://www.eeas.europa.eu/delegations/un-geneva/8th-session-open-ended-intergovernmental-working-group-transnational_en?s=62 (accessed 24 October 2022).

jurisdiction or judicial cooperation, but "at the same time using vague and open definitions for other key elements in the draft".[732] The German delegation aligned their contribution with the EU's statement and mentioned Germany's Supply Chain Due Diligence Act, which was to come into force on 1 January 2023.[733] In addition, the German delegation recommended that a legally binding instrument not be too intrusive on national legislative systems and should allow for greater flexibility by giving states choice or allow for a tier system with an opt-in system.[734] Germany suggested that the OEIGWG explore new ideas such as a framework agreement.[735]

2.6.7. Discussion

The treaty-making process has been ongoing since 2014. During the session, UNHRC resolution reaffirmed the UNGP and the work of the UNWG. As stated, the OEIGWG's work is mandated by UNHRC Resolution 26/9 passed in 2014 with a vote of twenty to fourteen and thirteen abstentions.[736] It is unclear why the resolution to draft a binding instrument has not been universally welcomed; soft law is probably seen as the preferred form of legalised governance that international actors choose instead of legally binding obligations, which are viewed as too precise to delegate authority for interpreting and implementing the law.[737] Despite hard law being the manner by which international actors can reduce transaction costs and resolve problems of incomplete contracting,[738] it is difficult to reach agreement, and many multilateral treaties have faced difficulty in entering into force or, more frequently, do so for a limited number of parties.[739] Through multinational agreements, states are able to expand available political strategies and strengthen the credibility of their commitments; however, it comes at the cost of restricting state actors' behaviour and their sovereignty.[740] Soft law is thought of as being weak on obligation,

[732] *Ibid*.
[733] 1st Meeting, 8th Session of Open-ended Intergovernmental Working Group on Transnational Corporations. Available at: https://media.un.org/en/asset/k1b/k1bw83cudr at 02:45.56 of 02:49.40.
[734] *Ibid*.
[735] *Ibid*.
[736] In favour: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam.
Against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America.
Abstaining: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates.
[737] Abbott and Snidal 2000 *Int Organ* 421.
[738] *Ibid*.
[739] Zerk (2006) 71.
[740] Abbott and Snidal 2000 422.

precision, and delegation issues, yet is preferred by states.[741] Soft law is viewed as a "way-station to harder legalization"[742] because it articulates and shapes shared values.[743] It seems to be the approach followed by the state delegations at the OEIGWG treaty negotiations who call for a framework convention based on the UNGP. From the submissions, especially from Global North states and employer organisations, it is evident that they believe the UNGP to be sufficient, specifically because legislative initiatives already have been taking shape in many jurisdictions.

Although China voted for the treaty resolution, Ruggie indicates that China's vote was with the understanding that an "affirmative vote was based on the following 'understanding': that the issue of a business and human rights treaty is complex … [and that] differences exist among countries in terms of their economic, judicial, and enterprise systems, as well as their historical and cultural backgrounds".[744] According to Ruggie, the Chinese delegation indicated at the time that it will be necessary to carry out "detailed and in-depth" studies and for the treaty process itself to be "gradual" and "inclusive".[745] Ostensibly, the Chinese delegation has not wavered from their initial position.[746]

Despite the treaty-making process taking up a great deal of time, energy, and effort, it must not be forgotten that the UNWG came into effect through Human Rights Council Resolution 17/4 in 2011, and the UNWG's mandate was renewed in 2014, 2017, and again in 2020.[747] In accordance with its mandate, the UNWG is responsible for promoting, disseminating, and implementing the UNGP.[748] Since 2011, the group has been working on exchanging and promoting good practices and lessons learnt from the implementation of UNGP, and an annual report about the UNWG's work is submitted to the UNHRC.[749] Two parallel processes are underway – one for an internationally binding instrument and one for the rigorous implementation of the UNGP.

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[741] *Ibid*.
[742] *Idem* 423.
[743] Chinkin 1989 *Int'l and Comp LQ* 865
[744] Ruggie (9 September 2014).
[745] *Ibid*.
[746] *Ibid*.
[747] Working Group on Business and Human Rights OHCHR 1996–2022.
[748] *Ibid*.
[749] *Ibid*.

The submissions made at the 2022 negotiations confirm Deva's opinion that the treaty negotiations limp along despite the political challenges, roadblocks, and resistance.[750] Regardless of significant differences regarding the form, scope and substance, as well as a legally binding instrument's relations to other soft and hard regulatory standards, Deva believes that a good faith effort must be made to address concerns of rights holders affected by business activities.[751] Deva mentions as contentious the scope of the treaty, namely, whether the treaty must apply to all types of business enterprises or only to TNCs, as well as whether the proposed treaty should cover all international human rights or only selected gross or serious human rights abuses.[752] As a possible compromise, Deva proposes a hybrid system, which means that the treaty could apply to all business enterprises while special provisions could be made for TNCs that require them to conduct human rights due diligence.[753] In respect of violations, Ruggie considers only gross violations;[754] however, defining what amounts to a gross violation may exclude most human rights abuses.[755] The current version includes all human rights abuses, labour rights, environmental rights, and climate change.[756] Deva opines whether an abuse is defined as gross or non-gross becomes relevant only when it comes to corporate liability, meaning that for gross human rights abuses corporations could face criminal liability while for other abuses it could be sufficient for there to be civil and/or administrative liability.[757] Since the UNGP has been the authoritative standard for more than ten years, the question arises as to what a legally binding instrument means for the popular UNGP. Unsurprisingly, there is a growing recognition that both soft law and hard law instruments complement one another and should be loosely rather than closely aligned.[758] Since the Norms, there has been a desire to bind corporations under international law; however, it is doubtful whether direct human rights obligations will be instituted, though they were contemplated in the Elements of the treaty, and despite the insistence of CSO's and some state delegations.[759] With regard to trade and investment agreements that are viewed historically as exploiting power imbalances and which

[750] Deva 2022 *Neth Q Hum Rights* 211–221.
[751] *Idem 216.*
[752] *Ibid.*
[753] *Idem 217.*
[754] Ruggie 2015 *SSRN* 5.
[755] Deva 2022 217.
[756] *Ibid.*
[757] *Ibid.*
[758] *Ibid.*
[759] *Ibid.*

resulted in investors having disproportionate rights and obligations, the Elements in 2017 envisaged a legally binding instrument trumping trade and investment agreements.[760] This idea was rejected, and the current version foresees that states ensure that the interpretation and implementation of "all existing or new bilateral or multilateral agreements (including trade and investment agreements) are in a manner that does not undermine or restrict their capacity to fulfil their obligations" imposed by this treaty or the UNGP.[761] As stated earlier, at the seventh session in 2021, six years into the process, the US, whose delegates appeared for the first time, suggested a framework treaty based on the UNGP because this would enable "a marriage between soft law and hard law" and overcome the deficiencies in the current version.[762]

According to De Freyter, a framework convention, also called a protocol approach, is about the "phased establishment of a legal regime".[763] Framework conventions, of which the UN Framework Convention on Climate Change[764] is an example, have been described as being hard law instruments while having soft law content as they contain objectives, principles, and/or general obligations known as substantive provisions and institutional provisions that create a plenary forum where states discuss issues with input from non-state actors, and all are able to agree on subsequent instruments.[765] At the 2022 session, almost all state delegations from the Global North expressed some form of support for a framework convention;[766] other delegations and many CSOs rejected alternative approaches because they viewed them as weakening the efforts to stop corporate misconduct.[767] In an attempt to move the process along, Deva suggests that "instead of aiming for a catch-all treaty, an incremental approach may be more practicable".[768] It is not clear whether those negotiating a legally binding instrument will reach a compromise between an "empty shell" framework convention that can be negotiated in a sequential manner and "an overly prescriptive" conventional instrument.[769]

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[760] *Ibid.*
[761] *Idem* 219.
[762] *Idem 220.*
[763] De Feyter "Type and Structure of a legally binding Instrument on the Right to Development" 6. Available at: https://www.ohchr.org/Documents/Issues/Development/Session20/LBI/KoenDeFeyter.docx (accessed 30 October 2022).
[764] UN Framework Convention on Climate Change, 9 May 1992, UNTS 1907 (No. 30822).
[765] *Ibid*.
[766] Germany, UK, Ethiopia
[767] Mohamadieh (2 November 2021).
[768] Deva 2022 220.
[769] *Ibid.*

2.7. Conclusion

In conclusion, the UNGP is an international non-binding instrument and an example of soft law. In this chapter, it has been highlighted that despite being soft law, the UNGP defines concrete and actionable steps that governments and companies must take to meet their duties and responsibilities, respectively, and provides remedies in the event of human rights abuse.[770] The UNGP has shaped the way the topic of business and human rights is talked about. To ensure that the UNGP becomes more effective, the UNWG is responsible for guiding, disseminating, and implementing the UNGP. Though the UNGP is not a negotiated instrument, it became necessary because multilateral public law efforts could not agree on rules for corporations.[771]

To recap, at the beginning of this chapter it was mentioned that the UN is responsible for negotiating multilateral agreements that reflect both national and regional interests. As such, the UN spearheaded efforts in the early 1970s to learn more about the impact of corporations that operate across borders and negotiations for a Code of Conduct on Transnational Corporations started in 1972, while in 1976 and 1977, the OECD and the ILO outlined the responsibilities of multinational enterprises.[772] In 1992, the negotiations to put together a code of conduct were suspended and it became clear that developing standards to regulate business behaviour would involve the cooperation of states, international organisations, multi-stakeholder groups, corporations, industry associations, CSOs, lawyer associations, and academics.[773] The UN Global Compact launched in 2000 demonstrated that the UN was ready to engage with business in respect of social and environmental impacts and recognised that corporations are relevant in the broader human rights context beyond employment and labour relations.[774] The Compact was the first global code to articulate that business behaviour act with an awareness of human rights and placed corporate human rights responsibility prominently on the agenda.[775] Non-binding in its nature and broad in its scope and focus, the Global Compact was meant to be an "initiative in the spirit of CSR".[776] At about the same time, the UN Sub-Commission on Human

[770] See para 2.4.2 above.
[771] Cata Backer 2011 *Ind J Global Legal Stud* 828–829.
[772] Deva (2020) 3. Deva and Birchall (2020).
[773] *Ibid.*
[774] Wettstein (2020) "The History of 'Business and Human Rights' and its Relationship with Corporate Social Responsibility" 28; Deva and Birchall (2020).
[775] *Ibid.*
[776] *Idem* 29.

Rights launched the drafting of the Norms, which was presented and rejected to the UNHRC in 2003.[777]

Also, covered in this chapter is an examination of regional initiatives such as the EU's Conflict Minerals Regulation, the deforestation regulation, the proposal for draft legislation that prescribes new rules for batteries, and the proposal for a regulation that would ban products produced by forced labour from the EU market (the proposed Directive on Corporate Sustainability Due Diligence is discussed in Chapter 3). In addition, this chapter looked at the absence of any action regarding the UNGP (except for Uganda and Kenya) by the African Union and SADC countries.

Finally, this chapter explored the treaty-making process that has been underway since 2014, and the Zero Draft and the revised drafts were briefly discussed. Negotiating human rights treaties is notoriously difficult and laborious. The legally binding treaty negotiations aim to replace the voluntary measures that have not effectively prevented corporate abuse of power or provided effective remedies for those harmed. At the seventh session of the treaty negotiation when the Third Revised Draft was discussed for the first time, the EU stated that they were not negotiating (yet they participated) and the US called on other UN member states to "consider alternatives".[778] After the 2021 session, a group of about 200 CSOs criticised the report by the OEIGWG Chair-Rapporteur as "distancing the process from its original mandate as established by Resolution 26/9".[779] According to the CSO group, the Chair-Rapporteur seemed to be emphasising the importance of voluntary norms.[780] The Chair-Rapporteur established the Group of Friends of the Chair, a move which was welcomed by delegates from many states as the Group will have a degree of power, especially regarding the "terms of content and seeking the needed compromise text".[781] The CSO group considers it essential that the Friends of the Chair also be "friends of the process" and not detract from the treating-making process.[782] The proponents of a binding treaty express a fear the advances made during the previous sessions which saw significant input from CSOs will be negotiated "away" by the state delegations at the

[777] Deva (2020) 4; Deva and Birchall (2020) 4. See para 1.2 above.
[778] Renfrey (22 November 2021).
[779] Open Letter to the Chair of the OEIGWG 23 March 2022.
[780] *Ibid*.
[781] *Ibid*.
[782] *Ibid*.

UN.[783] Their concern is real as the seventh and eighth sessions underscored which countries are in favour of a binding instrument and which are against ─ a fault line that was exposed when the two UNHRC Resolutions 26/9 and 26/22 were adopted in 2014. Submissions by states suggest that the lines are hardening with states from the Global North not being in favour.

At the time of writing, the eighth session started, and the general remarks made by state delegations and CSO representatives confirm an overwhelming sense that participants are a long way from reaching an agreement on a legally binding instrument. Deva, who addressed the delegations as part of a panel discussion at the 2022 session, expressed the desire that the negotiation process end in 2025;[784] however, the Chair-Rapporteur doubts this will be possible.[785] The prospect of success in negotiating an internationally legally binding instrument is discussed in Chapter 6.

[783] *Ibid.*
[784] 2nd Meeting, 8th Session of Open-ended Intergovernmental Working Group on Transnational Corporations. https://media.un.org/en/asset/k19/k19fknxmsg at 02:21:26 of 02:57:45 (accessed 30 October 2022).
[785] *Ibid*.

CHAPTER 3 – THE RESPONSE: FRANCE, GERMANY, THE EUROPEAN UNION, AND CHINA

> *"States should take appropriate measures to prevent, investigate, punish and redress corporate abuses through appropriate policies, regulations, and accountability".*[786]

3.1. Introduction

In June 2021, the European Coalition for Corporate Justice (ECCJ) concluded that governments' failure to regulate effective due diligence obligations is the reason that "non-compliance continues to be a major obstacle to a more just, sustainable world!", and if the UNGP is to work, it will be only if governments want it.[787] This is a harsh conclusion ten years after the UNGP was endorsed as the first global standard aimed at preventing and addressing the risk of adverse impacts on human rights linked to business activity.[788]

This chapter elaborates on the efforts undertaken by two governments, those of France and Germany, to implement the Guidelines. The EU proposed draft directive is also discussed.

From the research conducted for this thesis, two issues became apparent:

(1) The crucial role played by CSOs in motivating politicians to pivot from voluntary CSR to binding human rights and environmental requirements; and

(2) That China, which was once considered the "workbench of the world", cannot be excluded from the discussion, especially as they are transforming into a global power.[789]

Before concluding this chapter, I discuss the role of CSOs in the responses of France, Germany, and the EU to the UNGP, as well as China's response to Ruggies's principles.

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[786] UN Guiding Principles on Business and Human Rights. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (Accessed 10 May 2022).
[787] ECCJ "Justice delayed: 10 years of UN Guiding Principles News Global Due diligence Access to justice" 16 June 2021.
[788] *Ibid*.
[789] China as a global power: Statista overview report on China as a global power. Available at: https://www.statista.com/study/88121/china-as-a-global-power/ (5 September 2023).

3.2. France

In 2012, referring to human rights, former French President François Hollande said: "France wants to set an example, not to teach others a lesson but because it's our history, our message. Setting an example in promoting fundamental freedoms is our battle and a matter of honour for us".[790] In March 2017, the French parliament adopted the first business and human rights law, the *Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre,* translated as the law about the duty of due diligence of parent companies and main contractors.[791]

During a parliamentary debate, Dominique Potier, the Rapporteur who introduced the *Loi de Vigilance* (vigilance law; hereafter LdV), pronounced that the law pursued the modest but realistic objective of leading the way, showing the world that action is possible and also that history has shown how one country can initiate a movement of progress that can eventually spread to all continents.[792] The LdV represents the first endeavour in which states play a role of forcing companies to comply with human rights standards. Although not as ambitious as originally intended and despite objections from business lobbies, the LdV was passed in March 2017.[793] The French law is said to "pursue the objective of a fair correlation between the economic power of multinationals and their legal responsibility".[794] This objective presupposes the existence of conditions that make civil action against them possible if necessary.[795] According to Potier, the modern world aims to move away from the "old" economy dominated by economic consideration and the "frantic search for profitability".[796] The LdV is seen as a measure of correcting the excesses that "relegated the worker to the ranks of simple raw material and

[790] Hollande President of the Republic Opening Debate of the 67th Session of the General Assembly of the United Nations, 25 September 2012.
[791] Law *no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* English version available at https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf (accessed 20 October 2021).
[792] *Assemblée Nationale* 11 March 2015. Bill relating to the duty of care of parent companies and ordering companies 2578 Potier Rapporteur.
[793] Durán Ayago 2020 *Cuad Eur Deusto* 189. Four bills of the law were presented.
[794] *Assemblée Nationale* 11 March 2015. Bill relating to the duty of care of parent companies and ordering companies 2578 Potier Rapporteur.
[795] *Ibid*.
[796] *Ibid*.

sometimes of waste". [797] According to Potier, such excesses can no longer exist in developed market economy countries, in mentality or in the law.[798]

To achieve its goal, the LdV prescribes that companies above a specific size compile a vigilance plan.

3.2.1. The French Vigilance Law (LdV)

The explanatory memorandum of the first draft of the LdV refers to UNGP; it is considered the inspiration for the law and is seen as a reference for French businesses regarding the issue of human rights.[799]

The law lists several measures to be taken by companies of a specific size. Companies must:

- map risks by identifying, analysing, and prioritising the risks;
- establish procedures to conduct regular risk assessment of subsidiaries, subcontractors, or suppliers with whom the company maintains commercial relationships;
- take actions to mitigate risks or avert serious damage;
- together with trade union organisations, establish mechanisms for the monitoring but also for alerting of harms; and
- create a monitoring scheme to ensure the plan is implemented and check the efficiency of the measures.[800]

These measures must be taken by companies that have employed for two consecutive financial years more than 5,000 employees nationally or have 10,000 employees worldwide, whether as parent companies or as subsidiaries. Companies that satisfy the conditions of the corporate form under French law and employ the specified number of people are bound by the vigilance obligations, even if they are French subsidiaries of foreign groups.

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[797] *Ibid*.
[798] *Ibid.*
[799] Brabant and Savourey 2017 Scope of the Law on Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations 2.
[800] Law no. 2017-399, note 1, art 1, paras 4–9.

The French law establishes a threefold duty of care: elaboration, disclosure, and effective implementation of a vigilance plan (*plan de vigilance*).[801]

3.2.2. Companies Subject to the Law de Vigilance

The law does not specify which corporate forms it applies to. However, commentators[802] believe that if the LdV is read together with other parts of the French Commercial Code, the law applies to:

- public limited companies (*société anonyme*);
- partnership limited by shares (*société en commandite par actions*); and
- the European company form (*société européenne*), a company form governed by EU law.

It is unclear whether the corporate form that large industrial enterprises use as a corporate vehicle for holding companies and joint ventures, both at the national and international level, falls in the scope of the LdV.[803] These are companies incorporated as private companies limited by shares and are called *Sociétés par Actions Simplifiées* (SASs).[804] This uncertainty stems from the Commercial Code provision that covers the publication of SASs' management reports[805] and expressly excludes SASs from its application.[806] Consequently, there is a belief that the "duty of vigilance would not apply to them".[807]

In 2017, it was estimated that the LdV applies to between 150 and 200 French companies. The law thus is more restrictive in its scope than the UNGP envisages.[808]

[801] Cossart *et al.* 2019 *Bus Hum Rights J* 320.
[802] Brabant and Savourey 2017 Scope of the Law on Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations 2.
[803] J2M Tax & Legal no date Incorporation of a Private Company Limited by Shares – Simplified (*Société par Actions Simplifiée*).
[804] Brabant and Savourey 2017 Scope of the Law on Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations 3.
[805] *Ibid*.
[806] Law no. 2017- 227-1 paragraph 3.
[807] Brabant and Savourey 2017 Scope of the Law on Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations 3.
[808] *Ibid*.

3.2.3. The Vigilance Plan

Companies of a certain size have a duty of care and should compile a vigilance plan, referred to as the cornerstone of the LdV.[809] There are three vigilance obligations articulated in the law that involve the elaboration, disclosure, and effective implementation of a vigilance plan.[810] The plan must be drawn up with input from stakeholders or those associated with multi-stakeholder initiatives within sectors or at the territorial level.[811]

Before discussing the requirements of the vigilance plan, the entities in a specific company that must form part of the vigilance plan are examined.

3.2.4. The Ambit of the Vigilance Plan

Before implementing a plan, companies must establish which entities fall in the law's ambit because the vigilance plan covers the activities of the specific enterprise and the actions of a whole range of entities connected to that enterprise. For example, in terms of the LdV, companies must include in their plan the activities of the "companies that it controls,[812] directly or indirectly, as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship when these activities are related to this relationship".[813] In addition, the French Commercial Code defines an established commercial relationship as a "stable, regular commercial relationship taking place with or without a contract, with a particular volume of business and under a reasonable expectation that the relationship will last".[814]

3.2.5. Controlled Companies

To establish the ambit of the vigilance plan, it must be determined which companies' activities are included in the vigilance plan. However, it is not straightforward. When France's Constitutional Court ruled that a fixed fine in the event of a breach was unconstitutional, it stated that "the perimeter of the companies, enterprises, and operations that fall within the scope of the oversight plan … [is] … defined with […] inadequate clarity and precision".[815] Under French law,

[809] Brabant *et al*. 2017 The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance 1.
[810] Law no. 2017-399, note 1, art 1, para 3.
[811] *Ibid*.
[812] Within the meaning of ART L. 233-16 II of the French Commercial Code.
[813] Comm. Code, Art L. 225-102-4, para. 3 available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000035181820/.
[814] Cossart *et al*. 2019 320.
[815] Décision no. 2017-750, para 13 available at: https://www.conseil- constitutionnel.fr/en/decision/2017/2017750DC.htm.

"exclusive control" enables a company to regulate another entity's financial and operational policy decision-making.[816] In other words, when entities are directly and indirectly controlled without any limit to the chain of control and the company exercises a decision-making power, whether the entities are direct subsidiaries, second-tier subsidiaries, or third-tier subsidiaries, these are considered controlled companies.[817]

3.2.6. Suppliers and Subcontractors

Determining the ambit of the LdV with regard to suppliers and subcontractors is more challenging. An early version of the law limited the plan to cover an established commercial relationship of the specific entity responsible for setting up the vigilance plan.[818] However, the final law does not limit the cover to subcontractors and suppliers of the specific enterprise and also does not state if suppliers and subcontractors of the specific enterprise and other companies under its control are envisaged.[819] According to Brabant *et al*., the law should be interpreted "beyond the letter of the law" because the text reads, "reasonable vigilance measures to identify the risks and prevent severe impacts […] resulting from the activities of the company and those of the companies which it controls […], as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship when these activities are linked to this relationship".[820] The authors suggest that the Guiding Principles should be referred to because it was stated during the parliamentary debate that the UNGP provides "an ideal and internationally recognised foundation for the construction of a vigilance plan".[821] Under the UNGP, compiling a due diligence plan depends on the company's degree of involvement in the activities that could adversely impact human rights.[822] The authors conclude that if the activities, whether products or services, have adverse human rights impacts because of a company's direct or indirect business relationship, then they are in the ambit.[823] This means that a company can escape responsibility for adverse consequences only when these impacts have no connection whatsoever with the company.[824]

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[816] Brabant *et al*. 2017 The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance 2.
[817] *Ibid*.
[818] *Ibid* 3–4.
[819] *Ibid* 4.
[820] *Ibid*.
[821] *Ibid*.
[822] *Ibid*.
[823] *Ibid*.
[824] *Ibid.*

3.2.7. The Requirements for a Vigilance Plan

A company's plan must ensure that reasonable vigilance measures are taken to identify risk and take steps to prevent severe violations of human rights and fundamental freedoms, serious bodily injury, environmental damage, or health risks.[825]

The LdV articulates what risks a vigilance plan must identify and prevent as severe impacts:

- on human rights and fundamental freedoms
- on health and safety of persons
- on the environment

which result from their activities.[826]

The law does not list the norms that can be referenced when assessing the concept of "impact on human rights and fundamental freedoms, severe physical or environmental harms or health risks".[827] However, France has undertaken international human rights commitments and, therefore, it is understood because of the commitment to the International Bill of Human Rights, which is mentioned in the UNGP, and based on the content in the parliamentary debates, the rights that can be invoked are: first-generation rights and public liberties such as property rights, freedom of conscience, political rights and so on; second-generation rights, which include, among others, the right to work, access to healthcare, education, and strike; and third-generation rights that involve issues such as environment and bioethics.[828]

Additionally, it is suggested that companies' activities pose a risk to the health and safety not only of workers but also to local communities, and they are to be included in the vigilance plan.[829] The nature of globalisation means vigilance plans will involve entities that are subject to different legal protections because they are located in various jurisdictions; therefore, companies should aim to respect international standards if such standards are more protective than the "standards of the jurisdictions in which the entities […] operate".[830]

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[825] *Ibid*.
[826] Law no. 2017-399, note 1, art 1, para 3.
[827] Brabant *et al*. 2017 The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance 7.
[828] *Ibid*.
[829] *Ibid*.
[830] *Ibid*.

3.2.8. Stakeholders: Who Can Give Input?

The LdV states: "the plan shall be drafted in association with the company's stakeholders, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at a territorial level".[831] The idea of stakeholders is found in soft law instruments and stems from theories of corporate governance.[832] French vigilance law does not define who the stakeholders are. Although the French Constitutional Court did not strike the wording from the provision, they concluded that the "elastic and multi-faceted nature of stakeholders does not, prima facie, satisfy the requirements of legal certainty".[833] According to Beau de Loménie and Cossart, the stakeholders of a specific entity are identifiable and while the term constitutes several elements, they all "share a common feature, which is to have their rights and obligations affected directly or indirectly by a given company's activities".[834] The input of stakeholders in vigilance plans is not an obligation but merely an incentive.[835] Stakeholders can be internal, CSR departments, or trade unions, or external, NGOs, international organisations, and local residents.[836] The voluntary nature of expanding the vigilance plan to include stakeholders is viewed as a compromise between hard and soft law and thus between regulation and self-regulation, and so doing, preserves the self-regulation capacity of companies.[837]

The purpose of the vigilance plans is for a company to gather vital and reliable information about the potential adverse human rights and environmental impacts of its activities. In order to achieve that aim, the company must identify potential stakeholders and those effectively impacted, who then engage with the company to map the risks, which is thereafter followed by the effective implementation of the plan and monitoring of its effectiveness and implementation.[838] The legislation foresees an ongoing interactive relationship between the company and the stakeholders who are involved in developing the plan and the "management of alerts, complaints, and reporting".[839] In the same way as the UNGP, the law allows for methods of

[831] Brabant *et al*. 2017 The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance 7.
[832] UNGP, OECD Guidelines.
[833] Beau de Loménie and Cossart 2017 Stakeholders and the Duty of Vigilance 1.
[834] *Ibid* 2.
[835] *Ibid.*
[836] *Idem* 3–4.
[837] *Ibid* 3.
[838] *Idem* 4.
[839] *Ibid*.

alerting and reporting that must be centralised in the parent company.[840] The LdV prescribes the following:

- setting up a regulatory framework for controlling and checking the veracity of the information given;
- taking steps to prevent retaliation; and
- complying with personal data management requirements, managing publication or compliance with international standards.[841]

3.2.9. Publication of Vigilance Plan

The law stipulates that the vigilance plan must be made public and its effective implementation reported in the company's annual management report. In addition, the plan is subject to a decree of the Council of State that can add to the required measures by specifying how the vigilance plan can be elaborated on and implemented.[842] Thus, the publication of the vigilance plan, as well as reporting on the efficacy of its implementation, means that "shareholders, individuals and actors from civil society […] have access to better information on how the company is meeting its vigilance obligations, which creates even more effective external monitoring".[843] External monitoring leads to stakeholders exposing companies' activities that harm human rights or the environment, thus, naming and shaming can contribute to behavioural change. External monitoring, together with periodic penalty payments that the LdV authorises parties with legal standing to seek, makes the LdV more effective.

3.2.10. Penalties Under the Law de Vigilance

Brabant and Savourey view the vigilance plan as the backbone of the vigilance obligations imposed by the LdV.[844] Stakeholders are included in mapping a vigilance plan, and the authors highlight that the plans must include actions that can be implemented before human rights abuses occur.[845] To have appropriate processes to prevent and address the adverse impacts a company's activities may have on rights is something that is distinct from remediation.[846] For

[840] *Ibid*.
[841] *Ibid*.
[842] Law no. 2017-399 note 1, art 1, paras 10–11.
[843] *Ibid.*
[844] Brabant and Savourey 2017 A Closer Look at the Penalties Faced by Companies 4.
[845] *Ibid.*
[846] *Idem* 5.

companies, the process of preventing and addressing adverse impacts is to conduct due diligence, which can be incorporated into broader enterprise risk management systems.[847] Remediation, on the other hand, refers to the process of providing a remedy for an adverse impact and making good the adverse impact, for example, apologies, restitution, or financial or non-financial compensation, or guarantees of non-repetition, among others.[848]

The LdV initially included some form of remediation; unfortunately, this provision was ruled unconstitutional and struck out.[849] Brabant and Savourey believe that the "now-rejected civil fine also reflected [a] focus on prevention".[850] Despite the constitutional rejection of the civil fine, the vigilance law makes sure that companies comply with a threefold duty of care, as well as a civil liability regime in cases where there is actual harm to fundamental freedoms, health and safety, or the environment.[851] The LdV imposed two penalties deemed to be in line with the French Constitution.[852] These penalties have the dual purpose of remediation and prevention. TNCs can be motivated to act responsibly, thereby preventing the occurrence of events that violate human rights or harm the environment, whether in France or abroad.[853]

If a company fails to map potential risks in a vigilance plan, people with a legitimate interest can submit a formal notice to the company to comply.[854] If the company does not comply, a competent court can be approached to order the company, subject to a penalty (discussed below), to comply with the legal requirement to draw up a vigilance plan.[855] In other words, parties with *locus standi* with the help of the courts can force a company to ensure the publication of a vigilance plan and report on its effective implementation. In addition, the law imposes periodic penalty payments decided by a judge to encourage the non-compliant company to satisfy its vigilance obligations.[856] If a party has standing, the LdV allows members of civil society to check whether the vigilance obligations are being observed, irrespective of whether any actual damage has been sustained.[857] The threat of legal action and the consequent prospect of

[847] OECD 2018 Due Diligence Guidance for Responsible Business Conduct 3.
[848] *Idem* 4.
[849] Décision no. 2017-750, para 13.
[850] Brabant and Savourey 2017 A Closer Look at the Penalties Faced by Companies 5.
[851] Cossart *et al*. 2019 321.
[852] Brabant and Savourey 2017 A Closer Look at the Penalties Faced by Companies 1.
[853] *Ibid* 2.
[854] Law no. 2017-399, note 2.
[855] *Ibid*.
[856] Brabant and Savourey 2017 A Closer Look at the Penalties Faced by Companies 2.
[857] *Ibid*.

penalties serve as tools to "encourage companies to implement their vigilance plan to monitor and control their risks".[858] A failure to comply with the mapping, implementing, and monitoring of the risks exposes a company's activities to a threat of legal action and comprises legal and financial risks.[859] In short, if a company fails to comply with the requirement of the LdV and after receiving an official notice with three months to comply, a competent party can ask the relevant court to order the company to comply, and the decision is made public.[860]

Initially, it was envisaged that a judge could impose a civil fine of up to €10 million, but, as mentioned previously, this provision was found to be unconstitutional by the French Constitutional Council and is not included in the LdV.[861] Instead, when people suffer harm, they can seek damages for negligence if the company fails to comply with the vigilance plan or if its vigilance plan is inadequate.[862] In other words, the "duty of care sets a standard of conduct, and not implementing it can be considered a breach of legal obligations".[863] Companies incur civil liability under the French Civil Code[864] if they fail to comply with their legally prescribed obligations and if that failure can be linked to the harm suffered by the injured party.[865] According to Cossart *et al*., this requirement amounts to an obligation of the process (*obligation de moyens*) and not of the result (*obligation de résultat*), which requires the injured party to prove that failure to comply led to the harm suffered.[866] Meaning, "victims of business failing to comply with their vigilance plan, or with an inadequate vigilance plan, can seek damages for negligence".[867] The French legal system distinguishes between an obligation of result to deliver what is specified, that is, *obligation de résultat,* and the promise of best efforts, which is *obligation de moyens*.[868] Under the LdV, the aggrieved party has to show that a company did not comply with the obligations imposed by the legislation and that the damage suffered could have been prevented by the company doing what the law prescribes, thus making the company liable under tort law.[869]

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858 *Ibid*.
859 *Idem* 4.
860 *Ibid*.
861 Decision no. 2017-750 DC of 23 March 2017 https://www.conseil-constitutionnel.fr/en/decision/2017/2017750DC.htm (accessed 5 May 2022).
862 Law no. 2017-399, art 2, para 1.
863 Cossart *et al*. 2019 321.
864 Arts 1240 and 1241.
865 Cossart *et al*. 2019 321.
866 *Ibid*.
867 *Ibid.*
868 Grundmann 2009 *Mich Law Rev* 1589.
869 Brabant and Savourey 2017 A Closer Look at the Penalties Faced by Companies 2.

According to Brabant and Savourey, to establish civil liability under the law of tort, there must be a breach of an obligation, there must be damage suffered, and causation between the two must exist.[870] The onus for proving that these conditions are satisfied under French law is on the claimant, which, according to the authors, normally is difficult for a claimant.[871]

3.2.11. The Law de Vigilance and the UNGP

When the first draft of the LdV was tabled, the UNGP was invoked in the statement that the law introduces vigilance obligations to keep "transnational corporations responsible in order to prevent tragedies from occurring in France and abroad and to obtain reparations for victims in the event of damage to human rights and the environment".[872] To establish the overlap between the UNGP and the LdV, this research draws on the Development International Report of 9 June 2020.[873]

The UNGP requires firms to implement a human rights policy, a position analogous to the French law's vigilance plan. Both the LdV[874] and the UNGP[875] require that companies identify, prevent, mitigate, and remediate human rights impacts.[876] In addition, the LdV requires a more concrete level of action, laying out specific steps within the more general guidelines established by a policy.[877] Finally, the law clarifies that not only traditional human rights, but also environmental matters and the issues of serious bodily injury and other health risks are included.[878]

The LdV provides that companies consult with stakeholders when drafting the vigilance plan and the UNGP recommends stakeholder input in a risk assessment.[879] The UNGP indicates that in order to determine the human rights risks, business enterprises should identify and assess actual or potential adverse human rights impacts that their activities may have.[880] The LdV specifies that companies must identify risks in more detail and further establishes a duty to

[870] *Ibid*.
[871] *Ibid*.
[872] *Assemblée Nationale* 11 February 2015. Draft Law relating to the duty of care of parent companies and ordering companies 2578 Le Roux B. Available at: https://www.assemblee-nationale.fr/14/propositions/pion2578.asp (accessed 27 April 2022).
[873] Ibañez *et al*. 2020 *Devoir de Vigilance: Reforming Corporate Risk Engagement* 27, 28.
[874] Art L. 225-102-4.– I.
[875] Guiding Principle 16
[876] Ibañez *et al*. 2020 23.
[877] *Ibid.*
[878] *Ibid.*
[879] *Ibid.*
[880] Ruggie 2011.

implement risk assessment procedures and an alert system.[881] The LdV prescribes that the risks identified get ranked in the risk mapping in accordance with Principle 24 of the UNGP, which recommends prioritising actions to address actual and potential adverse human rights impacts.[882]

According to Principle 19 of the UNGP, companies should integrate risk assessment findings within internal functions and take appropriate action.[883] The LdV translates the recommendation into a legal requirement to take appropriate action to mitigate risks or prevent serious violations.[884] Principle 20 of the UNGP recommends that business enterprises track the effectiveness of their response to verify whether adverse human rights impacts are being addressed.[885] The French law implemented "a monitoring scheme to follow up on the measures implemented and assess their efficiency".[886]

The LdV establishes an alert system equivalent to UNGP, Principle 29, which recommends that companies set up a grievance mechanism for communities and individuals who may be impacted by company activities.[887]

With regard to the publication and implementation of vigilance plans, the LdV articulates that a vigilance plan must be more concrete than a policy and further provides that a vigilance plan statement must be published in the management report, as well as be presented by the executive board or the board of directors to the ordinary general meeting of shareholders every year.[888] This provision corresponds with Principle 16 of the UNGP, which recommends that a business enterprise expresses its commitment to respect human rights through a stated policy approved at the most senior level of the business enterprise.[889] The policy, which is to be informed by relevant internal and/or external expertise, should stipulate what the enterprise's human rights expectations are to personnel, business partners, and other parties directly linked

[881] Ibañez *et al*. 2020 24.
[882] *Ibid*.
[883] Guiding Principles.
[884] Ibañez *et al*. 2020 24.
[885] *Ibid*.
[886] Law no. 2017-399. Ibañez *et al*. 2020 25.
[887] Ruggie Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises 25.
[888] Ibañez *et al*. 2020 26.
[889] Ruggie Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises 15.

to its operations, products or services and be publicly available and communicated internally and externally.[890]

The UNGP's Principle 21 states, "to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally".[891] The French law requires that vigilance plans be designed to include a risk map, risk assessment procedures, risk mitigation actions, an alert mechanism, and an effective monitoring system.[892] In addition, the plan must be published in the management report, thus making all the items mentioned above publicly available to external parties, which aligns the LdV with the duty for public accountability expressed in Principle 21 of the UNGP.[893]

3.2.12. The Impact of the Law de Vigilance

The French law is unprecedented as it is a "formal recognition that soft law principles and voluntary initiatives are insufficient",[894] while recognising the economic reality that parent companies have a significant influence over their subsidiaries and their supply chains.[895] It is not surprising that when the law was passed, it was heralded as a positive first step,[896] a pioneer and remarkable progress.[897] On the one hand, the law is viewed as a "historic step forward for the corporate accountability movement" even though it was "watered down" because it did not include a reversal of the burden of proof from victims to companies or include the civil fine.[898] On the other hand, by adopting the LdV, it is feared that France runs the risk of imposing "unbearable duties" on companies that already are operating in a weak economy, which could encourage them to migrate to more lenient European jurisdictions.[899]

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[890] Ibañez *et al*. 2020 26.
[891] Ruggie Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises 20.
[892] Ibañez *et al*. 2020 27, 28.
[893] Ruggie Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises 20.
[894] Cossart and Chatelain What lessons does France's Duty of Vigilance law have for other national initiatives? 27 June 2019.
[895] *Ibid*.
[896] *Ibid.*
[897] Lavite "The French *Loi de Vigilance*: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence" (16 June 2020).
[898] Cossart *et al*. 2019 317.
[899] Barsan 2017 404.

Two years after the LdV came into effect, a study was undertaken into how eligible companies are implementing the law, including the quality of their reporting.[900] The study was the most comprehensive analysis since the implementation of the law and surveyed 134 companies that self-identified as subject to the law.[901] The study focused on whether companies complied with the minimum requirements of the LdV and how well companies' vigilance plans conformed with the UNGP human rights due diligence expectations, and evaluated how transparent and accessible the vigilance plans were using performance and qualitative indicators.[902] The study found that 91% of companies had established vigilance plans and that the quality of the plans varied from plans that were less than a page long, to one-page long plans consisting mainly of cross-references, to vigilance plans that were longer than a page but only because of font size and spacing, as well as to vigilance plans that merged non-financial statement section and the vigilance plan section.[903] On average, companies scored 66% when it came to compliance with the minimum requirements.[904] These findings suggest that French-based companies adopted a narrow compliance-orientated approach to the law rather than fully embracing the spirit of the LdV law.[905]

The LdV is a law passed without an EU Directive on the issue because conditions in 2017 were such that the government of President François Hollande and his Socialist Party had little choice given the extensive pressure from trade unions, civil society, and parliamentarians. The role of CSOs is discussed later in this chapter.[906]

3.3. Germany

Though the debate in Germany about mandatory human rights due diligence law started in mid-2010, developments in France inspired civil society and academics to explore the possibility of a German due diligence law.[907] Few economies are so internationally entwined as that of the Federal Republic of Germany and, for this reason, it was noted in the German NAP on Business and Human Rights that a responsible shaping of a sustainable and successful global economy

[900] Ibañez *et al*. 2020 6.
[901] *Ibid*.
[902] *Ibid*.
[903] Ibañez *et al*. 2020 51–52.
[904] *Ibid* 6.
[905] Bright 2020 in Ibañez *et al.* 2020 *Devoir de Vigilance:* Reforming Corporate Risk Engagement 7.
[906] See para 3.5 below.
[907] Krajewski *et al*. 2021 *Bus Hum Rights J* 553.

is of particular importance to the German government and that the ever-increasing involvement of German businesses in the global supply and value chains presents both opportunities and challenges.[908] On 21 December 2016, the German government implemented the UNGP by adopting the NAP.[909]

In the field of human rights, NAPs are drawn up so that states can identify steps whereby they "improve the promotion and protection of human rights".[910] NAPs are seen as a "rising phenomenon", and in 2011, the European Commission called on member states to implement the UNGP into NAPs.[911] In addition, the 2014 UNHRC Resolution 26/22 emphasised the vital role of NAPs and encouraged the implementation of the Guiding Principles through action plans.[912]

3.3.1. The German National Action Plan on Business and Human Rights (NAP)

The German NAP was developed in a two-year process that included presenting a baseline study in February 2015, which started the multi-stakeholder consultation process.[913] The action plan describes how Germany has to meet its human rights obligations in business and human rights.[914] The negotiation process involved rigorous discussions as to whether the UNGP should be implemented as a binding legal instrument or whether it should be voluntary regulation by a regime that will encourage companies to implement the UNGP.[915] Finding a "smart mix" of voluntary and binding regulations that Ruggie advocated as necessary to create a level playing field for all companies was not straightforward, so the German negotiators opted for voluntary measures as they found no legal basis for human rights due diligence in German law.[916] The resulting NAP has the following as its stated objectives:

- to make the UNGP applicable in practice for all players;

[908] German NAP 4.
[909] Statement *Stellungnahme Verabschiedung NAP* 2016 3.
[910] Originally included in the Vienna Declaration and Programme of Action, when the World Conference "recommend[ed] that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights". Available at: https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx (accessed 20 September 2022).
[911] Hutt *German action plan on business and human rights: A step forward or just business as usual?* 26.
[912] UN Resolution A/HRC/RES/26/22 2014. Available at: https://undocs.org/A/HRC/RES/26/22 (accessed 20 September 2022).
[913] Statement S*tellungnahme Verabschiedung NAP* 3 2016.
[914] German NAP 5.
[915] Statement *Stellungnahme Verabschiedung NAP* 2016 4.
[916] *Ibid*.

- to highlight the duties and responsibilities of the state and business, respectively;
- to guarantee policy coherence; and
- to make sure that German businesses remain sustainable and competitive.[917]

The NAP was meant to be a "road map for the practical implementation of the Guiding Principles" to improve the human rights situation throughout supply and value chains in Germany and worldwide.[918]

From the outset, the German Federal Government expected all enterprises to introduce the process of corporate due diligence "in a manner commensurate with their size, the sector in which they operate, and their position in supply and value chains".[919] The NAP aspired to reach 50% implementation by all German companies that employ more than 500 employees.[920] Thus, the hope was that approximately 3,000 companies would integrate a procedure to identify human rights risks in their business processes within the four years following the passing of the NAP.[921] The Federal government included a provision in the NAP that the government will "check" the implementation progress and that a review would be conducted in 2020.[922]

The core elements of human rights due diligence in the NAP are:

- a human rights policy statement that should be adopted by the senior management of enterprises and communicated within and outside the business;[923]
- to establish procedures for the identification of actual or potential adverse impacts on human rights where such procedures will identify, prevent or mitigate those potentially adverse effects of corporate activity on employees of the enterprise itself or of other companies in the supply chain, local populations, and customers;[924]
- to undertake measures to ward off potentially adverse impacts and review the effectiveness of these measures, which is done once the analysis is made;[925]

[917] German NAP 5.
[918] German NAP 5.
[919] German NAP 7.
[920] Statement *Stellungnahme Verabschiedung NAP* 2016 5.
[921] *Ibid*.
[922] *Idem* 4.
[923] German NAP 8.
[924] *Ibid*.
[925] *Ibid*.

- to report where appropriate to external entities to show that the company is aware of the actual and potential impact of corporate activity on human rights and is taking appropriate steps to address the situation;[926] and
- to implement a grievance mechanism to demonstrate that the enterprise is aware of its corporate activity's actual and potential impact on human rights and is taking appropriate steps to address the situation.[927]

3.3.2. The NAP Regarding the State's Duty to Protect

The NAP formulates that the German Federal Government will heed the protection of human rights in the business context when formulating basic rules governing its economic policy,[928] and this will be done when contracting with business enterprises and for state-owned enterprises.[929] The NAP further articulates the legislative measures already undertaken by the Federal government, such as passing minimum wage legislation, providing protections for whistle-blowers in the German Civil Code,[930] and placing men and women on an equal footing at all levels of the public and private sectors.[931] To further comply with the duty to protect, as articulated in the UNGP, the German NAP formulates measures such as supplementing existing governmental structures to combat human trafficking for exploitative employment and fighting abuses of temporary agency work and service contract agreements.[932] The final measure that is mentioned is to pass legislation that specifically allows for the disclosure of trade secrets to be lawful when the information is disclosed during the exposure of professional or other misconduct or illegal activity in the public interest.[933]

The NAP emphasises that the EU remains exclusively responsible for international trade policy matters.[934] The NAP stipulates that the German government supports the "systematic inclusion of sustainability chapters in free trade agreements", including the Transatlantic Trade and

[926] German NAP 9.
[927] German NAP 9.
[928] German NAP 11.
[929] *Ibid.*
[930] Ss 612 and 626 of the German Civil Code and s 1 of the Protection against Unfair Dismissal Act.
[931] Act on the Equal Participation of Women and Men in Leadership Positions in the Private and the Public Sector in force since 2015.
[932] German NAP 13.
[933] Is the transposition of European Directive 2016/943/EU. German NAP 13.
[934] *Ibid*.

Investment Partnership.[935] In addition, the NAP articulates that the German Federal Government will support what is referred to as "developing countries" by improving trade prospects, ensuring compliance with standards and strengthening the implementation of trade agreements.[936]

In accordance with Principles 5 to 7 of the UNGP, Germany's NAP deals with public procurement, state subsidies, and support and state-owned companies.[937] From the document, it is clear the German Federal Government takes the duty to protect against human rights violations seriously.

3.3.3. The NAP Regarding Businesses' Duty to Respect

The UNGP Principle 11 formulates that business enterprises should respect human rights, which means they avoid infringing on the human rights of others and address adverse human rights impacts caused by activities in which they are involved.[938] The German NAP affirms that companies should formulate a common definition of human rights due diligence within given regions and/or sectors.[939] It is difficult for businesses to meet systemic challenges, yet the German government expects companies to do the responsible thing and exercise due diligence with regard to human rights.[940] Enterprises are able to discharge their responsibility to exercise due diligence regarding human rights by creating and applying management instruments that appropriately minimise the risk of their activities having an adverse impact.[941]

Germany's NAP references the OECD Guidelines for Multinational Enterprises, which call on enterprises to do everything they can to avoid causing or contributing to adverse human rights impacts when undertaking activities at home and abroad.[942] The UNGP prioritises respecting human rights in areas that experience conflict. Consequently, to ensure that German corporations operating in such conditions have no part in "any adverse impacts on human rights", the NAP provides that the German government is committed to establishing binding due diligence rules that do not entail unnecessary bureaucratic red tape specifically for small- and

[935] *Ibid*.
[936] Statement *Stellungnahme Verabschiedung NAP* 2016 6.
[937] NAP 15–16.
[938] NAP 19.
[939] *Ibid*.
[940] *Ibid*.
[941] *Ibid*.
[942] *Ibid*.

medium-sized enterprises.[943] The NAP expressly refers to the federal government's aims to "prevent the use of proceeds from the sale of tin, tantalum, and tungsten (or their respective ores) and gold, to fund armed struggles in conflict zones and other high-risk areas of state structures".[944]

3.3.4. The NAP Regarding Redress

The UNGP's Principle 25 deals with states' duty to protect against business-related human rights abuse and the appropriate steps they have to take to ensure through judicial, administrative, legislative, or other appropriate means that in the event of such abuses occurring in their territory and/or jurisdiction, those affected will have access to effective remedy.[945] Consequently, the NAP established access to justice through the German courts.[946] Civil remedies are proposed for those whose rights are infringed by the actions of an enterprise through German courts guaranteeing access to remedies and redress.[947] Additionally, legal action can be brought in Germany when a German enterprise acts in ways that infringe on the rights of people who live abroad.[948] Finally, the NAP makes provision for the relevant court that has jurisdiction to be where the company's head office is registered.[949] According to the German Code of Civil Procedure, it is already possible to approach German courts for offences committed abroad, provided sufficient domestic connection can be shown.[950]

Companies can be held liable for their management's conduct if that conduct breaches criminal law, including company-related human rights violations.[951] Under the Regulatory Offences Act, a fine of up to €10 million may be imposed. However, it is possible for higher penalties to be imposed if an economic benefit is derived from the offence.[952] The NAP provides for national contact points, which already exist for the OECD Guidelines for Multinational Enterprises, which

[943] NAP 22.
[944] *Ibid*.
[945] NAP 24.
[946] *Ibid*.
[947] *Ibid*.
[948] *Ibid*.
[949] specific jurisdiction for tort under s 32 German Civil Code.
[950] NAP 25.
[951] *Ibid*.
[952] *Ibid*.

raise awareness and promote compliance with the OECD Guidelines and can be an effective extra-judicial grievance mechanism in implementing the UNGP.[953]

Finally, the NAP includes monitoring in an annual survey of how corporations implement the human rights due diligence elements set out in the NAP.[954] The NAP sets 2020 as the year when a review is to be conducted to establish whether at least 50% of all German-based enterprises with more than 500 employees have complied with the provisions of the NAP.[955] The review would include a 'comply or explain' mechanism that allows companies to explain why they failed to implement the NAP procedures.[956]

3.3.5. The Impact of the German National Action Plan

The review of the implementation of the NAP produced a final report that was adopted in October 2020.[957] According to the report, a mere 13% to 17% of the surveyed German companies complied with the NAP requirements, and 10% to 12% of enterprises were found to be "on the right track" towards fulfilling the NAP requirements.[958] This result is a far cry from the government's target of at least 50% compliance. The German Federal Government thus had to make good on its undertaking that if adherence to the NAP target was missed, they would consider further action, including legislative measures.[959] The 2018 Coalition Government Agreement undertook to implement the provisions of the NAP and, after the dismal compliance by corporations, steps had to be taken towards formulating binding legislation.[960] Legislative action was taken in July 2021.

Despite the low level of compliance, the NAP is viewed as an essential first step that relies on companies voluntarily implementing the requirements.[961] Though voluntary, the NAP remains in place for companies that do not meet the employee threshold required by the binding legislation.[962]

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[953] NAP 26.
[954] NAP 28.
[955] *Ibid*.
[956] *Ibid.*
[957] "Monitoring the National Action Plan for Business and Human Rights" (13 October 2020).
[958] *Ibid*.
[959] NAP 10.
[960] *Ein neuer Aufbruch für Europa Eine neue Dynamik für Deutschland Ein neuer Zusammenhalt für unser Land Koalitionsvertrag zwischen CDU, CSU und SPD 19* Legislaturperiode.
[961] Questions and Answers on the Due Diligence in Supply Chains Act.
[962] *Ibid.*

3.3.6. Germany's Corporate Due Diligence in Supply Chain Act

Christine Lambrecht, the then German Minister of Justice, stated that human rights are non-negotiable and that human rights demand respect and protection worldwide.[963] The German parliament passed the *Sorgfaltspflichtengesetz Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten* (Due Diligence Act on Corporate Due Diligence to Avoid Human Rights Violations in Supply Chains; in short, Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz*; hereafter LkSG)).[964]

The LkSG is legislation that is the result of a compromise between three federal ministers (two who headed the ministries responsible for the drafting of the legislation and one who was the Federal Minister of Economics) after the parliamentary coalition committee blocked a draft law.[965] Negotiating the compromise legislation was contentious and by no means a certainty.[966] The LkSG is a law that German politicians congratulate themselves on achieving, whereas civil society considers the law to be a watered-down measure – "a glass half empty";[967] "a start but with still a long way from the goal".[968] The following section discusses the Supply Chain Due Diligence Act (interchangeably, the LkSG).

3.3.6.1. The scope of the Act

The LkSG would come into force in January 2023 for companies that employ more than 3,000 workers in Germany regardless of their legal form.[969] From 2024, companies that employ more than 1,000 employees in Germany will also be subject to the law.[970] The law applies to companies with their head offices, principal place of business, administrative headquarters, or registered offices in Germany.[971] If foreign companies have at least 3,000 or 1,000 employees

[963] Bundesminister für Arbeit und Soziales *Gesetze über die unternehmerischen Sorgfaltspflichten in Lieferketten — Sorgfaltspflichtengesetz vom Bundeskabinett beschlossen* 3 March 2021.
[964] *Ibid*.
[965] Business & Human Rights Resource Centre *Bundesregierung einigt sich auf Kompromiss beim Lieferkettengesetz – Kommentar der Initiative Lieferkettengesetz* 2021.
[966] Solomon "German proposals for supply chain law spark fierce debate" (9 July 2020).
[967] ECCJ "Germany's proposed supply-chain law: a glass half-empty" 2021.
[968] Human Rights Watch (11 June 2021).
[969] S 1 para 1 und Art 5 s 1 LkSG.
[970] S 1 para 1 s 3 LkSG.
[971] S 1 para 1 s 1 Nr 1 LkSG.

and have a seat or main office in Germany,[972] these companies also fall within the purview of the law.[973] According to section 1(2) of the LkSG, temporary workers are considered to be employees.[974]

3.3.6.2. Risks and violations covered by the Act

The legal interests, which are protected in section 2(1) of the LkSG, are those on the list contained in the legislation and the human rights conventions that are listed in the annexure. The conventions are to be used to ascertain the behavioural requirements or prohibitions for corporate action so that they prevent the violation of rights.[975] The LkSG lists the human rights that companies are not to violate.[976] These include the worst forms of child labour,[977] forced labour or slavery, inadequate occupational health and safety conditions, not allowing freedom of association, specifically, the freedom to join trade unions, discrimination[978] and unequal treatment, including unequal pay for work of equal value.[979] The list includes unfair pay, whereas fair pay is to be determined by local law or should be equal to the minimum wage established by the applicable law.[980] Included is environmental damage that the activities of a company should not cause, such as harmful soil alteration, water, air pollution, excessive noise pollution, or excessive water usage.[981] Further environmental risks included in the LkSG are unlawful eviction and the prohibition of illegal seizure of land, forests, and waters.[982] As companies do not have control over security forces, the law also prohibits companies from using private or public security forces to enforce their legal interest.[983] Finally, there is a prohibition on torture or cruel, inhuman, and degrading treatment or injury to life or limb.[984]

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[972] In the meaning of s 13(d) of the Commercial Code.
[973] S 1 para 1 S2 Nr 1 LkSG.
[974] S 1 para 2 LkSG.
[975] Act on Corporate Due Diligence Obligations in Supply Chains (no date).
[976] S 2 para 2 No. 2 LkSG.
[977] As articulated by the ILO Convention No. 182.
[978] On the basis of nationality, ethnic origin, socialisation, health status, disability, sexual orientation, age, gender, political opinion, religion or belief, unless this is justified by the requirements of the employment.
[979] S 2(2)(1) to (7) LkSG.
[980] S 2(2)(8) LkSG.
[981] S 2(2)(9) LkSG.
[982] S 2(2)(10) LkSG.
[983] S 2(2)(11) LkSG.
[984] *Ibid*.

The LkSG additionally lists environmental protections that are to be prevented, exposure to mercury (as defined in the Minamata Convention), and the production and use of chemicals under the Stockholm Convention, including persistent organic pollutants.[985]

3.3.6.3. The ambit of the Act

Section 2(5) of Germany's Supply Chain Due Diligence Act defines the supply chain to include all company products and services, whether at home or abroad. The supply chain incorporates all processes necessary in the production of goods and services, and from the extraction of raw materials to the delivery to the end customer, covering:

- the actions of a company in its business area;
- the activities of a direct supplier; and
- the activities of an indirect supplier.[986]

In terms of the legislation, a company's activities cover any endeavours that aim to achieve the company's objective,[987] which include any activity for the production and exploitation of products and for the provision of services, irrespective of whether it is carried out at a location abroad.[988] In reference to affiliated companies, the parent company's own business includes a company belonging to the group if the parent company exercises a determining influence on the company.[989] However, there is no mention of the meaning of a determining influence. Companies must ensure that no human rights violations occur in their immediate operations and the activities of their direct suppliers.[990]

Further, the Act defines a direct supplier as a party to a contract for the supply of goods or the provision of services whose subcontracting is necessary for the manufacture of a product or the provision and use of services.[991] In comparison, an indirect supplier is any business that does not directly supply but whose supplies are necessary to manufacture an enterprise's product or for the provision and use of a service.[992] In terms of the LkSG, companies' supply chains include

[985] S 2(3)(1) to (8) LkSG.
[986] *Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten.*
[987] S 2(6).
[988] Spießhofer 2021 *Anwaltsblatt*.
[989] S 2(6) LkSG.
[990] Maihold *et al*. "Responsibility in Supply Chains: Germany's Due Diligence Act Is a Good Start" 2.
[991] S 2(7) LkSG.
[992] S 2(8) LkSG.

all manufacturing stages, whether in Germany or abroad, that are needed to produce the products or provide services "starting from the extraction of raw materials to delivery to the end customer, and covers the company itself, direct suppliers and indirect suppliers".[993]

3.3.6.4. Duty of Care under the Supply Chain Due Diligence Act

Whereas section 2 defines what the supply chain is, section 3 of the Act lists the due diligence obligations that extend to indirect suppliers only if the company has substantial knowledge of a potential violation of human rights or to environmental risk obligations of its indirect supplier.

These are the nine duties of care:

- establishing a risk management system (section 4(1));
- establishing in-house responsibility (section 4(3));
- conducting regular risk analyses (section 5);
- adopting a policy statement (section 6(2));
- establishing preventive measures in the own business area (sections 6(1) and (3)), and vis-à-vis direct suppliers (section 6(4));
- taking remedial action (section 7(1) to (3));
- establishing a complaint's procedure (section 8);
- implementing due diligence concerning risks with reference to indirect suppliers (section 9); and
- issuing documentation (section 10(1)) and reporting (section 10(2)).

Sections 4 and 5 articulate what an effective risk management system for human rights and environmental supply chain risks entails. To prevent, end, or minimise such risks, the company's risk management system must be implemented through appropriate measures in all relevant business processes.[994] Effective measures are defined as those actions that enable a company to identify and minimise human rights and environmental risks as well as to prevent, end, or minimise the extent of violations of human rights or environmental obligations or of such violations the company caused or contributed to, and such risks or violations in the supply chain.[995] In addition, the company is obliged to ensure that a person or persons be appointed

[993] Zeisel (2021) *Lieferkettengesetz Sorgfaltspflichten in der Supply Chain Verstehen und Umsetzen* 10.
[994] S 4(1) LkSG.
[995] S 4(2) LkSG.

responsible for overseeing risk management within the company and the legislation instructs management to apprise themselves of the work of the human rights officer/s regularly and at least once a year.[996]

In the establishment and implementation of its risk management measures, the LkSG provides that a company consider its employees as those within its supply chain and give "due consideration" to those who are otherwise affected by the company's economic activities or through the economic activities of a company in its supply chain that is in a legally protected position and that may be directly affected.[997] Thus, in terms of section 4, in establishing and implementing their risk management system, in-scope companies should give due consideration to the interests of their employees, of employees within their supply chain, and those who are in a protected legal position and who may be directly affected by the economic activities of the company and its supply chains.[998] The draft version designated people who may be affected by the company's economic activities, with the term "economic activity" being understood broadly.[999] However, for the purpose of civil liability, "economic activity" was limited to including direct suppliers and knowledge of indirect suppliers in the final version (discussed below) and is widely believed to be the result of criticism that German companies would be disadvantaged in international competition, which could lead to a breakdown of trade relations.[1000]

Section 5 deals with risk analysis because the law prescribes that the risk management systems must be monitored. The section articulates that the identified human rights and environmental risks must be appropriately weighted and prioritised.[1001] The risk analysis results must be communicated internally to the relevant decision makers, such as the board of directors or the purchasing department.[1002] The Supply Chain Due Diligence legislation prescribes that risk analysis be conducted once a year, as well as on an ad hoc basis when the company expects a significant change or an expanded risk situation in the supply chain, for example, when new products or projects are introduced or a new business field is entered.[1003] In order to adhere to

[996] S 4(3) LkSG.
[997] S 4(4) LkSG.
[998] *Ibid*.
[999] *Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten* (2021).
[1000] Campos Nave *Das Lieferkettengesetz ist beschlossen – Was jetzt zu tun ist* 14 June 2021.
[1001] S 5(2) LkSG.
[1002] S 5(3) LkSG.
[1003] S 5(4) LkSG.

the LkSG, companies must define responsibilities and competencies to ensure effective risk management and risk analysis.[1004] If the risk analysis identifies any risks, companies must take appropriate preventive measures.[1005]

Section 6 of the LkSG requires the management of a company that falls in the law's scope to adopt a policy statement on its human rights strategy.[1006] In addition, the company must ensure compliance with due diligence obligations and describe the implemented procedures.[1007] The preventive risk analysis, purchasing decision-making processes, and control mechanisms must be communicated and included in training programmes specifically for employees and suppliers.[1008] Additionally, the effectiveness of preventive measures must be reviewed at least annually and at any time the risk situation changes, the business processes must be updated.[1009]

A company may determine that a human right or environmental risk is imminent or already has occurred, and in that case, the remedial measures that must be taken are articulated in section 7 of the LkSG.[1010] Where possible, a violation of those in a protected legal position should be prevented, stopped, or minimised and in its own business the remedy must always lead to an end of the infringement.[1011] If a violation at a direct supplier can be minimised only in the short term, then in that case, a strategy with a concrete timetable must be drawn up. If possible, this can be done in the framework of an industry initiative.[1012] In the event that remedial measures do not help or the violation is severe, the business relationship must be terminated.[1013] In principle, the LkSG prescribes, where possible, that milder methods must be pursued first, which is in line with the NAP.[1014] To establish how effective the remedial action has been, the company must conduct a review once a year and on an ad hoc basis when conditions change.[1015]

Companies must establish appropriate complaints procedures in the company that enable people to report human rights and environmental-related risks and violations of human rights-

[1004] Zeisel (2021) 10.
[1005] S 6(1) LkSG.
[1006] S 6(2) LkSG.
[1007] S 6(2)(1) LkSG.
[1008] S 6(3) and (4) LkSG.
[1009] S 6(5) LkSG.
[1010] S 7(1) LkSG.
[1011] S 7(2)(1) LkSG.
[1012] S 7(2)(2) LkSG.
[1013] S 7(2)(3) LkSG.
[1014] S 7(3) LkSG.
[1015] S 7(4) LkSG.

related or environmental-related obligations that have arisen from the company's economic actions, either in its own business area or that of a direct supplier.[1016] Once the company has received the information, acknowledgement of the reported information must be sent to the person who provided it.[1017] According to section 8(1) of the LkSG, the person(s) appointed by the company shall discuss the facts of the report(s) with those who informed the company and may offer that the matter be settled amicably, where possible. The companies in the scope of the law must establish a complaints procedure in written form and make it accessible to the public.[1018] Those entrusted by the company to conduct the proceedings must be impartial, act independently, not be bound by company instructions, and observe strict confidentiality.[1019] The company must publicly provide information about its complaints procedures that are clearly and understandably articulated and indicate who is responsible, how they can be reached, and what steps are contained in the complaints procedure.[1020] Further, the company must ensure that the procedure is accessible to potential complainants and the complainants' identity must be protected.[1021] In addition, the company must provide adequate protection against complainants suffering any disadvantage or punishment due to the complaint.[1022] Finally, the effectiveness of the complaints procedures must be reviewed at least each year, and at any time the risk situation changes or significantly increases in the company's own business processes or that of a direct supplier and, if required, the measures must be repeated without undue delay.[1023]

Section 9 of the Supply Chain Due Diligence Act prescribes that the complaints procedure must be formulated in such a manner that enables people to report risks and violations that have arisen due to the actions of the indirect supplier. If there are indications that suggest that the company's indirect suppliers may have been involved in violations of human rights or an environmental obligation, that is substantiated knowledge, without undue delay and as necessary, the company must:

- carry out risk analysis per section 5(1) to (3);[1024]

[1016] S 8(1) LkSG.
[1017] *Ibid*.
[1018] S 8(2) LkSG.
[1019] S 8(3) LkSG.
[1020] S 8(4) LkSG.
[1021] *Ibid*.
[1022] *Ibid.*
[1023] S 8(5) LkSG.
[1024] S 9(3)(1) LkSG.

- lay down appropriate preventive measures vis-à-vis the responsible party, such as implementing control measures, supporting the prevention and avoidance of risks or implementing sector-specific or cross-sector initiatives if the company is a party to such;[1025]
- compile and implement prevention, cessation, or minimisation concepts; and[1026]
- update the statement policy envisaged by section 6(2).[1027]

Section 10 obliges relevant companies to document the fulfilment of their due diligence obligations regularly, and this documentation must be kept for seven years.[1028] Furthermore, the company must report annually on fulfilling its due diligence obligations in the previous financial year.[1029] The report must be made available free of charge on the company website no later than four months after the end of the financial year and must remain available for seven years.[1030] At a minimum, the report must indicate in an understandable manner whether the company has identified any human rights and environmental risks or violations of human rights-related or environment-related obligations, and these must be stipulated.[1031] In addition, the report must include what the company has done to fulfil its human rights due diligence obligations concerning the measures described in sections 4 to 9 of the LkSG, which include the policy statement according to section 6(2), as well as the measures undertaken by the company because of complaints under the relevant sections of the Act.[1032] Moreover, the report must indicate how the company assesses the impact and effectiveness of the measures.[1033] Finally, it must indicate what conclusions the company has drawn from the assessment for future measures.[1034]

[1025] S 9(3)(2) LkSG.
[1026] S 9(3)(3) LkSG.
[1027] S 9(3)(4) LkSG.
[1028] S 10(1 LkSG.
[1029] S 10(2) LkSG.
[1030] *Ibid*.
[1031] S 10(2)(1) LkSG.
[1032] S 10(2)(2) LkSG.
[1033] S 10(2)(3) LkSG.
[1034] S 10(2)(4) LkSG.

If no risk or violation has been identified or has been plausibly explained in the report, then no further details are required.[1035] Section 10(4) prescribes that consideration be given to protecting business and trade secrets.[1036]

To ensure that companies comply with the provisions, the LkSG articulates that oversight be conducted by a regulatory authority.

3.3.6.5. Regulatory authority

Section 9(4) authorises the Federal Ministry of Labour and Social Affairs, in agreement with the Federal Ministry for Economic Affairs and Energy, to draft regulations that are detailed in section 9(3). The official oversight, civil proceedings, and violations' sanction mechanism are set out in sections 11 to 24 of LkSG. A person whose rights have been violated by a company's non-compliance with the law's due diligence obligations may authorise a local German trade union or NGO committed to human rights to take legal action on their behalf.[1037]

Section 19 of the LkSG authorises the Federal Office of Economics and Export Control (BAFA) as the oversight authority responsible for monitoring and enforcing the measures prescribed by this legislation.[1038] As the competent authority, BAFA[1039] must establish a department and an electronic reporting system, consult with the other authorities concerned, publish cross-sectoral or sector-specific information recommendations, and provide assistance on compliance with the LkSG.[1040] BAFA is statutorily obliged to publish an annual report on its website on the monitoring and enforcement activities it has undertaken in the previous calendar year.[1041] In addition, the BAFA report must refer to and explain any violation identified, remedial measures ordered, and evaluate the reports that companies submitted without naming the company concerned.[1042]

BAFA, as the competent authority, is to receive the due diligence reports from companies to check whether all the requirements have been met and, if not, demand that rectification is done

[1035] S 10(3) LkSG.
[1036] S 10(4) LkSG.
[1037] S 11 LkSG.
[1038] S 19(1) LkSG.
[1039] Which is under the legal and technical supervision of the Ministry of Economic Affairs and Energy, in agreement with the Federal Ministry of Labour and Social Affairs.
[1040] S 20 LkSG.
[1041] S 21 LkSG.
[1042] S 21(2) LkSG.

in a reasonable time.[1043] The LkSG grants the authority strong legal powers that enable it to demand that a company that fails to comply with section 10 of the LkSG comply in a reasonable timeframe.[1044] The authority must exercise discretion when monitoring compliance with the obligations to detect, end, and prevent violations.[1045] If a person who is in a protected legal position makes a substantiated claim that their rights have been violated as a result of non-compliance with obligations set out in the legislation or that such non-compliance is about to happen,[1046] the authority may summon people, demand that a plan to remedy the non-compliance and an implementation timeline be submitted within three months, as well as require a company to take specific and concrete action.[1047] When necessary, BAFA may enter and inspect premises, and inspect and examine documents to determine whether the company complies with its obligations.[1048] When a company and persons are summoned to furnish information and documents to enable the authority to carry out its duties, they are obliged to do so.[1049] Refusal to answer questions is possible only if it will expose them or those referred to in section 52(1) of the German Code of Criminal Procedure to criminal prosecution.[1050] The company, its owners, representatives, and all those appointed to represent them are obliged to tolerate the measure undertaken by the competent authority.[1051]

The LkSG sets up a sanction mechanism that includes periodic penalty payments (up to €50,000), fines (up to €800,000 or 2% of the average annual turnover for large companies with more than €400,000 million turnover), and exclusion from being awarded public sector contracts.[1052]

3.3.6. Discussion

The German Supply Chain Act is controversial because of the concrete content of the due diligence obligations, liability issues, procedures, and enforcement mechanisms.[1053] For NGOs,

[1043] S 13 LkSG, also regulations must be passed to set out the procedures for submissions and report audits in detail.
[1044] S 13(2) LkSG.
[1045] S 14(1) LkSG.
[1046] S 15 LkSG.
[1047] S 14(2) LkSG.
[1048] S 16 LkSG.
[1049] S 17 LkSG.
[1050] S 17 para 3 LkSG.
[1051] S 18 LkSG.
[1052] Ss 23 and 24 LkSG.
[1053] Zeisel (2021) 10.

such as the Supply Chain Initiative,[1054] the obligations under the legislation are too strongly focused on companies' direct suppliers.[1055] They criticise that the legislation does not allow for civil liability when companies fall foul of the law.[1056] In addition, they consider the environment-related issues as not strong enough and the threshold for the number of employees for the law to apply is regarded as too high.[1057] Therefore, the law is said to be "a step between" the UNGP and Germany's NAP, on the one hand, and the planned EU supply chain legislation, which eventually will have to be implemented on a national level,[1058] on the other.

The LkSG is viewed as taking over CSR and environment and social governance that traditionally fall in the competence of public relations and consulting firms, which places the ball squarely in the legal professional's court.[1059] The LkSG is viewed as a "hardening of soft law" because it follows the UNGP by enforcing a corporate duty of care to respect all human rights and environmental risks in supply chains, which duty is to be fulfilled through risk management procedures.[1060] Even though the LkSG lists the human rights and environmental risks that companies need to monitor in their supply chains, the law's reference to conventions is considered to be problematic.[1061] The exhaustively listed rights (in section 2) are not the only ones companies will have to monitor as the reference to the conventions will have to be concretised by those interpreting the LkSG.[1062] It is trite law that once a state accedes to a convention, it is incumbent on the legislature to pass national law that gives effect to the terms of the convention. According to Spießhofer, legal certainty (*Rechtssicherheit*) is reduced because of the conventions that are annexed to the Act.[1063] In other words, rather than implementing and concretising the conventions' provisions regarding the rights that are prohibited, section 2(1), by referencing rights that arise from the annexed conventions, results in the user of the law having to interpret the law.[1064] This situation is different to that which exists

[1054] Founded to lobby for a supply chain law in Germany.
[1055] Statement Not there yet, but finally at the start: What the new Supply Chain Act delivers – and what it doesn't (11 June 2021).
[1056] *Ibid*.
[1057] *Ibid*.
[1058] Statement Not there yet, but finally at the start: What the new Supply Chain Act delivers – and what it doesn't (11 June 2021).
[1059] Spießhofer 2021 534.
[1060] *Ibid*.
[1061] *Ibid.*
[1062] *Ibid.*
[1063] *Ibid.*
[1064] *Ibid*.

in German labour law or in occupational health and safety laws that implement and concretise human rights conventions.[1065] Spießhofer, therefore, asserts that direct reference to the conventions opens up a parallel process, which raises the question of how a convention relates to the national law implementing that convention and thus gives concrete form to legal rights.[1066]

With regard to environmental obligations, the LkSG lists conventions ratified by Germany that, in effect, protect the health of people. The law also lists five types of environmental damage that companies must monitor, including damage to soil, water pollution, air pollution, noise pollution, and excessive water consumption.[1067] It is believed that by defining independent environmental risks derived from international accords, the LkSG, at least indirectly, protects health as a human right.[1068] For NGOs, the absence of an independent and comprehensive environmental due diligence obligation, while limiting environmental duties to a list of three conventions, means that the LkSG is seen only as a "start".[1069]

The German Supply Chain Due Diligence Act is detailed and has the objective of making supply chains more transparent and enhancing human rights and environmental protection. The sanctions for non-compliance are steep and can be costly for companies. Germany and France passed their supply chain legislation without an EU Directive on sustainable corporate governance, released in February 2022.[1070] Getting a supply chain law enacted has been a Herculean task for an alliance of more than 125 CSOs and NGOs working together to apply pressure for politicians to enact a law regarding business and human rights. A commitment made in the 2018 coalition agreement pushed the LkSG over the finish line in the waning days of Angela Merkel's grand coalition government between the Christian-Democratic alliance and the Social Democratic Party.

[1065] *Ibid*.
[1066] Spießhofer 2021 534, 536.
[1067] S 2(3)(1) to (8) LkSG.
[1068] FAQ on Germany's Supply Chain Due Diligence Act (October 2021).
[1069] Statement Not there yet, but finally at the start: What the new Supply Chain Act delivers – and what it doesn't (11 June 2021).
[1070] *Ibid*.

3.4. EU Proposal on Corporate Sustainability Due Diligence

In 2020, the European Parliamentary Research Service issued a briefing "towards a mandatory EU system of due diligence for supply chains",[1071] adding to the momentum already underway because member states such as France, Germany, and the Netherlands had already adopted laws aimed at combating human rights abuses in supply chains. The document showed that evidence gathered from, among other examples, studies commissioned by EU institutions, demonstrated that a decades-long voluntary approach to making multinational companies take responsibility for their supply chains had not done enough.[1072] In December 2020, the Council Conclusions on Human Rights and Decent Work in Global Supply Chains called upon the Commission to table a proposal for an EU legal framework on sustainable corporate governance that would include cross-sector corporate due diligence obligations along global supply chains.[1073] In addition, the European parliament called for clarification of company directors' duties in its initiative report on sustainable corporate governance, in December 2020.[1074]

In March 2021, an outline proposal was considered and adopted by the European parliament regarding mandatory human rights, environmental and good governance due diligence, whereafter the European Commission drafted a formal legislative proposal.[1075] After delays, a draft Directive on Corporate Sustainability Due Diligence was published on 23 February 2022,[1076] in which the Commission committed "to deliver on an economy that works for people, and to improve the regulatory framework on sustainable corporate governance".[1077]

The purpose outlined in the draft directive is that companies incorporated in the EU and those operating within the EU should honour human rights.[1078] Corporations that are affected by the proposal are large corporations as well as smaller companies that operate in specific "high-risk"

[1071] Zamfir "Towards a mandatory EU system of due diligence for supply chains" (October 2020).
[1072] *Ibid*.
[1073] Council Conclusions on Human Rights and Decent Work in Global Supply Chains 2020.
[1074] European Parliament resolution of 17 December 2020 on sustainable corporate governance 2020/2137(INI) (2020).
[1075] European Parliament 2021 Resolution.
[1076] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (2022).
[1077] Statement: European Commission: Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains 23 February 2022.
[1078] Art 2 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (2022) Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071 (accessed 10 September 2022).

sectors.[1079] The human rights due diligence duty encompasses identifying and taking steps to remedy actual impacts on human rights and the environment and prevent or mitigate potential adverse impacts of the companies' operations, subsidiaries, and value chains.[1080] At the same time, the Commission presented the Decent Work Worldwide document that proposed banning products manufactured by forced or child labour from the EU market.[1081]

The proposal, with its 70-plus recitals and 32 articles, came after CSOs insisted that a law is "urgently needed to establish clear, robust and enforceable cross-sectoral requirements on business enterprises, including financial institutions, to respect human rights and the environment and to carry out due diligence".[1082] The proposal makes specific reference to the UNGP as the "international standards on responsible business conduct".[1083] The existence of the proposed directive is viewed as a watershed moment for the EU.[1084] As the largest trading bloc, it wants to be a leader in the global debate on corporate accountability and take the opportunity to "shape not only corporate behaviour within the EU but also globally".[1085] The proposed directive sets out obligations for companies concerning actual and potential human rights abuses as well as adverse environmental impacts.[1086] The adverse impact relates to a company's "own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship".[1087] The draft directive makes provision for liability in the event of violations of the obligations set out in the proposal.[1088] In addition, the nature of established business relationships shall be reassessed periodically and at least every twelve months.[1089]

3.4.1. Directive Proposes to Focus on Value Chain, Not Only the Supply Chain

In terms of the proposed directive, member states have to ensure that companies undertake measures that identify actual and potential adverse human rights impacts and adverse

[1079] *Ibid.*
[1080] *Ibid.*
[1081] European Commission 2022 Commission Sets out Strategy to Promote Decent Work Worldwide and Prepares Instrument for Ban on Forced Labour Products.
[1082] Gardiner "A watershed moment on corporate accountability?" (1 September 2020).
[1083] Recital 5.
[1084] Gardiner (1 September 2020).
[1085] *Ibid.*
[1086] Art 1(a)
[1087] Art 1(a).
[1088] Art 1(b).
[1089] Art 1.

environmental impacts that may arise from their "own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships".[1090] As the operative provision for companies to identify actual and potential adverse impacts, the due diligence requirement envisaged by the proposal goes beyond the supply chain and extends to the value chain.[1091] To provide interpretative assistance and to clarify, Recital 18 of the proposed sustainability due diligence directive refers to the activities regarding the production of goods and services, "including the development of the product or the service and the use and disposal of the product and the related activities of established business relationships of the company".[1092] Consequently, the proposal includes "established direct and indirect business relationships that design, extract, manufacture, transport, store and supply raw material, products, parts of products, or provide services to the company that are necessary to carry out the company's activities".[1093] As the proposal refers to the value chain, it references direct or indirect business relationships that "use or receive products, parts of products or services from the company up to the end of life of the product, including among other things, the distribution of the product to retailers, the transport and storage of the product, dismantling of the product, it's recycling, composting or landfilling".[1094] By including this issue, the Commission makes companies responsible for what happens throughout the life of a product. Because of transboundary waste shipments, the electronic waste produced in the EU ends up in landfills in other countries.[1095]

The proposed directive defines what a value chain encompasses, as well as including activities represented by clients receiving a loan, credit, or other financial service.[1096]

[1090] Art 6(1).
[1091] Also see Baratta R 2014 "Complexity of EU law in the domestic implementing process" Available at: https://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf (accessed 29 November 2022).
[1092] Recital 18.
[1093] *Ibid.*
[1094] *Ibid*.
[1095] See Kaledzi I "Activists slam Europe for dumping on Africa" (4 January 2022); European Environment Agency 2009 Waste Without Borders in the EU? Transboundary Shipments of Waste; France 24 "Inside Ghana's 'graveyard' for Europe's e-waste" (14 June 2019); also see The Borgen Project 2021 Toxic Treasure at the Agbogbloshie Dump in Ghana; Yeung "The Toxic Effects of Electronic Waste in Accra, Ghana" *Bloomberg Europe* (29 May 2019). Available at: https://www.bloomberg.com/news/articles/2019-05-29/the-rich-world-s-electronic-waste-dumped-in-ghana (accessed 20 October 2022).
[1096] Art 3(g).

3.4.2. The Scope of the Proposed Directive

The scope of the draft directive covers about 13,000 EU companies and 4,000 companies from other countries operating in Europe as all companies with at least 500 employees and more than €150 million in net turnover worldwide will fall under the final directive.[1097] The new provisions also apply to other companies with more than 250 employees and a net turnover of €40 million worldwide and more that achieve at least 50% of their net turnover in defined high-impact sectors including agriculture, textiles and minerals.[1098] The Article 2(1)(b) provisions do not apply to companies with 250-plus employees until two years after they have entered into force for companies with 500-plus employees referenced in Article 2(1)(a).[1099]

Regarding non-EU companies, those companies active in the EU, that means companies operating in the single market and with a turnover threshold corresponding to the provisions in Article 2(1)(a) and Article 2(1)(b), also fall within the scope of the proposed directive.[1100] Businesses with fewer than 250 employees (SMEs) are not directly affected unless they operate within the value chains of companies in the scope of the directive.[1101] The definition of employees includes part-time employees calculated on a full-time equivalent basis, thus temporary agency workers are included in the calculation of the number of employees as if they were workers employed directly for the same period by the company.[1102]

The companies in the scope of the draft must comply with the corporate due diligence obligation that includes establishing policies so that adverse human rights and environmental impacts can be identified; these are actual or potential impacts.[1103] Companies must prevent or mitigate potential impacts and end or minimise actual impacts.[1104] Companies in the scope of the proposed directive must establish and maintain a complaints procedure and monitor the effectiveness of the due diligence policy and measures.[1105] According to the draft proposal, due

[1097] Art 2(1)(a).
[1098] Proposal for a Directive on Corporate Sustainability Due Diligence. Available at: https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf (accessed 20 August 2022).
[1099] *Ibid*.
[1100] Art 2(3).
[1101] Proposal for a Directive on Corporate Sustainability Due Diligence and Annex (2022) 14.
[1102] Art 2(3).
[1103] Art 5 and Art 6.
[1104] Art 7 and 8.
[1105] Art 9 and Art 10.

diligence obligations are the responsibility of the company's management.[1106] Further, companies must report annually on due diligence measures and communicate these publicly.[1107] Companies must monitor the effectiveness of the due diligence measures at least annually and adjust their assessment whenever there are reasonable grounds to believe that significant new risks can occur and adverse impacts arise.[1108]

3.4.3. The Ambit of the Proposed Directive

This proposal applies to the company's operations, their subsidiaries and value chains (direct and indirect established business relationships).[1109] A subsidiary, according to the definition in Article 3 of the draft proposal, is "a legal person through which the activity of a 'controlled undertaking' is exercised".[1110] A controlled undertaking is defined in Article 2(1), point (f) of Directive 2004/109/EC of the European parliament and of the Council.[1111]

3.4.4. Due Diligence and Compliance

In order to ensure compliance with the corporate due diligence obligation, member states are encouraged to amend their laws to ensure that directors fulfil their duty to act in the best interests of the company.[1112] According to the proposed directive, the best interests of the company include attention to human rights, climate change, and other environmental consequences in the short, medium and long term.[1113] By including this provision, the Commission aims to increase the involvement of directors of companies in corporate sustainability due diligence obligations and strengthen the integration of sustainability in corporate strategy.[1114] The draft proposal allows for bonus payments to be made contingent on compliance with the duties as set out in the proposed directive.[1115]

[1106] Art 15(3).
[1107] Art 11.
[1108] Art 10.
[1109] Proposal for a Directive on Corporate Sustainability Due Diligence 10. Available at: https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf (accessed 20 August 2022).
[1110] Art 3(d).
[1111] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390 31.12.2004 38).
[1112] Proposal for a Directive on Corporate Sustainability Due Diligence 25. Available at: https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf (accessed 20 August 2022).
[1113] Art 25.
[1114] Statement: European Commission: Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains 23 February 2022.
[1115] *Ibid.*

The draft ensures compliance by instructing member states to appoint national administrative authorities.[1116] These authorities will supervise whether companies comply with the obligations and, if not, the authorities may impose fines.[1117] The proposed directive makes provision for the creation of a European Network of Supervisory Authorities that will facilitate cooperation between the competent supervisory authorities at member state level.[1118] The proposal provides that enforcement is performed by national supervisory authorities, but the establishment of a European Network of Supervisory Authorities will ensure coordination and alignment of "regulatory, investigative, sanctioning and supervisory practices of the supervisory authorities and, as appropriate, sharing of information among them between Member States".[1119]

In addition, victims can bring legal action for damages that could have been avoided had appropriate due diligence measures been undertaken.[1120]

3.4.5. Liability

The EU proposal includes civil liability, which presumes that the damage could have been identified and prevented or mitigated by means of suitable due diligence preventive measures.[1121] According to the proposal, sanctions for non-compliance are the responsibility of member states and these must be effective and proportionate and serve to deter non-compliance.[1122]

3.4.6. Specific Concerns Covered by the Proposed Directive

By choosing to release not only the EU draft Directive on Corporate Sustainability Due Diligence but also the detailed Communication document as part of its "just and sustainable economy package", the Commission formulated the internal and external policies that the EU intends to advance the implementation of Decent Work Worldwide and to make this objective central to its inclusive, sustainable, and resilient recovery from the pandemic.[1123]

[1116] Proposal for a Directive on Corporate Sustainability Due Diligence and Annex 23 February 2022 17.
[1117] Art 17 and Art 18.
[1118] Art 21.
[1119] *Ibid*.
[1120] Art 19.
[1121] EU Commission presents proposal for European supply chain Directive – plans to expand due diligence duties in supply chains 24 February 2022.
[1122] Art 20.
[1123] Statement: European Commission: Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains 23 February 2022.

The draft directive is comprehensive as it tries to impose the effective protection of human rights that are included in international conventions and avoid adverse environmental impacts that are contrary to the main environmental conventions.[1124] In addition, companies must take proactive steps "to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement".[1125] This provision is not linked to the core human rights and environmental due diligence requirements,[1126] nor does it indicate that failure to achieve the plan will affect directors' remuneration, thus it is possible companies can interpret emission reduction targets as voluntary.[1127] The draft directive amends the 2019 directive on sustainability-related disclosures in the financial services sector.[1128] The regulation on sustainability-related disclosures in the financial services sector establishes a framework to facilitate sustainable investment.[1129]

As stated earlier in this chapter, the EU Commission affirmed its commitment to championing decent work at home and around the world through its Decent Work Worldwide Initiative, which promotes decent work in all sectors in domestic markets, Third World countries, and global supply chains.[1130]

The Commission's Communication document specifically expresses that EU trade policy expects its trading partners to respect international labour standards in EU bilateral and regional relations.[1131] The Commission has placed sustainability at the heart of its new trade strategy, supporting the fundamental transformation of its economy to be climate-neutral and thereby moving towards an assertive approach when implementing and enforcing its trade agreements to address sustainability concerns and fight unfair trade practices.[1132] To this end, the EU has articulated the fifteen-point action plan on development, which the Commission indicates will be

[1124] *Ibid*.
[1125] Art15.
[1126] Human Rights Watch 2022 *Enttäuschender Entwurf zur Sorgfaltspflicht von Unternehmen Gesetzgeber sollten Schlupflöcher beseitigen und wegweisendes Gesetz beschließen*.
[1127] Statement: German Watch *EU-Lieferkettengesetz in Reichweite, aber es besteht Nachbesserungsbedarf* 23 February 2022.
[1128] Text called: Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.
[1129] Regulation (EU) 2019/2088 of the European Parliament and of the Council on sustainability -related disclosures in the financial services sector (2019).
[1130] Statement: European Commission: Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains 23 February 2022.
[1131] European Commission 2022 15.
[1132] Statement: Commission sets course for an open, sustainable and assertive EU trade policy 18 February 2021.

used to assess the implementation and enforcement of labour provisions in free trade agreements[1133] by focusing on the scope of commitments, monitoring mechanisms, the possibility of sanctions for non-compliance, the essential element clause, the institutional set-up, working with civil society, and the resources required.[1134] In addition, the Communication text envisages a comprehensive EU framework to implement the UNGP and develop and implement NAPs.[1135] The promotion of decent work, according to the Commission's Communication, will be implemented in financing operations such as lending and guarantees, as well as ensuring that labour rights are considered as a precondition for granting macro-financial assistance.[1136] Moreover, the European Bank for Reconstruction and Development will be engaged to "promote a regular update of its environmental and social policy to align it with EU and international standards on supply chain responsibility, including the UN Guiding Principles on Business and Human Rights".[1137]

The EU Commission, in the proposal for a Directive on Corporate Sustainability Due Diligence, adopted a broader approach than chosen by France and Germany because it aims to "foster sustainable and responsible corporate behaviour throughout global value chains".[1138] By formulating comprehensive policy proposals, the Commission lays out what member states are to do if they want to achieve large-scale improvement.[1139] Also, through the proposal, the Commission officially establishes a corporate sustainability due diligence duty to address negative human rights and environmental impacts.[1140] The proposal is the first step in the EU legislative process and the European parliament is expected to debate it. The proposed directive is seen as a means of including "ambitious and controversial proposals", and the debate is expected to be intensive with lobbying by CSOs and business representatives prior to the parliament and the EU Council of Ministers approving and passing the directive. This process can take a year or two. Once the proposal becomes law, the French and German legislatures

[1133] European Commission 2022 15.
[1134] *Ibid.*
[1135] *Idem* 18.
[1136] *Ibid.*
[1137] *Ibid.*
[1138] Statement European Commission: Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains 23 February 2022.
[1139] Statement European Commission: Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains 23 February 2022.
[1140] *Ibid.*

will amend the LdV and the *Lieferkettenschutzgestetz* in the specified implementation period of two years.

In the words of the EU's Commissioner for Justice, Didier Reynders, the proposed directive is necessary because it is no longer possible to turn a blind eye to what happens down the value chain.[1141] The EU is a community in support of "democracy and common values" that the EU is "determined to defend".[1142] According to EU President Von der Leyen, "human rights are not for sale – at any price".[1143] The proposed directive is a step in proving this commitment.

As stated in Chapter 2, in September 2022, the Commission published its proposal for a regulation that would ban products produced by forced labour from the EU market.

The debate in the European parliament about the proposed sustainable due diligence directive is expected to be intense. The ECCJ indicates that the scope of the proposed directive, as envisaged, would apply to fewer than 0.2% of EU companies and that the restriction "… wilfully ignores many harmful business operations, as staff size and annual turnover are not reliable indicators of how a company is impacting the lives of workers and communities worldwide".[1144] The provision that companies can be liable for harms committed at home or abroad by their subsidiaries, contractors, and suppliers that avails their victims of a chance to file lawsuits in EU courts potentially is hamstrung by a "dangerous loophole".[1145] According to the ECCJ, the text implies that "companies could fulfil their obligations by adding certain clauses in their contracts with suppliers and offloading the verification process to third parties".[1146] The reference here is especially to Article 7(4) of the draft directive, which provides for "independent third-party verification" for contractual assurances that suppliers have taken appropriate measures to prevent or mitigate potential adverse human rights impacts and adverse environmental impacts.[1147] This proposal is considered to be a way for companies to "shift their responsibilities onto their suppliers".[1148]

[1141] Pronczuk "Companies in the E.U. could be held liable for violations along their supply chain" (23 February 2022).
[1142] State of the Union Address by President von der Leyen (15 September 2021).
[1143] *Ibid*.
[1144] ECCJ "Dangerous gaps undermine EU Commission's new legislation on sustainable supply chains" 23 February 2022.
[1145] *Ibid*.
[1146] *Ibid*.
[1147] Art 7(1) and Art 7(4).
[1148] ECCJ 23 February 2022.

European CSOs criticise the proposed directive as not going far enough, especially with regard to the scope; for example, the Supply Chain Law Initiative Alliance asserts that duties of care do not only apply to large companies.[1149] According to Transparency International, the EU corporate due diligence proposal falls short because corruption is not addressed despite the fact that experience has proved that corruption undermines efforts to protect human rights as well as the environment.[1150] Moreover, the proposed directive does not change the burden of proof, which remains a "serious obstacle" because those who are affected by a company's actions will find it challenging to prove any claim as they will have to rely on publicly available information.[1151] Employers organisations, such as the German Chamber of Industry and Commerce, have warned that German companies could be overburdened by the EU proposals[1152] and that there is a possibility that, if the proposed directive is passed, companies will have "enormous effort and high costs, for comparatively little effect".[1153]

In this chapter, we discussed the responses of Germany, France, and the EU to the UNGP. Throughout, the role of CSOs is evident in getting Germany and France to commit to and act on the UNGP. The next section looks at the role of organisations that held the government's feet to the fire.

3.5. CSOs: The Catalyst for Hardening Soft Law

According to Birchall:

> Civil society is defined "as the socio-sphere located between the family, the state, and the market and operating beyond the natural confines of national societies, polities and economies. CSOs are organizations emerging from civil society. The UN Guiding Principles on Business and Human Rights (UNGPs) Reporting Framework defines CSOs as '[n]on-State, not-for-profit, voluntary entities formed by people in the social sphere that are separate from the State and the market. CSOs represent a wide range of interests and ties. They can include community-based organizations as well as non-governmental organizations (NGOs)." As such, CSOs display extreme diversity in terms of formality and institutionalization, size, scope of activities, normative goals and mode of operation. There is also very often overlap, and many organizations are initiated jointly by civil society, business and/or government agencies.[1154]

[1149] Statement: *Initiative Lieferkettengesetz* (2022).
[1150] Statement Transparency International Deutschland eV EU Supply Chain Law: Draft overlooks anti-corruption measures (4 March 2022).
[1151] Press Release: German Watch *EU-Lieferkettengesetz in Reichweite, aber es besteht Nachbesserungsbedarf* 23 February 2022.
[1152] Statement *EU-Lieferkettengesetz: DIHK warnt vor Überlastung der Unternehmen Regelungen sollten praxistauglich, verhältnismäßig und rechtssicher sein* (23 February 2022).
[1153] *Ibid.*
[1154] Birchall (2020) "The Role of Civil Society and Human Rights Defenders in Corporate Accountability" 422; Deva and Birchall (2020).

CSOs have been described as increasingly performing several critical functions in society because of their unique combination of private structure and public purpose.[1155] Generally, CSOs are small scale in terms of their connections to citizens, their flexibility, and their capacity to tap private initiatives in support of public purposes,[1156] which make them invaluable in the fight against corporate impunity. Birchall asserts that in the developing field of business and human rights, there is the emergence of a tripartite governance order that consists of the domestic and international legal regime, corporate governance, and a civil governance system that involves stakeholders who are affected by business enterprises and who are engaged and employ various social compliance mechanisms.[1157]

As the "third pillar […] alongside the public and private sector",[1158] CSOs played a critical role in highlighting social problems, and through their expertise and persistence have formed alliances and lobbied governments to take up the UNGP and pass legislation. The French experience shows that passing the vigilance law was made possible by a very active, vocal, and persistent campaign by CSOs.

In Germany, when the German parliament passed the NAP in 2016, CSOs blamed the lack of political will for the "baby step" implementation of the UNGP.[1159] A 2019 study by *Brot für die Welt, Misereor* and Global Policy Forum showed that the Confederation of German Employers' Associations and the Federation of German Industries pressured the German Federal Government to remove binding rules from the NAP.[1160] The study highlighted that the associations attempted to delay the review of how German companies implemented the NAP.[1161] As a result, a broad alliance of CSOs was formed, and the *Initiative Lieferkettengesetz* (Initiative Supply Chain Law) began an almost two-year petition and picket campaign for a supply chain law.[1162] By applying pressure and keeping up a sustained campaign, the German Supply

[1155] Salamon 2010 *Ann Public & Coop Econ* 168.
[1156] Birchall (2020 422; Deva and Birchall (2020).
[1157] *Ibid.*
[1158] *Ibid*.
[1159] Deutsches Institut für Menschenrechte *„Zögerliche Umsetzung"* 2016.
[1160] Seitz 2019 *Sorgfältig verwässert*.
[1161] *Ibid.*
[1162] *Zeitstrahl Lieferkettengesetz* (no date).

Chain Law was passed, but it was a watered-down version that CSOs viewed as "a start".[1163] CSOs are continuing to mobilise at the EU level by bringing together over 480 organisations from different European countries that promote corporate accountability.[1164] The ECCJ hopes to lobby for even greater corporate accountability given that, despite being the first of its kind, the proposed directive fails to deliver on its potential.[1165] Nevertheless, it is viewed that the EU supply chain proposal lays the "foundation for less exploitation and environmental destruction in the supply chains of European companies".[1166] With the proposed Sustainable Corporate Governance Directive, the EU is attempting to create a "level playing field" because all member states must comply.[1167]

As stated before, the current EU proposal will be debated and discussed before being approved by the European parliament and EU Council. The German experience demonstrates that employer associations actively attempted to slow down and dilute the review of human rights due diligence by German companies.[1168] Something similar can be expected regarding the EU proposed directive – already business associations have expressed concern because it is seen as unrealistic to expect European companies to control their entire value chains worldwide.[1169]

CSOs will again protest and lobby members of the European parliament so that the proposed directive can be passed without it being watered down any further. Once it has passed, all EU countries will have to achieve corporate accountability through their own national legislation. With all member states passing national legislation based on the draft directive on accountability along supply chains, the criticism that German or French companies will be uncompetitive should no longer apply.[1170] Time will tell whether the prospective directive incentivises European TNCs to transfer their headquarters to countries outside the EU.[1171]

However, the vital role of civil society in human rights and business is under threat. In February 2022, a United Nations Human Rights Office of the High Commission statement indicated that

[1163] Seitz 2019.
[1164] See ECCJ. Available at: https://corporatejustice.org/ (accessed 30 November 2022).
[1165] ECCJ 23 February 2022.
[1166] Statement: *EU-Lieferkettengesetz: Für "großen Wurf" nicht konsequent genug* (23 February 2022).
[1167] Zamfir "Towards a mandatory EU system of due diligence for supply chains" (October 2020).
[1168] Seitz 2019.
[1169] Pronczuk (23 February 2022).
[1170] Argument made with regard to France's vigilance plan by Barsan 2017 433.
[1171] *Ibid.*

the UNWG and others are calling for states and business actors to take action to prevent the use of the judicial system to silence human rights defenders through strategic lawsuits.[1172] The use of Strategic Lawsuits Against Public Participation (SLAPPs) is becoming a worldwide problem as people who speak out against injustice in relation to business operations face lawsuits. [1173] It is alleged that this is a judicial tactic to divert "time, energy, and resources away from human rights defenders' vital work".[1174] It appears a troubling development, specifically considering the role played by CSOs highlighted in this study.[1175]

Before concluding this chapter, I discuss how China has responded to the UNGP.

3.6. China's Response to the UNGP

As stated previously,[1176] the GPRF gives guidance on implementation for companies and guidance on assurance for internal auditors and external assurance providers. In July 2017, the GPRF announced that it had completed the Chinese translation of the UNGP.[1177]

In September 2021, China published the Human Rights Action Plan of China (2021–2025) through the State Council Information Office (SCIO).[1178] The document sets out the country's latest human rights action plan and formulates the objectives and tasks of respecting, protecting, and promoting human rights in the period from 2021 to 2025.[1179] The plan lists targets such as economic, social and cultural rights, civil and political rights, education and environment rights, and minority group rights that the country wishes to reach. Also, mentioned in the Action Plan is:

> [p]romoting responsible business conduct in global supply chains. It will encourage Chinese businesses to abide by the UN Guiding Principles on Business and Human Rights in their foreign trade and investment, to conduct due diligence on human rights, and to fulfill

[1172] Statement: Critical part of the UNGPs 10+ Roadmap: Increasing the protection of human rights defenders in the face of strategic lawsuits against public participation 4 February 2022.
[1173] *Ibid.*
[1174] *Ibid.*
[1175] The South African Constitutional Court recently heard a Strategic Lawsuit Against Public Participation case.
[1176] See para 2.4.3 above.
[1177] GPRF no date Translations. Available at: https://www.ungpreporting.org/resources/translations/ (accessed 5 September 2023).
[1178] The State Council Information Office: The People's Republic of China Full text: Human Rights Action Plan of China (2021–2025).
[1179] "China: Human Rights Action Plan (2021–2025) mentions encouraging Chinese businesses to abide by UN Guiding Principles". Available at https://www.business-humanrights.org/en/latest-news/human-rights-action-plan-of-china-2021-2025/ (accessed 30 October 2022).

> their social responsibility to respect and promote human rights. It will participate and play a constructive role in negotiations on the UN business and human rights treaty.[1180]

This undertaking is interesting, as there is a commonly held belief that China dismisses emerging soft law governance frameworks because it is not binding as a matter of law.[1181] Cheng conducted a study in which he interviewed workers and managers face to face in order to find out "their own interests, ideas and demands" at factory shop level as it relates business and human rights.[1182] The study, which dealt with the implementation of the UNGP by TNCs in China, indicates that the UNGP is contextualised within the government systems and, as such, the document is being "(re)framed in certain ways and by certain terms".[1183] According to Cheng, the Chinese government reformulates the texts on human rights in its "own characteristic way, which emphasises social/economic rights and the right to development".[1184] Thereafter, these reinterpreted texts are implemented by Chinese TNCs. This is not surprising, given that China's discourse on human rights "prioritizes the right to food, clothing, shelter, and economic development".[1185] As a consequence of this approach, Cheng found that "the workers are forced to undertake excessive work in ways that they appear to be "willing" to do, in order to keep up a certain standard of living". [1186] In other words, eradicating poverty is a basic element of improving human rights. The Cheng study showed that an authoritative document such as the UNGP does cascade down from the UN to Chinese ground level, but that the "process of accountability" as envisaged by the UNGP is reinterpreted and happens "through texts in the form both of inscriptions and the utterances of various actors".[1187] One should note that despite the Chinese government expressing appreciation and support for the UNGP at the UNHRC in 2011, it has not taken any steps regarding a NAP that the Danish Institute for Human Rights, monitoring the implementation of NAPs, recognises. According to the official Chinese press authority, "human rights are something covered by the sovereignty of a country. A country's sovereignty is the foremost collective human right".[1188]

[1180] The State Council Information Office: The People's Republic of China Full text: Human Rights Action Plan of China (2021–2025).
[1181] Bu 2015 *Afr J Leg Stud* 39.
[1182] Cheng 260.
[1183] *Idem* 121.
[1184] *Idem* 242.
[1185] Bu 2015 38.
[1186] Cheng 249.
[1187] *Idem* 250.
[1188] Dan "Human rights can be manifested differently" *China Daily* (15 December 2005).

Despite China's human rights policies differing from how other countries define human rights, China is participating in the negotiations for a treaty on business and human rights. Reports from the seventh OEIGWG negotiation session held in 2021 indicate that despite China formally remaining part of the efforts to negotiate a treaty, they "do not seem to support it enthusiastically".[1189] Furthermore, the International Institute for Sustainable Development reports that China is one of the countries that submitted concrete textual proposals but that all the proposals covered a wide range of issues that seemingly "leave little room for compromise".[1190]

3.7. Conclusion

Chapter 3 dealt with the response in three jurisdictions, namely France, Germany, and the EU, to the UNGP, as well as with the role that CSOs have played in getting supply chain law passed. China, and its different way of implementing the UNGP, was also discussed briefly.

To recap, in 2017, the French parliament passed legislation that was described as a "historic first step".[1191] The French Duty of Vigilance of Parent and Instructing Companies (Law No. 2017-399, LdV) applies to the largest French companies that must be vigilant and "assess and address" the harmful impacts of their actions.[1192] Companies must publish annual vigilance plans reporting on the company's own actions and on the impact of the activities of those with which they have an established commercial relationship, such as companies under their control and their suppliers and subcontractors, and these plans must be made public. If companies fail to fulfil their obligation, those harmed and other concerned parties can approach a court that can impose fines for the failure to publish plans, as well as when that failure causes harm that could have been preventable. The law is considered not to be ambitious enough as it applies only to the largest 100 companies. Additionally, victims have the burden of proof, and if harm results from a company's actions, despite the implementation of an adequate vigilance plan, the company is not liable – "a company is not required to guarantee results, but only to prove that it has done everything in its power to avoid damages".[1193]

[1189] Krajewski 2021 Analysis of the Third Draft of the UN Treaty on Business and Human Rights.
[1190] "Breakthrough in business and human rights binding treaty negotiation but be prepared for a bumpy road ahead" 20 December 2021.
[1191] ECCJ "A historic first step: France adopts corporate duty of vigilance law" 21 February 2017.
[1192] *Ibid*.
[1193] ECCJ 23 February 2022.

When the law passed on 27 March 2017, it was the result of a four-year battle waged by French NGOs, trade unions, and with the help of three deputies of the French Congress. According to Schilling-Vacaflor, the law's enactment was possible due to several conditions, such as public outrage surrounding the structural collapse of the textile factory in Bangladesh that had close links with French companies, known as the Rana Plaza tragedy in 2013.[1194] Despite 222 companies signing the Accord on Fire and Building Safety in Bangladesh, it was viewed as not doing enough within months of the tragedy, and the improvements still are not considered sufficient.[1195] At the time, French national political culture was characterised by widespread anticipation of state intervention because of high youth unemployment, public debt, taxes, and French anti-globalisation sentiment.[1196] The year 2017 was an election year and President François Hollande of the centre-left Socialist Party, who had been in office since 2012, was not running for re-election.[1197] Another factor influencing matters was the appointment of a Minister of Economy and Industry in 2016 who favoured the law.[1198] One can say the stars were aligned in favour of passing the LdV. Under the Macron government, in power since 2017, the implementation and enforcement of the law have been weak – Macron (who was the Minister of the Economy and Industry from 2014 to 2016) was outspoken in his opposition to mandatory rules on business and human rights.[1199] The vigilance plans published and reports on how companies' vigilance plans have been implemented (from 2018 to 2019) indicate the plans were brief, which made it difficult for CSOs to understand and know exactly what risks were identified or how companies intend to respond to them.[1200]

Also discussed in this chapter was the German Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz*) that the government passed in 2021. It was an election year for the German Federal Government in which Chancellor Angela Merkel would not stand for re-election after she took office for the fourth and last time on 14 March 2018. Unlike the situation in France, which passed groundbreaking vigilance legislation, Germany first adopted a NAP in December 2016, following a process that included stakeholder consultations and had

[1194] Schilling-Vacaflor 2021 *Hum Rights Rev* 116.
[1195] Rahman and Yadlapalli "Years After the Rana Plaza Tragedy, Bangladesh's Garment Workers are Still Bottom of the Pile" (22 April 2021).
[1196] Bertelsmann Stiftung "France before the election: Where is the country headed?" (19 April 2017).
[1197] Chhor "The spectacular rise and fall of Hollande's Socialist Party" (9 December 2016).
[1198] Schilling-Vacaflor 2021 116.
[1199] *Ibid*.
[1200] Vigilance Plans Reference Guidance: a legal analysis on the duty of vigilance pioneering law (12 February 2019).

started in 2014.[1201] In 2017, German citizens elected a new chancellor and new government. In Germany, a new federal government is formed only once the new federal parliament decides who the chancellor is, which is a tedious process that can take months. In 2017, the election results led to "unprecedented difficulties" and the "grand coalition" made up of the conservative Christian Democrats (CDU/CSU) and Social Democrats (SPD) was possible only after the longest and most protracted government-building process in modern Germany.[1202] This was the second time that Germany was to be ruled by a "grand coalition" under Merkel. This time around, the coalition partner, the SPD deputy chairman, Olaf Scholz, indicated that the government would "advance the country and create growth and dynamism, strengthen Europe and ensure cohesion in our country".[1203] To this end, the coalition agreement included a commitment to the implementation of Germany's NAP on Business and Human Rights, as well as to conducting an effective and comprehensive review of whether companies had adhered to the voluntary implementation of the NAP in 2020. In addition, the coalition agreement stated that if not enough companies implemented the NAP, the government would pass national legislative action and advocate for EU-wide regulation.[1204] This commitment paved the way for the supply chain due diligence law, which was passed before the federal elections in September 2021.

As discussed above,[1205] the German Supply Chain Law splits implementation over two years and will apply to about 900 companies starting in 2023 and to roughly 4,800 the following year.[1206] In terms of the law, companies must establish grievance mechanisms and report on their supply chain activities, and the law also covers basic human rights and environmental impacts.[1207] The legislation obliges companies to comply with due diligence requirements in the field of human rights, which means analysing human rights-related risks and taking steps to prevent and mitigate any violations. Further, companies must set up grievance mechanisms in their own field of business and that of their direct suppliers. Similar measures are required for an indirect supplier once substantiated reports of human rights violations reach a company. Yearly reports must be completed, and a failure to comply with the obligations stipulated by the

[1201] *Entwicklung des Aktionsplans unter Einbindung von Politik, Wirtschaft und Zivilgesellschaft* 3 November 2017.
[1202] Wettengel "The long road to a new government coalition in Germany" (29 September 2021).
[1203] Angela Merkel: *Das Wohlstandsversprechen erneuern* 12 March 2018.
[1204] *Koalitionsvertrag zwischen CDU, CSU und SPD 19.* Legislaturperiode.
[1205] Para 3.3.5 above.
[1206] *Mehr Schutz von Menschen und Umwelt in der globalen Wirtschaft* (3 March 2021).
[1207] *Ibid*.

law could lead to administrative fines being imposed. The penalties are seen as having a devastating effect on specific industries, such as the furniture production industry, mainly because penalties can be imposed if the required risk analysis is too weak or incomplete.[1208] Finally, fines are imposed under the German supply chain due diligence law by a federal authority tasked with monitoring compliance with the LkSG.

The compliance administrative authority founded within the Federal Ministry of Labour and Social Affairs aims to develop efficient and effective resource-saving solutions with as little bureaucracy as possible.[1209] A department must be set up that will implement the Supply Chain Due Diligence Act and create guidelines that will enable companies to comply with the Act and conduct control checks to detect, eliminate, and prevent companies from violating the Act.[1210]

The regulatory authority, BAFA, is responsible for supervising economic development, foreign trade, climate protection, and government oversight of auditors.[1211] To strengthen the competitiveness of small- and medium-sized companies, BAFA focuses on business development and the implementation of support programmes.[1212] Already involved in the federal government's export control policy and in issuing licences, BAFA now is charged with supporting companies implementing Germany's Supply Chain Due Diligence Act, and is thus responsible for monitoring and imposing appropriate fines and penalties where violations occur. The regulatory authority empowered to decide whether German goods have a permit for export, among other tasks, now acts as a supervisory body within the framework of the LkSG. The LkSG tasks a federal authority with oversight of supply chains. In contrast, the French Duty of Vigilance Law enforcement is ensured through the courts as the law allows "any interested person" to approach a competent court for an order, under the threat of penalty, compelling a company to comply with the obligations under the French Commercial Code and for an order that compensation be paid for the damage caused by a company's lack of vigilance.[1213]

France and Germany enacted their supply chain and vigilance laws before the EU published a draft proposal on the issue of corporate accountability regarding human rights in their supply

[1208] VDMA „*Kritisiert Sanktionsdrohungen im geplanten Lieferkettengesetz scharf*" 3 March 2021.
[1209] BAFA – *Überblick* (no date).
[1210] *Ibid*.
[1211] *Bundesamt Für Wirtschaft Und Ausfuhrkontrolle* (BAFA) 2022.
[1212] *Ibid*.
[1213] Brabant and Savourey 2017 A Closer Look at the Penalties Faced by Companies 2.

chains. Both national laws will have to be amended to comply with a final EU Directive when that happens. The EU proposal includes the provision that member states charge national administrative authorities with the supervision and implementation of the supply chain due diligence – especially, France's Duty of Vigilance law will have to be amended. The French advocacy group, Sherpa, indicates that supervisory authorities are not everything it is made out to be because of their limiting role – a supervisory authority limits the duty of vigilance to a formal reporting obligation.[1214] Furthermore, transparency is not guaranteed, and the sanctions imposed on companies are not made public.[1215] According to Sherpa, having a supervisory authority results in a duty to make an effort rather than a duty to be vigilant and to implement human rights due diligence mechanisms.[1216] Where the competent supervisory authority must eliminate and prevent violation of the law, as in the German legislation,[1217] then it is imperative that there are sufficient staffing and funding so that the regulating authority effectively honours the obligations imposed on it by legislation.

Thereafter, the EU Commission's proposed Corporate Sustainability Due Diligence Directive was discussed in this chapter. The Commission stated that "improvement is difficult to achieve with voluntary action".[1218] As the body responsible for initiating and enforcing the laws of the EU, as well as managing EU policy, the Commission set out the internal policy in the announcement of the draft law on corporate due diligence. It is unlikely that the proposal will pass in its current form – this did not happen when the national rules on due diligence were introduced. The French and German draft proposals included controversial issues that were removed from the final version. The proposed directive is expected to undergo changes before it is adopted by the European parliament and the European Council. Arguably, the proposed directive will make it difficult for EU companies and those operating in the EU to remain competitive. Not only companies of member states operate in the EU market; therefore, the Chinese government's approach to business and human rights must be considered. Chapter 5 of this study examines the divergent EU and Chinese definitions regarding human rights and what this difference can mean in a global and competitive trade market.

[1214] Sherpa 2021 Creating a Public Authority to Enforce the Duty of Vigilance Law: A Step Backward? 2.
[1215] *Ibid*.
[1216] *Ibid*.
[1217] LkSG s 14(1)(b).
[1218] *Ibid*.

Discussed in this chapter was the role that CSOs played in Germany and France acting on the UNGP despite, as mentioned in Chapter 2, CSOs' initial lack of support for the UNGP in 2011.[1219] France was a co-sponsor of the resolution that strengthened the UNGP; Germany too was a strong supporter of the UNGP. However, support does not always translate into state action, such as the passing of appropriate legislation, especially of a soft law instrument. States are governed by parties, and candidates of parties are elected to parliaments that must pass legislation. In France and Germany, this political process presented an opportunity for civil society to apply pressure through organised campaigns, which led to the two states implementing their "duty to protect" human rights. According to Ratner, a reliance on states to do something, for example, making it the states' duty to ensure that corporations do not violate human rights, is inadequate because corporations are powerful global actors, and some states lack either the resources or the will to control them.[1220] Yet, corporations are created in states, and their privileges are given by the state – corporations are seen as profitable and fundamental to the political and economic order.[1221] TNCs want to be unencumbered to pursue profits, regardless of whether their actions violate rights. Generally, states are happy to oblige, but those in power also want to maintain their political power, especially in established democracies where elections are held regularly and parties that are in power during one legislative period can be in opposition in the next. At the prospect of losing or gaining political power, promises are made and constituencies assured. The UNGP is a document that business organisations and states supported, so CSOs could campaign on the issue if political parties were to get their support. The pressure CSOs exerted on lawmakers made the UNGP more than voluntary in France and Germany. Time will tell whether the EU's final version to promote sustainable and responsible corporate behaviour is weaker than the draft proposal.

Finally, China's response to the UNGP was highlighted because Chapter 3 dealt with select countries' response to the UN-endorsed Guiding Principles. The understanding of human rights in France, Germany, and the EU is within the international human rights regime, while as Cheng suggests, "not all countries conduct their human rights practice in the same way as the Western approach […] and [that] the persistent claims of the Chinese government to the rights of

[1219] Business & Human Rights Resource Centre "NGOs criticise UN Special Representative Ruggie's draft Guiding Principles on Business and Human Rights" (14 January 2011).
[1220] Ratner 2001 *Yale L J* 461.
[1221] Jessen (30 January 2020).

development all reveal the rather complex picture in which human rights are realised in varying ways."[1222] Therefore, Chapter 5 deals with China to better understand how corporations, respecting human rights in their supply chains, could mean something different in the Chinese context.

[1222] Cheng 110.

CHAPTER 4 – South Africa and the UNGP

4.1. Introduction

The French and German governments embraced the UNGP, thanks largely to pressure from civil society and parties having to make good on election promises; thus, they enacted legislation that compels companies to conduct human rights due diligence on their supply chains. The South African government has been conspicuously silent on the matter. According to the Danish Institute for Human Rights that monitors the implementation of NAPs, the South African government has no official commitment to develop a NAP and all efforts related to business and human rights are spearheaded by academia and civil society.[1223] The UNGP, its NAPs, or possible legislation regarding business and human rights, which has as its goal the protection of worker's rights in global supply chains, seems of little or no interest to the South African government. An explanation may be that although the UNGP is not an instrument that was negotiated multilaterally, it was drawn up by Ruggie, albeit in consultation, and was unanimously endorsed by the UNHRC. Despite being "road-tested", the UNGP remains voluntary. Companies have piloted and tested the effectiveness of the grievance mechanism and workability of due diligence provisions.[1224] As mentioned in Chapter 2, South Africa and four South American countries submitted a draft resolution to the UNHRC for an international legally binding instrument on transnational corporations and other business enterprises concerning human rights in June 2014.[1225] The UNHRC adopted Resolution 26/9 with twenty countries voting in favour, thirteen abstaining, and fourteen countries, including the EU and the USA, voting against it.[1226] The South African government seems to view the UNGP as non-existent. The following section elaborates on the protection that workers enjoy while working for South African companies within South Africa.

[1223] National Action Plans on Business and Human Rights "South Africa" (16 November 2017).
[1224] Ruggie 2011.
[1225] UN Doc. A/HRC/RES/26/9 Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 (accessed 30 October 2022).
[1226] *Ibid*.

4.2. South Africa: Human Rights and Corporations

Human rights are the cornerstone of democracy, and the South African Bill of Rights, specifically section 8(2) of the South African Constitution, requires the private sector to respect these rights.[1227] Section 8(2) of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, considering the nature of the right and the nature of any duty imposed by the right.[1228]

Additionally, section 8(3)(a) provides that in the event of a human rights provision applying to the private sector, courts "must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right".[1229] It can be concluded that "human rights are not directly applied to companies, but instead, through statutory interpretation or the development of the common law".[1230] Section 39(2) of the Constitution provides that legislation be interpreted to promote the "spirit, purport and objects" of the Bill of Rights.[1231]

South Africa has passed statutes that give effect to constitutionally guaranteed rights. These statutes include legislation such as the Companies Act.[1232] Specifically, section 7 sets out the Act's purposes and "demands that human rights concerns are placed at the centre of policymaking within the company and should be embedded in the holistic functioning of the company".[1233] Section 72 enables the Minister of Trade and Industry to pass regulation that would allow certain companies to form a social and ethics committee (SEC) that would have regard for the impacts companies have on the public interest and provide speedy resolution of disputes involving the company.[1234] SECs are necessary to encourage large companies that

[1227] Constitution of the Republic South Africa, 1996.
[1228] *Ibid*.
[1229] S 8(3)(a) Constitution of the Republic South Africa, 1996.
[1230] Smit 2016 *Bus Hum Rights J* 349.
[1231] Constitution of the Republic South Africa, 1996.
[1232] The Companies Act 71 of 2008 (the Companies Act) – came into force on 1 May 2011.
[1233] Katzew 2011 686–687.
[1234] Companies included are: state-owned company; listed public company; and companies that has, in any two of the previous five years, had a public interest score of at least 500 points. Public interest scores = points given for a set of structural and financial parameters including number of employees, third party liabilities, turnover, number of shareholders. See https://www.cipc.co.za/?page_id=11891 (accessed 3 December 2022).

have an impact on the public interest to act responsibly and from a public interest perspective account for their decision-making processes and the results thereof.[1235]

Regulation 43 of the Companies Act (71 of 2008, as amended) requires a committee to monitor the company's activities, having regard to any relevant legislation, other legal requirements, or prevailing codes of best practice of matters relating to–

(i) social and economic development, including the company's standing in terms of the goals and purposes of–
(aa) the 10 principles set out in the United Nations Global Compact Principles; and
(bb) the OECD recommendations regarding corruption;
(cc) the Employment Equity Act; and
(dd) the Broad-Based Black Economic Empowerment Act;

(ii) good corporate citizenship, including the company's–
(aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;
(bb) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and
(cc) record of sponsorship, donations and charitable giving;

(iii) the environment, health and public safety, including the impact of the company's activities and of its products or services;

(iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and

(v) labour and employment, including–
(aa) the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and
(bb) the company's employment relationships, and its contribution toward the educational development of its employees;
(b) to draw matters within its mandate to the attention of the Board as occasion requires; and
(c) to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate. [1236]

[1235] Erasmus J "The Companies Act the Social and Ethics Committee and the management of the Ethics Performance of the Company" 2014. Available at: https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_SocialAndEthicsCommitteeAndTheManagementOfTheEthicsPerformance_24032014.pdf (accessed 3 December 2022).

[1236] Regulation 43(5)(a). See Regulations in terms of the Companies Act No 71 (2008) (As amended). Available at: https://marxgore.co.za/wp-content/uploads/2020/01/Regulation-43-Social-and-ethics-committee.pdf (accessed 3 December 2022).

Regulation 43(2)(a) exempts subsidiary companies from the need to establish a SEC if the holding company has one that does what the regulations require on behalf of the subsidiaries.[1237] In terms of regulation 43(2)(b), a company can apply to the Companies Tribunal for exemption from having to establish a committee.[1238] A SEC is a board-appointed committee to which governance functions has been delegated.[1239] This regulation is believed to enforce good corporate citizenship, which affects the economic bottom line and encompasses social and environmental dimensions.[1240] The regulation encourages companies to take the interests of their stakeholders, including employees, consumers and communities, and the environment into account, as well as be cognisant of employee health, public safety, and the impact of the company's activities, products, and services.[1241] In addition, ethical duties include the prevention of unfair discrimination and the reduction of corruption.[1242] Ostensibly, this regulation is aimed at companies being good corporate citizens and relates to ethics in the workplace rather than conducting human rights due diligence to identify, prevent, mitigate, and address adverse impacts on human rights.[1243] SECs seem to fulfil a very different function from that which Ruggie envisaged, which is that:

> … human rights due diligence must reflect [on] what is unique to human rights. Because the aim is for companies to address their responsibility to respect rights, it must go beyond identifying and managing material risks to the company itself, to include the risks the company's activities and associated relationships may pose to the rights of affected individuals and communities. Moreover, because human rights involve rights-holders, human rights due diligence is not simply a matter of calculating probabilities; it must meaningfully engage rights-holders or others who legitimately represent them. And because situations on the ground may change–often by the sheer fact of a company's presence–human rights due diligence is not a one-off task, but must be conducted periodically over the life cycle of the particular project.[1244]

South Africa has a variety of laws dealing with constitutionally guaranteed human rights, such as the Basic Conditions of Employment Act that has as its purpose to "advance economic development and social justice by fulfilling the primary objects which are to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution and to give effect to obligations incurred by the Republic as a member state of the International Labour

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[1237] *Ibid.*
[1238] *Ibid.*
[1239] Social and Ethics Committee Trends and Survey Report 2021. Available at: https://www.tei.org.za/wp-content/uploads/2021/12/SEC_Trends_Report_2021_Final.docx.pdf (accessed 2 December 2022).
[1240] Schoeman "Social and ethics committees: a value or a cost?" no date. Available at: https://www.ethicsmonitor.co.za/Social-and-ethics-committees-a-value-or-a-cost.aspx (accessed 2 December 2022).
[1241] *Ibid.*
[1242] *Ibid.*
[1243] See para 6.6 below.
[1244] Ruggie (2013) ch 3.

Organisation".[1245] The Act prohibits child labour, which means that children under the age of 15 or under the minimum school-leaving age may not be employed.[1246] In addition, the Regulations on Hazardous Work by Children in South Africa prohibit children who are over the age of 15 or above the minimum school-leaving age from working in hazardous conditions or from being exposed to health and safety risks when employed.[1247]

As a document that recognises and entrenches the "building blocks of social justice", the Constitution enables the Broad-Based Black Economic Equity (B-BBEE) Act,[1248] which furthers the constitutional aim of advancing equality of opportunity.[1249] The Employment Equity Act also aims to right historical wrongs[1250] and promotes equal opportunities and fair treatment in employment while implementing action to redress previous employment disadvantages.[1251]

The right to fair labour practices is constitutionally guaranteed; therefore, legislation exists to counter the inherent inequality in the relationship between employees and employers. The Act governing labour relations allows workers in South Africa the right to join and participate in the activities of trade unions,[1252] enables trade unions to organise,[1253] establishes bargaining structures,[1254] and recognises collective agreements[1255] and the right to strike.[1256]

The Occupational Health and Safety Act provides protection for South African workers during their day-to-day working activities.[1257] In addition, workers and visitors to workplaces are protected against hazardous substances and equipment that is potentially harmful.[1258]

Whistle-blower legislation exists in the form of the Protected Disclosures Act[1259] that provides that private and public sector employees "who disclose information of unlawful or corrupt conduct

[1245] Basic Conditions of Employment Act s 2.
[1246] Basic Conditions of Employment Act ch 6.
[1247] Basic Conditions of Employment Act: Regulations on Hazardous Work by Children in South Africa.
[1248] Act 53 of 2003 as amended by Act 46 of 2013. Discussed in para 3.1 below.
[1249] Pooe 2013 *Mediterr J Soc Sci* 636.
[1250] Act 55 of 1998.
[1251] Employment Equity Act s 2.
[1252] LRA s 4.
[1253] LRA ss 12–16.
[1254] LRA ss 27–48.
[1255] LRA ss 23–26.
[1256] LRA s 64(1).
[1257] Occupational Health and Safety Act 1993.
[1258] Regulations for hazardous Chemical Agents 2021.
[1259] No. 26 of 2000.

by their employers or fellow employees, are protected from occupational detriment".[1260]

South African employees are further protected, as all employers, irrespective of size, must process employees' personal information in terms of the Protection of Personal Information Act 4 of 2013. The Act was signed in 2013 but came into force only in 2020 after substantial delays in setting up the Information Regulator's enforcement agency.[1261]

Legislation that originally was not explicitly aimed at workers, but all South Africans is the Promotion of Equality and Prevention of Unfair Discrimination Act,[1262] which gives effect to section 9 of the Constitution. The Act seeks to prevent and prohibit unfair discrimination and harassment, promote equality and eliminate unfair discrimination, prevent and prohibit hate speech, and provide for matters related to these matters.[1263] The law makes it illegal to discriminate unfairly in almost every sphere of society and establishes positive duties in respect of equality on the state and on all persons to promote substantive equality.[1264] An amendment bill[1265] is currently being discussed that would affect workers as the amendment provides, *inter alia,* that employers and employees be made jointly and severally liable for any discrimination committed by an employee in the course of that employee's work, unless the employer can show that they took reasonable steps to prevent it.[1266] Retaliation is prohibited against a person who either objects to discriminatory conduct or who brings a complaint in terms of the Act.[1267]

Environmental laws have been passed in South Africa that give effect to the constitutionally protected right to an environment that does not harm health and well-being.[1268] The National Environmental Management Act[1269] provides that persons, including juristic persons who cause pollution and degradation of the environment, must prevent, stop, avoid, minimise, and rectify any pollution or degradation.[1270] In addition, the Mineral and Petroleum Resources Development

[1260] A Guide for Public Sector Managers Promoting Public Sector Accountability Implementing the Protected Disclosures Act.
[1261] Bowan After 7-year wait, South Africa's Data Protection Act enters into force July 2021.
[1262] Act 4 of 2000.
[1263] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[1264] Kok 2008 *S Afr J Hum Rights* 445.
[1265] Available at: https://www.groundup.org.za/media/uploads/documents/pepuda_amendment_bill.pdf (accessed 20 September 2022).
[1266] Singo "Proposed Amendments to the Equality Act" (2 June 2021).
[1267] *Ibid*.
[1268] Constitution s 24.
[1269] Act 107 of 1998.
[1270] NEMA s 28(1).

Act regulates companies in the extractive industry.[1271] The legislation encourages mining companies to consult with local communities, develop social and labour plans, and give effect to section 24 of the Constitution.[1272]

Other legislation considered is the Competition Act.[1273] Unlike legislation such as the Companies Act that does not refer specifically to human rights, the Competition Act focuses on historically disadvantaged persons and small business and does not mention human rights even after the Act was amended.[1274] The Constitutional Court pronounced in the *Competition Commission v Mediclinic* case that invoking of section 39(2) of the Constitution in interpreting legislation "ought not to be viewed as an optional extra" but a "constitutional injunction".[1275] The Constitution is paramount when interpreting and adjudicating all legislation, including competition law, especially regarding section 27, which deals with the right to have access to health care services.[1276]

All these legislative measures are considered a "constant risk" for companies navigating human rights and labour in South Africa.[1277] For South African companies operating within South African borders, developing good practices on human rights is essential, and accordingly, these companies must understand and respond to a range of regulatory and voluntary requirements.[1278]

The King Code[1279] on Corporate Governance articulates requirements that Johannesburg Stock Exchange-listed (JSE) companies, regardless of form, must adhere to, whereas unlisted companies can act voluntarily. The legitimate interests of stakeholders are considered and recognised in King III and IV, and stakeholders include employees, suppliers, customers, regulators, the environment, the community, and in adopting a stakeholder-inclusive approach, the King Code recognises that "the best interests of a company are not necessarily always

[1271] Mineral and Petroleum Resources Development Act 28 of 2002.
[1272] Mineral and Petroleum Resources Development Act s 21.
[1273] Competition Act 89 of 1998.
[1274] Competition Amendment Act, No 18 of 2018.
[1275] Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another (CCT 31/20) [2021] ZACC 35; 2022 (5) BCLR 532 (CC); 2022 (4) SA 323 (CC) (15 October 2021).
[1276] Eveleigh South African Competitions Commission to Litigate Against the Excessive Pricing of Breast Cancer Treatment Drugs 14 February 2022. Available at: https://africanantitrust.com/2022/02/14/south-african-competition-commission-to-litigate-against-the-excessive-pricing-of-breast-cancer-treatment-drugs/ (accessed 30 October 2022).
[1277] By the National Business Institute and Global Compact Network South Africa.
[1278] National Business Institute 2016 Toolkit for Business and Human Rights in South Africa 1.
[1279] Institute of Directors Reports King 1 (1994), King II (2002), King III (2010), King IV (2016).

equated to the best interests of shareholders".[1280] The Code stipulates that holding companies, in a group of companies, are mere shareholders of subsidiaries and that boards of directors of subsidiaries should always do what is in the best interest of the subsidiary company.[1281] When companies operate in different jurisdictions, the law of the host countries must be abided by, and where the holding company adheres to the King corporate governance principles, the "adaptation and implementation of policies, structures, and procedures of the holding company is a matter of consideration and approval by the board of the subsidiary company as a separate legal entity".[1282]

Another voluntary code that companies follow is CRISA.[1283] This soft law initiative was drafted in response to King III when it was evident that, unless corporations became actively involved the King III requirement that governance principles are applied, or the requirement that companies will have to explain why they failed to do so, would not be effective. Thus, the Committee on Responsible Investing in South Africa[1284] is responsible for producing CRISA, which makes it a private industry initiative.[1285] Intended to apply only to JSE-listed companies, CRISA is based on the UN Principles of Responsible Investment.[1286] CRISA gives guidance to institutional investors on how to conduct investment analysis, engage in investment activities, and exercise rights so as to establish whether sound governance is promoted by investee companies.[1287] Corporate governance is understood in terms of King IV and includes behaviour that supports sustainable development and is stakeholder inclusive, rather than being only shareholder focused.[1288] In the South African context, institutional investments is a broader concern than the protection of assets for the beneficiaries – it is about the "use of shareholder ownership and rights to influence companies to create long-term value which […is…] to have a societal benefit over and above economic results for beneficiaries".[1289]

[1280] Institute of Directors 2016 King IV Report on Corporate Governance for South Africa 26.
[1281] King IV Report Principle 16 72.
[1282] *Ibid*.
[1283] Institute of Directors Southern Africa, Code for Responsible Investing in South Africa 2011. Available at: https://www.iodsa.co.za/page/crisaresourcecentr (accessed on 19 October 2022).
[1284] Convened by the Institute of Directors of Southern Africa.
[1285] Locke "Encouraging Sustainable Investment in South Africa: CRISA and Beyond" (2022) 475.
[1286] See https://www.unpri.org/pri/about-the-pri (accessed 30 October 2022).
[1287] Locke (2022) 476.
[1288] *Ibid.*
[1289] *Ibid.*

When South African companies operate in other jurisdictions where there are not numerous human rights and environmental protections for workers in their supply chain, there is no obligation to apply the South African standard in the countries in which they or their subsidiaries operate.

4.3. The South African Human Rights Commission

When rights are infringed within South Africa, the aggrieved have access to the South African Human Rights Commission (SAHRC), which derives its powers from South Africa's 1996 Constitution and the South African Human Rights Commission Act 40 of 2013. The SAHRC is mandated to monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality and the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.[1290] In 2016, the SAHRC Commissioner responsible for access to justice and housing urged the South African government to openly express support for the UNGP and develop NAPs on business and human rights.[1291] This support is viewed as necessary because, despite many laws being in place to protect those working in the supply chains of corporations within South Africa, there is a lack of sufficient and effective remedies for victims of business-related human rights violations.[1292] Moreover, "victims of corporate human rights abuse in South Africa face numerous barriers to access remedies",[1293] including difficulties in piercing the corporate veil and high legal costs with relatively little financial aid, which are exacerbated by the loser-pays principle and the rather unfriendly legal environment that is not conducive to successful class-action lawsuits.[1294]

The UNGP provides that access to remedy be made possible, and this provision would help workers within and outside South Africa to have access to courts. Despite the South African government not implementing the UNGP, the courts have referred to the UNGP.

[1290] The South African Human Rights Commission (SAHRC).
[1291] Ameermia Business and Human Rights: Access to Fairplay for those Affected by Business-related Human Rights Violations is Possible via SA's Constitution (21 April 2016).
[1292] *Ibid.*
[1293] *Ibid.*
[1294] *Ibid.*

4.4. The University of Stellenbosch Legal Aid Clinic Case[1295]

This case involves general workers, earning low wages, who approached a company known as SA Multiloan in Stellenbosch for small loans. The individual applicants signed forms and obtained the loans they applied for. When later they fell into arrears in the repayments, the credit provider, through its representatives, had them sign further documents. This practice resulted in default judgements and emoluments attachment orders being obtained by the credit provider. Deductions were drawn from their wages by their employers, and only at this stage, the applicants became aware of the legal route taken by the credit provider. The applicants sought legal assistance from the Law Clinic, Stellenbosch, which instituted proceedings to vindicate their rights. In the High Court judgement, Desai J referred to the Protection of Wages Convention of the ILO that obliges states to prevent the violation of socio-economic rights by private actors in its jurisdiction. Despite South Africa not having ratified the Convention, the judge concluded that given the length of time the Convention has been in existence, it has probably reached the status of international customary law, which is binding on all states and that the ILO Convention's provisions are highly persuasive. In addition, Desai J stated that "[s]imilarly, the UN Guiding Principles on Business and Human Rights […] place a duty upon the state to take measures to prevent the abuse of human rights in their territory by business enterprises … [moreover] … States are obliged to reduce legal and practical barriers that may deny individuals a remedy".[1296] Additionally, the judgement refers to the UNHRC Resolution 26/22 that stated that there is a "concern of legal and practical barriers to remedies for business-related human rights abuses, which may leave those aggrieved without an effective remedy, through judicial or non-judicial avenues",[1297] and though the reports of the UN General Assembly and Human Rights Council are not binding, they are "highly persuasive and generally express the current consensus".[1298] The High Court ruled in favour of the applicants, but the Constitutional Court was approached to consider whether "this form of debt collection strikes a constitutionally compliant balance between the rights of creditors to recover debts and the rights of debtors who are subject to such

[1295] University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others (2015) 36 ILJ 2558 (WCC).
[1296] *The University of Stellenbosch-case* para 71.
[1297] *Idem* para 72.
[1298] *Idem* para 73.

processes".[1299] The Constitutional Court did not refer to the UNGP in its decision that ordered parliament to change the wording of the sections of the relevant legislation so as to make it consistent with section 34 of the Constitution.[1300] Nevertheless, the Constitutional Court found that there is a judicial obligation to consider relevant international standards such as the ILO Protection of Wages Convention.[1301]

The case demonstrates that lending schemes render the most vulnerable South Africans exposed to human rights violations because of unethical lending and debt collection practices.[1302] In addition, according to the SAHRC, "those with impaired credit records often face discrimination by employers and potential employers, reducing their ability to escape cycles of debt and poverty".[1303] In the past, the SAHRC has demonstrated consistent support for the UNGP and has urged the government to support them.

4.5. Shadow National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks

In 2016, the SAHRC, academia, and civil society conducted a national baseline assessment (NBA) that used established approaches and was based on indicators for the development of human rights monitoring frameworks as well as the guidelines that exist for NAPs.[1304] It was aimed at providing an overview of existing legislative and regulatory frameworks relating to business and human rights in South Africa, and provided information about the gaps that remained in such frameworks or in their implementation.[1305] The document was intended to lay the groundwork for a NAP process and to provide evidence-based recommendations for developing business and human rights policies at the government level.[1306]

[1299] South African Human Rights Commission 2016 Media Statement: Constitutional Court Judgment in: University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others CCT 127/15.
[1300] Re University of Stellenbosch Legal Aid Clinic, *et al*., Constitutional Court of South Africa, Case CCT 127/15 (13 September 2016) para 205.
[1301] *Idem* para 91.
[1302] South African Human Rights Commission 2017 Human Rights Impact of Unsecured Lending and Debt Collection Practices in South Africa.
[1303] *Ibid* 7.
[1304] Shadow National Baseline Assessment 7. Available at: https://www.chr.up.ac.za/images/researchunits/bhr/files/shadow-sa-nba.pdf (accessed 2 December 2022).
[1305] *Idem* 6.
[1306] Debevoise & Plimpton 2021 50.

The shadow[1307] NBA found that there were various areas under South Africa's domestic legislative framework that require attention as having an impact on business and human rights:

(1) Concerns were expressed regarding the context of labour that pertain to job insecurity, inadequate wages and poor working conditions, especially in the informal sector.[1308]

(2) Land reform is a controversial topic in the country due to the legacy of South Africa's turbulent past and the historically discriminatory dispensation of land – it was suggested that there is thus an urgent need for policy reform that clarifies the human rights responsibilities and accountability of company executives and directors.[1309]

(3) Several concerns were expressed around the issue of illicit financial flows due to ongoing transfer pricing and other tax avoidance practices in the country.[1310]

(4) The public procurement system in South Africa often faces allegations of corruption and cartel-related incidents, and though South African laws provide guidelines for public procurement practices, there are no prescribed procedures in the law or specific oversight mechanisms.[1311]

(5) Human rights due diligence requirements and measurements were lacking across the business spectrum, including among State-owned enterprises.[1312]

(6) In 2015, the Protection of Investment Bill was passed by the South African parliament that is aimed at regulating foreign direct investment. The bill has been widely criticised for deterring foreign direct investment, but its human rights implications remain unclear.[1313]

(7) It was noted that the South Africa's business landscape is quite active in the field of corporate governance, specifically through the efforts put into the development of the King Report on Corporate Governance which has a prominent focus on human rights.[1314]

[1307] Because it did not have government involvement.
[1308] "Shadow" National Baseline Assessment 2. Available at: https://www.chr.up.ac.za/images/researchunits/bhr/files/shadow-sa-nba.pdf (accessed 2 December 2022).
[1309] *Ibid.*
[1310] *Ibid.*
[1311] *Idem* 3.
[1312] *Ibid.*
[1313] *Ibid.*
[1314] *Ibid.*

(8) Regarding the access to remedy framework in South Africa, mention was made in the shadow NBA of a combination of judicial, quasi-judicial, and non-judicial remedies.[1315] The SAHRC was viewed as one of a few national human rights institutions in the world to have a complaints mechanism and investigative powers.[1316] Additionally, South Africa has an active Public Protector that has launched several business and human rights-related investigations regarding the abuse of public power, misadministration of public funds, and corruption in procurement practices.[1317]

(9) The assessment highlighted the barriers to access to remedies that victims of corporate human rights abuse face in South Africa, such as difficulties in piercing the corporate veil and issues around *forum non conveniens* – also, victims in South Africa face very high legal costs with relatively little financial aid, which is exacerbated by the loser-pays principle.[1318] In addition, it has been established that South Africa's legal environment is not very conducive to successful class-action lawsuits, even though they are often the most appropriate filing class in business and human rights-related cases.[1319]

The shadow NBA found that although the South African legislative and regulatory framework regarding business and human rights is relatively well developed, it appeared that in most cases, the laws and regulations are not being interpreted, fully implemented and enforced as expected.[1320] Usually, governments lead NAP processes, of which an NBA is a necessary component because it informs the action to be taken in drafting a NAP.[1321]

The South African government has resisted engaging with the UNGP or developing a NAP. This refusal has consequences, and what follows is a discussion highlighting why not making a decision regarding the UNGP is, in fact, a decision that has consequences.

[1315] *Ibid.*
[1316] *Ibid.*
[1317] *Ibid.*
[1318] *Ibid.*
[1319] *Ibid.*
[1320] *Idem* 2.
[1321] *Idem* 6.

4.6. Economic Realities in South Africa

The South African economy is an anchor of economic stability in southern Africa and beyond.[1322] Unlike most other African states, South Africa enjoys comparatively higher industrial, commercial, infrastructural, and financial power.[1323] Despite structural challenges and anaemic economic growth, exacerbated by the COVID-19 pandemic,[1324] it was reported that the earnings for South African-listed companies grew 35% per year over the last three years and that revenues in these companies have grown 6.0% per year. [1325] These companies generate greater products, resulting in greater profits.[1326]

South Africa has a dual economy with one of the highest and most persistent inequality rates in the world with the unemployment rate at an unprecedented level (35.3% in the fourth quarter of 2021) and youth unemployment (ages between 15 and 24) at 66.5% for the same period.[1327] The South African government has greater problems than coming to grips with the UNGP and its actions in relation to the UNGP are not that surprising. Yet, the government is expected to engage with multiple competing complex international policies, because South Africa is the home state to companies that have a large footprint in Africa. For example, Sanlam operates in 33 African countries,[1328] Standard Bank in twenty,[1329] MTN in seventeen,[1330] and the Shoprite Group, as the largest South African retailer by market capitalisation, sales, profit and number of employees and customers, in ten African countries.[1331] Naspers, which is headquartered in South Africa, is a global concern operating in more than 130 countries.[1332] Given how ubiquitous South African companies are, the country's response to the UNGP is particularly disappointing.

[1322] McNamee "What if Africa's Regional Powers Did Better?" (10 October 2016).
[1323] Egu and Adewale 2017 *Afr J Bus Manag* 689.
[1324] "The World Bank in South Africa". Available at: https://www.worldbank.org/en/country/southafrica/overview. (accessed 2 November 2022).
[1325] South African (JSE) Market Analysis and Valuation (updated 2 November 2022). Available at: https://simplywall.st/markets/za (accessed 2 November 2022).
[1326] *Ibid*.
[1327] "The World Bank in South Africa". Available at: https://www.worldbank.org/en/country/southafrica/overview (accessed 2 November 2022).
[1328] Sanlam "Who we are" Available at : https://www.sanlam.com/sanlam-at-a-glance (accessed 28 November 2022).
[1329] "Our Global Footprint" (no date) Available at: https://www.standardbank.com/sbg/standard-bank-group/contact-us/ourfootprint (accessed 28 November 2022).
[1330] "MTN Group ranked #1 African brand, and among top 10 brands on the continent" (26 May 2022).
[1331] Shoprite "Our Group" (no date). Available at: https://www.shopriteholdings.co.za/group.html (accessed 28 November 2022).
[1332] World Economic Forum Naspers 2022. Available at: https://www.weforum.org/organizations/naspers-limited (accessed 28 November 2022).

After 1994, South Africa formalised its relationship with the EU, and in 1995, the EU was South Africa's biggest trading partner.[1333] At that time, South Africa's economic investment in Africa had been relatively sluggish and South Africa was urged to make Africa a significant destination of its investment.[1334] Over the last several years, South African-based capital has expanded its presence and has become a key actor in diverse arenas in Africa, including the "food processing, manufacture, logistics, and distribution operations [and also] the rapidly growing reach of South African supermarkets and fast food chains".[1335] South Africa's economy had experienced rapid expansion.[1336] Labour, employment, and human rights legislation protects workers in South Africa from abuses if they fall within the scope of the labour laws such as the Labour Relations Act, which allows collective agreements, or the Basic Conditions of Employment Act that protects the employee-employer relationship and "attempts to protect the 'vulnerable' employee against the employer who holds the purse strings in the event of any disagreement as to the details".[1337]

The South African context is unique because of the extensive legacy of inequality that apartheid policies left behind. There is a dichotomy between the well-developed financial system and the majority population, which it does not serve.[1338] Since 1994, the South African government has implemented various policies, such as affirmative action, preferential procurement, and black economic empowerment,[1339] that aimed to facilitate the economic participation of the previously disadvantaged as a means to redress inequalities. A quarter of a century after legislative initiatives such as B-BBEE,[1340] which aims to achieve "substantive equality by placing black people in a position to participate fully in all spheres of society in order to develop their full human potential", the goal is yet to be attained.[1341] The Act's objective is to transform South African society by dismantling economic inequality, unfortunately, ten years since being enacted a "large part of the black population remain […] out of the mainstream economy, and this is evidenced

[1333] Hurt *Meeting the challenges of past and present: Post-apartheid South Africa's reintegration into the global political economy, 1994–1997* 146.
[1334] Miti and Kilambo 2012 *Insight on Africa* 63.
[1335] Hall and Cousins 2018 *Globalizations* 2.
[1336] ILO "National Labour Law Profile: South Africa" (no date). Available at: https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm (accessed 28 November 2022).
[1337] *Ibid*.
[1338] Locke (2022) 471.
[1339] Janse Van Rensburg *The constitutional framework for broad-based black economic empowerment* 17.
[1340] Act 53 of 2003 (BEE Act).
[1341] Kloppers 2014 *Law Democr Dev* 59.

by their lack of assets, education, skills, and capital and their high rate of joblessness".[1342] The implementation of B-BBEE measures is seen as imperative to eradicate economic inequality.[1343] B-BBEE involves a number of factors that aim at increasing the number of black people (South African citizens previously racially classified as African, Indian or coloured) who manage, own and control the country's economy.[1344] There is no obligation to have a particular B-BBEE status level, but it is an important element for companies that wish to do business with South African organs of state, such as when applying for licences, permission, or authorisation.[1345] Also, the B-BBEE Regulations require JSE-listed companies to report annually to the B-BBEE Commission regarding their compliance with B-BBEE and, as such, the JSE Listings Requirements[1346] place a "continuing obligation on JSE-listed companies to publish such B-BBEE compliance reports on their company website".[1347]

The South African government has enacted a multitude of laws that are aimed at improving the lives of South Africans, which has shown its willingness and ability to pass laws that place obligations on companies.[1348] The government remains dilatory in its response to UNGP, despite the fact that mandatory rules relating to human rights due diligence are overdue, for those working in the supply chains[1349] of South African companies. According to Human Rights Watch, supply chain workers often suffer serious labour rights abuses, which include violations such as child labour.[1350] Communities face human rights impacts due to the environmental damage caused by mining and industrial agriculture.[1351] Children, in particular, are affected by a wide range of violations, including increased risk to their health.[1352] It is widely accepted that companies can reduce the risk of contributing to abuses in their supply chains by identifying

[1342] Chauke "Broad-Based Black Economic Empowerment (B-BBEE) as a competitive advantage in conducting business in South Africa" 2020 577.
[1343] *Ibid*.
[1344] An overview of B-BBEE 4. Available at: https://www.bowmanslaw.com/wp-content/uploads/2020/10/BBBEE-1_15.12.2021.pdf (accessed 30 October 2022).
[1345] *Ibid.*
[1346] Available at: https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf (accessed 30 November 2022).
[1347] SAIFM "Greater B-BBEE disclosure requirements for JSE-listed companies" (8 February 2018). Available at: https://financialmarketsjournal.co.za/greater-b-bbee-disclosure-requirements-for-jse-listed-companies/ (accessed 30 November 2022).
[1348] For example the Employment Equity Act 55 of 1998 (EEA), amended in 2022.
[1349] Kippenberg "Corporate human rights responsibility – why a strong supply chain act is important" (26 October 2022).
[1350] *Ibid*.
[1351] *Ibid.*
[1352] *Ibid.*

human rights risks, taking steps to address and prevent them, and reporting publicly on their efforts.[1353]

4.7. UN Treaty on Business and Human Rights: South Africa's Shiny Object?

The activities of South African-based TNCs can impact human rights or involve environmental risks. For this reason, the South African government should explore human rights due diligence legislation, just as other countries that are home to large internationally operating corporations. Many governments of countries with large TNCs accepted the UNGP in 2011. As stated previously, at the UNHRC's 26th session, South Africa, Bolivia, Cuba, and Venezuela co-sponsored Ecuador's Resolution 26/9 for a binding treaty for business and human rights to be negotiated.[1354] The resolution was rejected by the "industrialised members, including the EU member states sitting on the UNHRC, and most Latin American members abstained".[1355] Also, at the 2014 UN session, Argentina, Ghana, Norway, and Russia tabled Resolution 26/22, which was unanimously adopted requesting that the UNWG[1356] prepare a report considering, among other things, the benefits and limitations of a legally binding instrument and reaffirmed the importance of the UNGP and called for an examination of the benefits and limitations of a binding treaty.[1357]

When the Ecuadorian proposal was approved, twenty states were in favour, and none of the economies that the UN defines as "developed" supported the resolution.[1358] China and India[1359] are defined as developing countries by the UN despite having GDP growths that project that these countries will be in the three largest economies by 2030.[1360] As discussed in Chapter 2, Resolution 26/9 was supported by an alliance of about 600 NGOs and was viewed as being passed by "a deeply divided vote".[1361] South Africa seems to be focused on the prospect of a treaty being negotiated and adopted. Through the Department of International Relations and

[1353] *Ibid*.
[1354] See para 2.6. above.
[1355] Zamfir "Towards a mandatory EU system of due diligence for supply chains" October 2020. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI(2020)659299_EN.pdf (accessed 5 May 2022).
[1356] Established in 2011 by UNHRC resolution 17/4.
[1357] Zamfir "Towards a mandatory EU system of due diligence for supply chains" (October 2020).
[1358] Country classification: Data sources, country classifications and aggregation Methodology 2014.
[1359] Singh "At WTO, China a 'developing' country: Why many nations are raising concerns" (12 January 2022).
[1360] Rapp and O'Keefe "This chart shows how China will soar past the U.S. to become the world's largest economy by 2030" (31 January 2022).
[1361] Ruggie (9 September 2014).

Cooperation, South Africa is engaging only with the treaty-making process in Geneva[1362] to the exclusion of any other initiatives. According to the South African delegation, the treaty negotiation is to provide as a "law of last resort, effective legal remedies to the victims of the grave violations of human rights and fundamental freedoms committed by Transnational Corporations (TNCs) and Other Business".[1363] The delegation stated that South Africa remains committed to the letter and spirit of Resolution 26/9.[1364] During the fourth session, the South African delegation stated that the underlying purpose of the UNGP is deterring and preventing abuses, as well as providing remedies with legal certainty, which is important.[1365] The delegation compared the negotiating process to the anti-apartheid struggle, reiterating that during that time sanctions were required and not "voluntarism of corporate social responsibility which is reliant on the goodwill of business".[1366] South Africa as a state has not taken any steps to draft legislation based on the UNGP that would oblige South African TNCs to conduct human rights due diligence, instead focusing on CSR measures that depend on the goodwill of business.

Ruggie argues that emerging market countries such as South Africa are "as protective of 'their' multinationals as Western home states are of theirs".[1367] South Africa, as have other home states of TNCs, could implement the NAP, but it has not. Unlike its co-sponsors of Resolution 26/9, South Africa is a home country to TNCs operating in other countries. As discussed previously, TNCs operate in foreign countries through subsidiaries and are bound by local laws and regulations, which leaves the door open for human rights violations or environmental risks that the UNGP specifically aims to address. Unlike what France and Germany have done, South Africa has not opted to engage with the UNGP but rather places all its efforts into the treaty-negotiating process. According to Ruggie, it takes a notoriously long time for states to negotiate treaties because the "broader their scope and the more controversial the subject", the longer negotiations last before treaties enter into force.[1368] For example, negotiations on the Convention on the Rights of Persons with Disabilities lasted five years, making it one of the quickest UN treaties negotiated in comparison to the Declaration on the Rights of Indigenous Peoples that

[1362] See para 2.4 above.
[1363] Izquierdo Miño 2022 Annex to the Report on the Seventh Session of the OEIGWG 20.
[1364] Human Rights Council 2019 Addendum to the Report on the Fourth Session of the OEIGWG 23.
[1365] *Idem* 23.
[1366] *Ibid.*
[1367] Ruggie (2013).
[1368] *Ibid.*

took more than twenty years to negotiate.[1369] By not preparing a NAP or drafting legislation, the South African government maintains the status quo for South African TNCs, making South Africa an outlier. In 2020, Ecuador's government announced its commitment to developing a business and human rights NAP,[1370] while a BRICS[1371] partner, Brazil, has begun the process of developing a NAP on business and human rights.[1372] India published a draft NAP in February 2019.[1373] According to the Danish Institute for Human Rights, South Africa has left action on a NAP to academic and civil society involvement.[1374]

It is unclear why the South African government and the majority party are quiescent on the subject. It is submitted that the issue pertains to the relationship between the ANC and corporate South Africa. They engage in a mutual blame game but the relationship has been called a "fatal embrace".[1375] The government changed the focus in the original black economic empowerment policy of being "skills enhancement, affirmative action, and new firm development … [to a desire] … for a transfer ownership to politically connected, influential individuals".[1376] The B-BBEE approach to economic empowerment accordingly "sucked energy from initiatives [that] focus on growth and employment creation" in South Africa.[1377] As stated earlier, chronic low growth characterised the South African economy before and during the Covid-19 pandemic,[1378] yet South African TNCs posted profits in 2021.[1379] Although companies bemoan the inflexibility of the South African labour market, they accept settlements in wage negotiation that are higher than inflation rates without improvement in productivity.[1380] Before the pandemic, companies remained competitive by shedding labour and raising prices.[1381] The "dysfunctional relationship"[1382] between the South African government and South African business suggests

[1369] Small 2007 The Convention on the Rights of Persons with Disabilities.
[1370] National Action Plans on Business and Human Rights "Ecuador" (2020).
[1371] BRICS partners include Brazil, Russia, India, China, and South Africa.
[1372] National Action Plans on Business and Human Rights "Brazil" (2018).
[1373] National Action Plans on Business and Human Rights "India" (2018).
[1374] National Action Plans on Business and Human Rights "South Africa" (16 November 2017).
[1375] Hirsch 2020 *S Afr J Int* 1.
[1376] *Idem* 15.
[1377] *Ibid*.
[1378] "The World Bank in South Africa". Available at: https://www.worldbank.org/en/country/southafrica/overview (accessed 2 November 2022).
[1379] Headlines: "S.Africa's Shoprite posts profit jump on better Q2, declares dividend" (16 March 2021), "South Africa's Amplats posts 160% rise in full year profit" (21 February 2022), Bidcorp reports record profits in South Africa (23 February 2022), S.Africa's Standard Bank expects 40% rise in first half profits (31 May 2021).
[1380] Spicer 2016 *J Helen Suzman Found* 78.
[1381] *Ibid*.
[1382] *Ibid*.

that, in terms of the UNGP, they would prefer not to burden corporations with additional obligations – especially extraterritorial obligations. Also, companies offer political funding.[1383]

The South African government is distracted by the goal of negotiating a treaty on business and human rights. At the same time, workers in South Africa face human rights violations, despite being well protected on paper. However, protection is only available for those who have permanent employment. Rights in South Africa can be described as a tale of two countries – one is characterised by formal employment that gives rise to a spring of prosperity and hope, while the other consists of seasonal and casual jobs that results in a winter of poverty and despair.

4.8. Laws Not Enforced, or Laws Circumvented Result in Human Rights Violations

Despite farm work being subject to regulation, a 2011 Human Rights Watch study found that the government failed to protect the rights of farmworkers and farm dwellers or to ensure that farmers comply with national law.[1384] A 2017 Oxfam study found that "farm workers' rights continue to be violated daily by farmers because the government does not effectively enforce legislation by acting against such farmers".[1385] In 2021, the Rosa-Luxemburg Foundation conducted a study that revealed violations of fundamental human rights and labour rights that took place on four South African wine farms.[1386] The plight of farmworkers was again highlighted on 17 March 2022 when the Langeberg Municipality released a statement about unemployed locals who protested against alleged discriminatory employment, and clashes broke out between Lesotho and Zimbabwean nationals in Nkqubela, Robertson.[1387] The statement highlights how South African employers, many of whom are suppliers of international companies, are circumventing statutory provisions that are in place to protect workers. Ostensibly, that the employment of foreign (seasonal) workers in South Africa is regulated by contractual agreements formed outside South Africa that include contractual conditions that are probably not allowed under South African legislation.

[1383] "IEC issues party funding disclosure for 3rd quarter 2021" (23 February 2022).
[1384] Human Rights Watch 2011 Ripe with Abuse: Human Rights Conditions in South Africa's Fruit and Wine Industries.
[1385] Devereux *et al*. 2017 "The Farmer Doesn't Recognise who Makes Him Rich": Understanding the Labour Conditions of Women Farm Workers in the Western Cape and the Northern Cape, South Africa.
[1386] Rosa-Luxemburg Stiftung 2021 Cheap Wine, Bitter Aftertaste.
[1387] Statement Public Unrest in Nkqubela, Robertson (18 March 2022).

Due to the UNGP and subsequent French and German legislation, it is foreseeable that companies sourcing products from South Africa will have to conduct human rights due diligence to identify and remedy any violations that may occur.[1388] In other words, through supply chain legislation, the French and German governments instruct companies to investigate and prevent any violations, and if they source their products from South African farms, they will have to act, report on violations, and enable grievance mechanisms.[1389] In contrast, the South African government's singular focus on a binding instrument has the effect that South African companies that operate outside South Africa's borders have no such obligation. Even within South Africa, the three studies mentioned above, which were conducted within the last ten years by international CSOs, expose the disregard for rights within the borders of South Africa.[1390]

Since the endorsement of the UNGP, many governments have responded by starting the process of implementing NAPs and others have already implemented NAPs or passed legislation based on the UNGP.[1391] For a soft law instrument, the UNGP's impact has been similar to that of a hard law instrument. South Africa is the home country to several TNCs, yet South Africa is unwavering in its passivity. The UNGP stipulates that states have a duty to take steps towards holding enterprises accountable when their activities result in human rights abuses. Still, in South Africa, corporations are free to chase profits at the expense of workers unless they are contracted, permanent, and able to unionise. Therefore, they are protected by South Africa's Rolls-Royce legislation, the Labour Relations Act.

South African corporations have a commitment to CSR, which is referred to in South Africa as corporate social investment;[1392] however, when it comes to supply chains, human rights violations are meaningless. B-BBEE[1393] is an empowerment policy specific to South Africa, and CSR in South Africa includes B-BBEE. The concept of CSR has its roots in the UN Global Compact and the ISO and started out as corporate philanthropic responsibility.[1394] CSR in South

[1388] German companies: in terms of ss 2 and 3 LkSG, discussed above para 3.3; French companies: In terms of Art L. 225-102-4 LdV, discussed above para 3.2 above.
[1389] See paras 3.2.7 and 3.3.6 above.
[1390] Human Rights Watch Report 2011 South Africa: Farmworkers' Dismal, Dangerous Lives; Devereux *et al*. 2017; Rosa-Luxemburg Stiftung 2021.
[1391] See Debevoise & Plimpton 2021.
[1392] Kabir *et al*. 2015 *Probl Perspect Manag* 283.
[1393] See para 4.6 above.
[1394] Reddy and Hamann "Multinationals don't approach investing in Africa the same way: the differences matter" The Conversation (21 June 2021).

Africa incorporates principles that include an "emphasis on human rights, addressing the needs of excluded groups and investing in community development".[1395] Traditionally, CSR "reflects recognition by companies of their need to develop the capacity to respond to these social compliance mechanisms".[1396] However, this is in contrast to businesses' respect for human rights (business and human rights), which requires specific measures to be undertaken so that companies can "know and show" that they respect rights.[1397] Wettstein asserts that CSR "may not be a suitable frame to advance business respect for human rights".[1398] In South Africa, the focus is on CSR/ corporate social investment as the government obsesses over creating a binding instrument on business and human rights.

An illustration will assist in developing an understanding why CSR/corporate social investment is not sufficient. South African manganese ore is in increasing demand because it is used in batteries.[1399] In 2021, research by ActionAid and the Dutch NGO Centre for Research on Multinational Corporations, SOMO, revealed that South African communities are being exposed to the harmful impact of manganese mining in the Northern Cape.[1400] There are 22 operating manganese mines, of which four are partially owned by JSE-listed companies.[1401] For a company to become JSE listed, the JSE requires compliance with the King Code of Corporate Governance as set out in King IV, and if companies are institutional investors, they must comply with CRISA.[1402] Corporate governance is about operating a company with accountability, transparency, and compliance that will benefit all stakeholders,[1403] whereas social responsibility refers "to 'softer issues', that is company actions that support social objectives considered to be sought after by investors".[1404] In South Africa, corporate governance and corporate responsibility investments influence the social capital that companies enjoy.[1405] The JSE has a Socially Responsible Investment Index that gives investors and fund managers the assurance that the constituent companies "have been screened, monitored and assessed according to objective

[1395] *Ibid*.
[1396] Ruggie (2013).
[1397] *Ibid*.
[1398] Wettstein The History of 'Business and Human Rights' and Its Relationship with Corporate Social Responsibility 29; Deva and Birchall (2020).
[1399] ActionAid Report Manganese Matters 2021.
[1400] *Ibid*.
[1401] Creamer South Africa has 22 operating manganese mines – AmaranthCX 28 September 2020.
[1402] See para 3.2 above.
[1403] Du Toit and Lekoloane 2018 *Afr J Econ Manag Sci* 2.
[1404] *Ibid*.
[1405] *Idem* 3.

environmental, social and governance criteria".[1406] None of these measures would necessarily pick up on the issues found by the ActionAid/SOMO study. If UNGP-based legislation existed in South Africa, the companies would have been obliged to conduct human rights due diligence to detect, eliminate, and prevent potential violations of human rights or environmental risk. Moreover, such human rights due diligence measures are constructed explicitly so that companies can become aware of violations of communities' rights to water and health, as well as to have given free and prior informed consent that the ActionAid research exposed. Legislation is necessary to oblige the conducting of human rights due diligence in South Africa so that companies can become aware of activities that expose them to the risk of violations. Waiting for the arrival of a treaty not only leaves companies exposed to risk but also communities vulnerable to abuse.

By failing to implement the UNGP, the South African government, which often claims the moral high ground when it comes to human rights, leaves the most vulnerable without recourse.

4.9. Conclusion

In this chapter, South Africa's response to the UNGP was examined. The chapter started with an overview of legislation that enshrines the Constitution. Highlighted was the fact that laws alone do not ensure that human rights violations do not occur in the supply chains of South African companies. Although, on the face of it, the Companies Act (read with Regulation 43) seems to address the same issues as the UNGP: the regulation deals with CSR and not business and human rights, which requires specific measures to be undertaken in respect of rights.[1407] Although the Act is applicable to JSE-listed companies, under CSR they can apply for exemption – clearly they should not be exempt from responsibility in ascertaining where there is a risk of human rights violations in its business activities.[1408]

The South African response to the UNGP was examined. The South African government requires companies to play their part in making the South African economy more inclusive. Also examined was the reason for the South African government not taking steps to implement the

[1406] *Ibid*.
[1407] See paras 1.11.12 and 4.8 above.
[1408] See para 4.2 above.

UNGP. It was concluded that it is probably due to the complex relationship between South African companies and the South African government, specifically with the majority party.

Unlike the practice in many home states of large international companies, the South African government seemingly disregards the UNGP and has not attempted to complement its treaty endeavours with developing a domestic NAP for due diligence legislation, nor has it formulated policies relating to business and human rights for South African TNCs. South African laws relating to in-country workers and corporations are stringent and comparable with those of industrialised economies. South African TNCs are no different to any other country with large TNCs, yet South Africa largely neglects the UNGP and has opted to focus its efforts on articulating a binding instrument on business and human rights. South Africa embarked on the treaty-making process together with Ecuador, Bolivia, Cuba, and Venezuela, countries which do not have many large TNCs. A 2018 study identified that 85 global TNCs have operations in at least ten African countries, and of those, 22 have South Africa as their home country.[1409] South Africa prefers not to look too closely at the supply chains of South African TNCs, including those that offer financial services and operate extraterritorially, undermining reliance on ending human and environmental rights violations, and leaving workers subjected to human rights violations deprived of effective judicial or non-judicial remedies.

The South African government's reluctance to impose obligations on TNCs, such as conducting human rights due diligence, because they do not stem from a treaty but is the result of a soft law instrument, such as the UNGP, is less than helpful and leaves supply chain workers in a potentially precarious position. It is argued that a lack of enthusiasm is the result of a collaborative relationship between the ANC and business.[1410] Economic policy, especially in the Mbeki era, was "pro-capital, penalising the poor, doing little to effect redistribution, and […instead] promot[ed] a hugely rich, party connected, business elite".[1411] The relationship between government and business has been strained in recent years. However, it remains mutually beneficial as it "continues [even to this day] to revolve around 'an odd combination of new (political) power without money and old money without [political] power', each needing the

[1409] Dupoux *et al*. 2018 Pioneering One Africa: The Companies Blazing a Trail Across the Continent.
[1410] Southall 2008 *Rev Afr Polit Econ* 286.
[1411] *Idem* 297.

other to advance its interests".[1412] Despite the government paying lip service to poverty alleviation and the eradication of unemployment, a black elite has developed because the ANC "deploy[ed]" high-ranking loyalists to the "commanding heights of the economy" rather than focusing on more broadly-based black empowerment.[1413] Instead of benefitting the masses, black economic empowerment and B-BBEEE deals often involve the same people because corporations and banks prefer to deal with individuals with an established track record of competence.[1414] Despite the belief that black economic empowerment is a moral and business imperative to break the cycle of underdevelopment, in May 2022, President Ramaphosa stated that in some areas, black economic empowerment has failed.[1415]

Historically, the governing party has been underpinned by substantial corporate funding,[1416] and the fact remains that the government needs companies to continue with the implementation of BEE.[1417] I submit that it is for this reason that the South African government has failed to engage with the UNGP. Business in South Africa is already burdened by B-BBEE, corporate social investment, and other corporate governance regulations to which JSE-listed companies need to adhere. Ostensibly, it would be easier to convince corporations to accept additional obligations if these are imposed because South Africa accedes to a treaty (when the treaty is eventually negotiated) than to conduct human rights due diligence that stems from a voluntary instrument.

In conclusion, in November 2022, the Minister of Finance, Enoch Godongwana, promulgated the new Preferential Procurement Regulations[1418] that "empower organs of state with the authority to determine their own preferential procurement policies".[1419] The new regulations

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[1412] *Ibid*.
[1413] *Idem* 292.
[1414] *Ibid*.
[1415] BusinessTech "BEE has failed in South Africa in some areas: Ramaphosa". Available at: https://businesstech.co.za/news/business/591458/bee-has-failed-in-south-africa-in-some-areas-ramaphosa/ (accessed 30 October 2022). Also, the Zondo Report found that "evidence shows that the ideals of empowerment were grossly manipulated and abused to advance the interests of a few individuals". Zondo R Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State Report: Part 1 vol. 1: ch 1 – South African Airways and its Associated Companies 744. Available at: https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf (accessed 20 October 2022).
[1416] Southall 2008 286.
[1417] In June 2021, the Minister for Trade, Industry and Competition, announced that trade union, employee share ownership programmes, and cooperatives will be included in BBBEE. Available at: https://www.gov.za/speeches/minister-ebrahim-patel-supporting-local-economic-growth-3-jun-2021-0000 (accessed 20 October 2022).
[1418] Promulgated in November 2022 to be effective from 16 January 2023.
[1419] Within the ambit of the Preferential Procurement Policy Framework Act 5 of 2000. Godongwana 2022 MTBPS Speech. Available at: https://www.treasury.gov.za/documents/mtbps/2022/speech/speech.pdf (accessed 29 November 2022).

mean that state-owned enterprises do not need to procure services from B-BBEE-compliant companies only, but it is not the "wholesale scrapping of Black Economic Empowerment".[1420]

[1420] National Treasury Statement "Preferential Procurement Regulations (2022 Regulations)". Available at: https://www.treasury.gov.za/comm_media/press/2022/2022110801%20Media%20Statement%20-%20PPP%20Regulations%202022.pdf (accessed 29 November 2022).

CHAPTER 5 – THE ROLE OF THE PEOPLES REPUBLIC OF CHINA

5.1. Introduction

A discussion of the impact of The People's Republic of China (PRC) on a globalised economy was not planned initially, but in the context of examining human rights in the global supply chain, its role is significant. In the beginning, when China first rejoined global trade, China was a low-cost manufacturing haven for large international corporations, but today it has become a trade powerhouse. This chapter examines China's understanding of human rights and how it contributes negatively to efforts to make TNCs more accountable. The role China plays in the prospects for an agreement being reached on a treaty on business and human rights is discussed.

On 16 October 2022, President Xi Jinping delivered a report to Congress at the Twentieth National Congress of Communist Party of China in which he indicated that the PRC must strive to "realize, safeguard, and advance the fundamental interests of all our people".[1421] He further stated that they should do all in their capacity to resolve the most practical problems that are of the greatest and most direct concern to the people and, thus, the government must continue to improve the system of income distribution and implement their employment-first strategy.[1422] President Xi Jinping highlighted that the country must "uphold and act on the principle that lucid waters and lush mountains are invaluable assets" and "maintain harmony between humanity and nature when planning our development".[1423] He claimed that during his previous two terms, the Chinese Communist Party won the largest battle against poverty in human history, and the entire nation had been galvanised to carry out targeted poverty alleviation,[1424] ensuring a more complete and lasting sense of fulfilment and happiness, as well as security, thereby, making progress in achieving common prosperity for all.[1425]

[1421] *Idem* 9.
[1422] *Ibid*.
[1423] *Ibid*.
[1424] *Idem* 6.
[1425] *Idem* 9.

Assurances were given by the Chinese government that advances were made in "promoting ethnic unity and progress, fully implemented the Party's basic policy on religious affairs, and provided better protections for human rights", yet the Office of the UN High Commissioner for Human Rights (OHCHR) has published an assessment[1426] of serious human rights violations committed in the Xinjiang Uyghur Autonomous Region in China.[1427] The OHCHR assessment was published in August 2022, two months prior to President Xi Jinping's speech, highlighting that China will follow a Chinese path of human rights development while actively participating in global human rights governance and promoting an all-around advancement of human rights.[1428] On the issue of human rights, Xi Jinping's speech mentioned the three action plans on human rights China has formulated and implemented since 2009.[1429] The last action plan, released in 2021, noted that the Chinese people have prospered, that they have their rights better protected, and that the government has policies and legal measures in place that improve the protection of the rights of particular groups, thereby strengthening the legal safeguards for human rights.[1430] Additionally, the action plan indicates that China has participated in global human rights governance and has made a major contribution to the international cause of human rights.[1431]

China is a one-party state and "endorses such human rights that are consistent with its state-centred view on human rights".[1432] An explanation of what human rights could mean in this context is discussed below.

5.2. Sovereignty and Pragmatism

Muller views sovereignty as crucial to the international legal discourse and considers no concept to be more central.[1433] According to Muller, few states are more closely associated with the

[1426] Based on the High Commissioner's visit April and May 2022.
[1427] United Nations Human Rights Office "OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China" (31 August 2022).
[1428] *Idem* 32.
[1429] The State Council Information Office: The People's Republic of China Full Text: Human Rights Action Plan of China (2021–2025). Before the start of the winter Olympics in 2022, Amnesty International and Human Rights Watch called China out on its appalling human rights record that include the systematic mass internment, torture, and persecution of Muslim ethnic groups, the decimation of independent media, democratic institutions, and the surveillance of citizens, just to name a few. Available at: https://www.amnesty.org/en/latest/news/2022/01/china-world-must-use-winter-olympics-to-demand-human-rights-improvements/ and https://www.hrw.org/news/2022/01/27/beijing-olympics-begin-amid-atrocity-crimes (both accessed 29 November 2022).
[1430] *Ibid*.
[1431] *Ibid.*
[1432] Ahl 2015 *Hum Rights Q* 637–661.
[1433] Muller 2013 *China-EU Law J* 35.

defence of sovereignty in the international environment than China.[1434] For the Chinese government, sovereignty entails the protection of its independence and a reluctance to 'interfere' in what it considers "the internal affairs of other states".[1435] In a globalised world, there is greater interconnectedness and sovereignty is said to be "under attack",[1436] especially because of the number of human rights violations that call for international intervention.[1437] The then Republic of China (1911–1949) was a signatory to the 1945 UN Charter, and the PRC (1949–) was given a seat in the Security Council in 1971.[1438] At the heart of PRC foreign policy are five principles of mutual respect for territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in internal affairs, equality and co-operation for mutual benefit, and peaceful coexistence.[1439] The Chinese government, especially in the wake of the Tiananmen Square massacre, consistently emphasises sovereignty, describing it as the "hard-won prize of their long struggles for their lost sovereignty".[1440] Chinese foreign policy is said to be pragmatic and serves as a tool that distinguishes the realm of the legal from the realm of the political.[1441] Pragmatism allegedly led the National People's Congress of China to approve the ratification of the ILO's Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105) on 20 April 2022. [1442] This process has brought the number of ILO Fundamental Conventions ratified by China to seven and the total number of China's ratified ILO Conventions to 28.[1443] As a member of the international community, the PRC is intent on becoming a "respected global player".[1444] Under the leadership of Secretary-General Xi Jinping, it has strived to "strengthen strategic thinking, strengthen strategic determination, better coordinate domestic

[1434] *Idem 36.*
[1435] *Ibid.*
[1436] *Idem 38.*
[1437] *Idem* 39.
[1438] UN General Assembly Session 26 Resolution 2758. Restoration of the lawful rights of the People's Republic of China in the United Nations A/RES/2758(XXVI). Available at: https://digitallibrary.un.org/record/192054 (accessed 20 October 2022).
[1439] Address by HE Mr Xi Jinping President of the People's Republic of China at Meeting Marking the 60th Anniversary of the Initiation of the Five Principles of Peaceful Coexistence: "Carry forward the Five Principles of Peaceful Coexistence to build a better world through win-win cooperation" 28 June 2014. Available at: https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/201407/t20140701_678184.html (accessed 30 October 2022).
[1440] Wang cited in Muller 2013 *China-EU Law Journal* 46.
[1441] *Idem* 49.
[1442] ILO "China ratifies the two ILO Fundamental Conventions on forced labour". Available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_853575/lang--en/index.htm (accessed 30 October 2022).
[1443] *Ibid.*
[1444] Jin and Wang "Key Concepts and Features of China's Diplomacy since the 18th CPC National Congress" (2021).

and international situations, and adhere to open development, cooperative development, and win-win development".[1445]

To achieve these goals, it is claimed China is pragmatically implementing policies that enable the country to manage what Xi Jinping calls global progress, which is like a tidal wave one must ride in order to prosper because sailing against it will mean one will surely perish.[1446] Every action China takes is aimed at shaping a favourable external environment that is conducive to China's economic development and strategic rise.[1447] China's engagement with international human rights, such as acceding to ILO Conventions, is a means to further its objective of developing a "new type of great power relationship" and building a "community of common destiny" with other countries.[1448] The new power relationship refers to Chinese relations "with major powers", and a "community of common destiny" is directed at neighbouring countries in Southeast Asia, but it is argued that this also refers to Africa.[1449] China is strategically fostering a core belief that "sovereignty is the most important feature of any independent state" as Xi Jinping has stated, "[w]e will keep walking on the peaceful development road, but we must not forsake our legitimate rights and interests, must not sacrifice core national interests".[1450] It is argued that under the leadership of Xi Jinping, China is implementing the adage about flies and honey – the Chinese government does what it must to be accepted in an international community that is founded on an understanding of human rights, which incorporates human dignity, though this foundation does not align with China's understanding of human rights.

The OHCHR report on the investigation conducted into human rights concerns in the Xinjiang Uyghur Region showed that the Chinese government has undertaken labour law reforms that apparently strengthen the safeguards against forced labour.[1451] However, the Amnesty

[1445] Xi Jinping "Better coordinating domestic and international situations to consolidate the foundation for peaceful development" (30 January 2013). Available at: http://cpc.people.com.cn/n/2013/0130/c64094-20368861.html Accessed 30 October 2022).
[1446] Jin and Wang (2021) 75. The original speech is in Chinese; therefore, only a summary of the speech is available at: Xi Jinping: "Better coordinating domestic and international situations to consolidate the foundation for peaceful development" 30 January 2013. Available at: http://cpc.people.com.cn/n/2013/0130/c64094-20368861.html (accessed 30 October 2022).
[1447] Zhang 2015 *Glob Change, Peace & Secur* 7.
[1448] *Idem* 14.
[1449] "China's intensified peacekeeping efforts in Africa reveals not only China's desire for maintaining the regional peace and stability for its economic cooperation and trade with Africa, but also China's strategic intention of creating its own sphere of influence in the forms of Sino-African 'Community of Common Destiny'". See Lei 2018 *Glob Policy.*
[1450] Zhang 2015 9.
[1451] United Nations Human Rights Office "OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China" 36.

International report for 2021/22 notes that the human rights situation continues to deteriorate as the government continues a campaign of political indoctrination, arbitrary mass detention, torture, and forced cultural assimilation against Muslims living in Xinjiang in which thousands of Uyghur children have been separated from their parents.[1452]

How China implements international human rights law explains these contradictions. An in-depth discussion is beyond the scope of this thesis, and only a brief explanation follows below.[1453]

5.3. China and International Human Rights Law

As referred to in Chapter 1,[1454] the Chinese government's understanding of human rights differs from what is referred to in the UNGP as internationally recognised human rights.[1455] China distinguishes two categories of human rights: individual rights and corporate (also called community) rights.[1456] According to Inboden and Chen, the government's view of individual rights are civil, economic, and political entitlements, which are of a bourgeois nature, whereas corporate/community human rights include the national rights to self-determination and economic development.[1457] Corporate or community rights are seen as the institutional foundation upon which individual rights can be realised because only "colonialism, imperialism, hegemonism and racism, […] were violations of human rights […as…] they deliberately denied and even oppressed a nation's legitimate pursuit of statehood and economic autonomy".[1458] As a result of this interpretation, any intervention in a state's domestic affairs is tolerable only when a government is guilty of policies that amount to colonialism, imperialism, hegemonism, and/or racism, which violate corporate political and/or economic national rights.[1459] Human rights, therefore, support and do not constrain the augmentation of state power because human rights are conceptualised as a gift from the state; it is the state that grants or deprives citizens of the enjoyment of their human rights.[1460] Consequently, the ratification of human rights conventions and the voluntary commitments to human rights protection that China undertakes do not convey

[1452] Amnesty International Report 2021/22. Available at: https://www.amnesty.org/en/location/asia-and-the-pacific/east-asia/china/report-china/ (accessed 30 October 2022).
[1453] Ahl 2015.
[1454] para 1.11.3. above.
[1455] Ruggie (2013).
[1456] Inboden and Chen 2012 *Int Spect* 48.
[1457] *Ibid*.
[1458] *Ibid*.
[1459] *Ibid*.
[1460] *Ibid*.

the "binding power of the international human rights regime, but the absolute, exclusive power of a strong, centralised state over human rights in both domestic politics and foreign relations".[1461] This understanding of human rights differs significantly from internationally agreed values that have human dignity and equality at their core.[1462]

The PRC's participation in international human rights regimes has increased significantly in the last number of years despite continued reports of human rights violations, which needs to be explained. For this, Ahl's article on the rise of China and international human rights law is insightful and helpful.[1463] According to Ahl, China's acceptance of the international human rights system is more "tactical learning" than socialisation into international standards.[1464] As China's engagement in international human rights law is interlinked with how international treaties are transposed into municipal law, there seems to be resistance from the state when it comes to assimilating liberal human rights into local practices and institutions.[1465]

The Chinese Constitution does not mention what status international law has in the national legal system.[1466] It does provide that the Standing Committee of the National People's Congress of China decides whether international treaties are ratified, which means that because the Committee adopts treaties and domestic law as statutes, they enjoy the same status.[1467] Despite the adoption and publication of a treaty text in the Official Gazette, the administration and the courts cannot apply the treaty's provisions directly because direct application would require the Supreme People's Court to make a statutory reference norm or a judicial interpretation of the relevant international treaty.[1468] Only such reference norms are statutory provisions that make a specific international treaty applicable within municipal law if, for example, national law contravenes an international treaty obligation.[1469] In other words, interpretations of the Supreme People's Court supplement or adjust statutory reference norms; therefore, except for explicit references to international law, the domestic legal system must be harmonised with international

[1461] Council of Europe "What are human rights?" Available at: https://www.coe.int/en/web/compass/what-are-human-rights- (accessed 30 October 2022).
[1462] *Ibid*.
[1463] Ahl 2015.
[1464] *Ibid* 638.
[1465] *Idem* 639.
[1466] *Idem* 640.
[1467] *Ibid.*
[1468] *Ibid.*
[1469] *Ibid.*

treaties by amending those existing laws and regulations or by adopting new legislation.[1470] According to Ahl, official statements set out that international treaties can either be implemented by amending and adopting existing laws, enacting new laws or, in some cases, by directly applying international norms, depending on the area to which they belong.[1471] This complex mechanism that controls the application of treaties in China allows state organs to limit the effectiveness of domestic treaty implementation.[1472] Particularly in the field of human rights, there is an interplay of resistance on the domestic level, while simultaneously on the international level, there are efforts to increase the appearance of China's international human rights compliance.[1473] To understand how complex the domestication of international law is in China, Ahl explains it as follows:

> If the NPC [National People's Congress of China] Standing Committee were to avoid publication of the treaty text in the Official Gazette, the treaty would fail to become valid in domestic law. Published treaties would be of no effect at all if no statutory reference provisions were adopted that refer to the treaty and enable direct application of it. Even if there were a reference norm that refers to a treaty, a legally binding judicial interpretation could prevent a court from referring to a treaty. Moreover, reference provisions grant courts wide discretionary power, particularly those that make the prior application of a treaty subject to the condition of a conflict of domestic and international provisions or a loophole in national law.[1474]

Thanks to the PRC's complicated domestic political process and its obsession with sovereignty, China endorses only those human rights that "are consistent with its state-centred view on human rights", and China accepts human rights only if those rights acknowledge the power of the party state.[1475]

This short exposition of how China deals with the international human rights framework is important because it is believed that China seeks to shape international human rights institutions in ways that suit its state interests.[1476] Understanding how China operates will facilitate an understanding of China's role in the business and human rights treaty that is currently afoot.

[1470] *Ibid*
[1471] *Ibid.*
[1472] *Ibid.*
[1473] *Ibid.*
[1474] *Idem* 641.
[1475] *Idem* 643.
[1476] Inboden and Chen cited in Kinzelbach 2012 *Neth Q Hum Rights* 302.

5.4. China, the UNGP and the Treaty Negotiations

As discussed in Chapter 3,[1477] the Chinese government formulated its aims and means of "respecting, protecting and promoting human rights" in a human rights action plan.[1478] Yet, in August 2023, the *New York Times* published a headline stating that the solar supply chain is growing more opaque because of concerns about human rights.[1479] Referring to a UK study,[1480] the article indicates that solar supply companies are becoming less transparent despite previous promises to scrutinise their supply chains and, that for the international world, exposure to forced labour remains.[1481]

Despite headlines and warnings from foreign ministries of governments, such as the Netherlands, that working conditions in China are enshrined in national labour law, which in certain aspects differ from international standards, the Chinese government continues navigating the international arena, talking about human rights, while at the same time, its leadership is showing "greater determination to forcefully protect China's national interests".[1482]

The OEIGWG treaty-negotiating process[1483] is an example of China's discussion about human rights. During the 2022 session, the OEIGWG's eighth session,[1484] the representative from China reiterated that the PRC attaches great importance to a legally binding instrument, but that such an instrument should not go beyond the mandate that the OEIGWG was given by the UNHRC and should take into account the concerns of all countries and achieve consensus as far as it is possible.[1485] Reference was made to the twentieth National Congress of the Communist Party of China, where Xi Jinping highlighted that China continues to promote the global development of human rights.[1486] Further, according to the delegation from China, a legally binding instrument must take into account the fundamental human right to development

[1477] See para 3.6 above.
[1478] From 2021 to 2025 "China: Human Rights Action Plan (2021–2025) mentions encouraging Chinese businesses to abide by UN Guiding Principles". Available at https://www.business-humanrights.org/en/latest-news/human-rights-action-plan-of-china-2021-2025/ (accessed 30 October 2022).
[1479] Swanson and Penn "Solar Supply Chain Grows More Opaque Amid Human Rights Concerns" (1 August 2023).
[1480] Crawford and Murphy 2023 Study: Over-exposed: Uyghur Region Exposure Assessment for Solar Industry Sourcing.
[1481] Swanson and Penn (1 August 2023).
[1482] Zhang 2015 9
[1483] See ch 2.
[1484] See paras 2.6.6 and 2.6.7 above.
[1485] 2nd Meeting, 8th Session of Open-ended Intergovernmental Working Group on Transnational Corporations. Available at: https://media.un.org/en/asset/k19/k19fknxmsg (accessed 30 October 2022).
[1486] *Ibid*.

and must fully respect the legal sovereignty of different countries.[1487] On the face of it, China's submission does not seem problematic. However, many stakeholders who are involved in the OEIGWG process support a legally binding instrument that will effectively stop corporate impunity and, for that to happen, a potential treaty will have to go beyond the UNHRC mandate. This suggests that consensus will not be reached any time soon. The expectations of those in favour of a treaty and those who think that the UNGP can be worked into a framework convention are so far apart that it does not bode well for the prospects of an internationally binding treaty coming to fruition. The success of a legally binding instrument that makes TNCs more accountable requires the coalescence of African countries and others that have their citizens exploited and their environments desecrated by the activities of TNCs. If China is not on board, then there is a greater chance that some African countries may not vote for a business and human rights treaty. A 2021 study found that China's total trade with Africa amounted to USD 200 billion in 2019, which makes it Africa's largest bilateral trading partner and is a measure of its growing influence.[1488] Since the 2014 statement (discussed in Chapter 2)[1489] announcing the cooperation of the African Union Commission and the EU to promote the UNGP, there have been no reports or updates, which indicates that the cooperation is not ongoing and that the EU's moral influence in Africa is diminishing. Only twelve out of 55 African countries sent delegates to the 2021 OEIGWG session, implying a treaty on business and human rights is not a priority for the African Union. The October 2022 session of the states' negotiation process was attended by fifteen African countries.[1490] However, the region did not send a representative to work with the Friends of the Chair during the inter-sessional period, which meant that no progress was made between the 2021 and 2022 sessions, and the same Third Revised Draft was discussed in both sessions.[1491] In contrast, in 2021, the Ministerial Conference of the Forum on China-Africa Cooperation was attended by "[r]epresentatives of 53 African countries and the African Union Commission including 36 foreign ministers, and several dozen ministers for commerce and finance".[1492] In August 2022, at the Coordinators' Meeting on the Implementation

[1487] *Ibid.*
[1488] Stein and Uddhammar 2021 China in Africa: The Role of Trade, Investments, and Loans Amidst Shifting Geopolitical Ambitions 5.
[1489] See para 2.5.3 above.
[1490] Algeria, Angola, Burkina Faso, Cameroon, Côte d'Ivoire, Egypt, Ethiopia, Kenya, Mali, Mozambique, Namibia, Senegal, South Africa, Togo, Zambia.
[1491] Discussed para 2.6.6 above. See Chair-Rapporteur Statement 7 September 2022.
[1492] Li "Riding the Wind and Breaking the Waves, Working Together to Build a China-Africa Community with a Shared Future in the New Era" (no date).

of the Follow-up Actions of the Eighth Ministerial Conference of the Forum on China-Africa Cooperation, State Councillor Wang Yi announced that China would waive the 23 interest-free loans to seventeen African countries that had matured by the end of 2021 and that "China and Africa have stayed our course in enhancing solidarity and focusing on cooperation".[1493] It cannot be denied that China's influence in Africa is growing. As Mpya asserts, "[i]n the 21st century, China has shown all the signs of dominance in the global market, especially on the African continent. The sad reality about Africa is that it is not its TNCs that are driving their economies but empire after empire come to exploit the continent for their own growth".[1494]

As referenced earlier,[1495] the 2021/2022 Amnesty International report concluded that the "human rights situation across China continued to deteriorate".[1496] The Australian Strategic Policy Institute published a report in 2020 that indicates that the Uyghurs people worked under duress in China in violation of well-established international labour laws;[1497] this is despite China's lofty undertakings and the support expressed for the work of the OEIGWG.

Reports abound, including the August 2022 OHCHR report, that human rights violations are occurring at the same time China is acceding to ILO Conventions, which also means submitting to reporting procedures. It is possible that China will be making statements that accept the universality of rights on an abstract level while simultaneously emphasising national realities and levels of development as historical and cultural backgrounds when it comes to the concrete implementation of human rights standards at the domestic level.[1498] As China engages with other countries and continues to pursue development, it does not forsake its goal to pursue what it considers its legitimate national rights and interests.

There will be more reports of human rights violations, especially given that the main features of the Chinese human rights concept are the superiority of collective over individual rights, the intrinsic hierarchy of rights, the subordination of civil and political rights to socio-economic

[1493] China and Africa: "Strengthening Friendship, Solidarity and Cooperation for a New Era of Common Development: Remarks by State Councillor Wang Yi at the Coordinators' Meeting on the Implementation of the Follow-up Actions of The Eighth Ministerial Conference of The Forum on China-Africa Cooperation (FOCAC)" 18 August 2022. Available at: https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/202208/t20220819_10745617.html (accessed 30 October 2022).
[1494] Mpya 449.
[1495] See para 5.2 above.
[1496] Amnesty International 2022 Report 2021/2022 124–130.
[1497] Xu *et al*. 2020 Uyghurs for Sale.
[1498] Ahl 2015 646–647.

development and the contingency of rights on local conditions, as well as the primacy of economic growth.[1499] Because of the divergency in understanding human rights, companies in China may be able to produce products more cost-effectively than their counterparts elsewhere. The EU has a proposed corporate sustainability directive that would require corporations to conduct human rights due diligence. This chapter concludes with a discussion of what impact it could have.

5.6. Will China's Divergent Views on Human Rights Affect EU Companies?

The EU and China have strong trading relations, and the proposed changes concerning business and human rights will impact EU businesses and their operations. Not all businesses that sell their goods or offer their services in the EU market operate under the same rules.

China prioritises its people's right to "eat their fill and dress warmly", and by focusing on economic construction, it has "expanded the social productive forces and enabled the nation to basically solve the problem of feeding and clothing its 1.1 billion people".[1500] According to the Chinese government, given the extensive differences in "historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights".[1501] China views its state capitalist system as having provided the basic guarantee to its people to constantly improve their human rights situation, which is based on equal participation in economic development and the sharing of the fruits of their labour.[1502]

The EU's proposed Directive on Corporate Sustainability Due Diligence comes at a time when the way TNCs do business is long-established and profitable. Since the 1970s and 1980s, European companies have been manufacturing their products in countries where little or no priority was paid to human rights issues such as "child labour and exploitation of workers, and on the environment, for example, pollution and biodiversity loss".[1503] In order to gain a competitive advantage, corporations have migrated their production sites from Europe to Asia, and since China joined the WTO in 2001, the production of many European companies has

[1499] *Idem* 642.
[1500] White Papers of the Government: Human Rights in China (November 1991). Available at: http://www.china.org.cn/e-white/7/index.htm (accessed 6 October 2022).
[1501] *Ibid*.
[1502] Fifty Years of Progress in China's Human Rights Office of the State Council of the Peoples Republic of China (June 2000).
[1503] Statement European Commission: "Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains" 23 February 2022.

shifted from within Asia to China as entire industries cut costs,[1504] including those associated with the protection of human rights or the environment. Corporations relocated production to China, and this has resulted in the "export of consumer goods being one of the cornerstones of the Chinese development model".[1505] Factors such as reduced costs and lower environmental regulations were the motivation for companies shifting their production lines originally limited to consumer goods that had low value-added but were highly labour-intensive.[1506] Through relocation, companies were able to remain competitive. In the proposed EU Directive, EU companies must conduct "corporate due diligence to identify, bring to an end, prevent, mitigate and account for negative human rights and environmental impacts in their own operations, subsidiaries and value chains",[1507] a practice which might lead to a loss of the companies' competitive advantage.

A 2020 study on China's quest for dominance in global supply and value chains and its implication for Europe[1508] indicates that China has the ambition "to become a global superpower in industrial manufacturing and innovative research and development" and to improve the competitiveness of the Chinese economy.[1509] By strengthening its position within global value chains, China aims to "reduce its dependence on foreign countries by building up its own capabilities and replacing foreign products and technologies with Chinese alternatives".[1510] China's share of global value-added in industrial production has risen steadily, and what started as China producing goods of low value-added with high labour intensity has shifted, and technological advances have enabled Chinese companies to compete.[1511] Already, Europe is losing competitiveness in global value chains and Chinese production surges.[1512]

According to a February 2022 survey of 1,000 German companies by the *Instituts der Deutschen Wirtschaft* (German Institute of Commerce), the obligation imposed by German's supply chain due diligence law is the reason one in five German companies intend to increase the prices of

[1504] Stiftung Arbeit und Umwelt der IG BCE and Merics 2020 15.
[1505] *Ibid*.
[1506] *Idem* 12.
[1507] Statement European Commission: "Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains" 23 February 2022.
[1508] Stiftung Arbeit und Umwelt der IG BCE and Merics 2020 6.
[1509] *Ibid*.
[1510] *Ibid*.
[1511] *Ibid.*
[1512] Statement European Commission: "Just and sustainable economy: Commissions lays down rules for companies to respect human rights and environment in global value chains" 23 February 2022.

their products.[1513] Higher prices will affect the consumer's ability to buy products, especially considering that in 2021, the OECD/Bertelsmann Foundation study comparing OECD countries found that the middle class has shrunk in Germany and, consequently, the level of disposable household income has been dropping continuously since 2000;[1514] hence, the volume of consumers able to pay higher prices has declined. An EU-wide directive will level the playing field between countries in the Union because all states will implement corporate sustainability measures in line with their national legislation, but market share also competes with the products of Chinese companies. China is no longer the "workshop of the world" but has strategically expanded its know-how,[1515] enabling Chinese companies to offer high-quality alternatives at a lower price, for example, Huawei or Lenovo. "Western industrialised countries and China are no longer just cooperation partners, but also competitors".[1516]

If EU companies are to remain competitive, it can be argued there is a high probability that their human rights due diligence measures will be only a "tick the box" exercise,[1517] which is specifically not what Ruggie intended human rights due diligence to be. Companies could be tempted to find loopholes to remain competitive, a practice that has already been identified and criticised by CSOs.[1518] The EU's proposed directive envisages that the due diligence measures result in levelling the playing field; I submit that the playing field is unlikely to be level as Chinese companies can sell quality products much cheaper because of China's policies.

Deva asserts that to ensure that all TNCs respect human rights, there needs to be a fundamental change in all legal norms that interact with corporations, specifically at the "various stages of doing business: from incorporation to the purpose of the corporation, listing regulations, board composition, director's duties, disclosure and transparency rules, procurement, mergers and acquisitions, accounting standards and allocation of liability within corporate groups".[1519] He contends further that businesses, as specialised organs of society, should not be allowed to

[1513] *Wirtschaftswoche Firmen erhöhen Preise wegen Lieferkettengesetz* 23 Februar 2022.
[1514] Consiglio *et al.* 2021 Bröckelt die Mittelschicht? Risiken und Chancen für Mittlere Einkommensgruppen auf dem Deutschen Arbeitsmarkt.
[1515] Stiftung Arbeit und Umwelt der IG BCE and Merics 2020 12.
[1516] *Ibid* 8.
[1517] ENNHRI statement on the European Commission's Proposal on Corporate Sustainability Due Diligence March 2022. Available at: https://ennhri.org/wp-content/uploads/2022/03/Statement-on-the-European-Commissions-proposal-on-Corporate-Sustainability-Due-Diligence.pdf (accessed 30 November 2022).
[1518] Trócaire "New EU corporate accountability law 'riddled with loopholes'" (23 February 2022).
[1519] Deva (2020) 13; Deva and Birchall (2020).

undermine collective societal goods such as human rights.[1520] According to Deva, because of human rights concerns, society should "reorient the role and purpose of the corporation from a profit maximising machine to an agent in service of society".[1521]

These aspirations appear to disregard the reality in which China has expanded its global trade position and has become a dominant player.[1522] Economic growth has little meaning for the Chinese government unless it gives the Chinese people a better life. For this reason, China is targeting a 5.5% growth rate in 2022,[1523] whereas the forecast for the EU suggests that the GDP in the nineteen countries using the euro will grow by 4.0% this year and 2.7% in 2023, which was highly optimistic.[1524] On 7 June 2021, at China's SCIO briefing on the implementation of China's National Human Rights Action Plan of China (2016–2020), a speaker suggested:

> … human rights were originally developed in different countries and nationalities. For example, China has always upheld Confucianism emphasizing benevolence towards fellow human beings. In the West, there is a tradition of natural law and natural rights. Africa holds a utopian view and thinks that one should treat others like brothers, while Buddhism advocates that all beings are equal. So, human rights are inherently permeated by different cultures. As for the formation of a consensus on human rights, it was actually with the globalization of the economy, […], that a certain consensus was reached among different national cultures on the issue of human rights, as highlighted by the UDHR and various international human rights covenants […] China safeguards and facilitates the current internationally recognized of human rights concepts … [W]e observe that different countries have different conditions, different cultures, different political systems, and different levels of economic and social development, so there are certainly many differences in how human rights are understood and how they are implemented […] China is a developing country, so it puts the rights to subsistence and development in the priority place, while some developed countries have different priority rankings in regards to human rights … there are different development paths in the world.[1525]

As Gumpinger declares, corporations are rooted in the inbuilt tendency to create and strengthen injustices, and that in its "relentless pursuit of profit, the corporation often gives rise to and facilitates the five "faces" of oppression: exploitation, marginalization, powerlessness, cultural imperialism, and systemic violence".[1526] There is general agreement that corporations must be competitive to succeed. However, the EU Commission places values as paramount, whereas the Chinese government sees delivering opportunities for a better life to all Chinese people as

[1520] *Ibid*.
[1521] *Ibid*.
[1522] Stiftung Arbeit und Umwelt der IG BCE and Merics 2020 30.
[1523] The State Council Information Office of China (27 March 2022).
[1524] European Commission "Growth expected to regain traction after winter slowdown" 10 February 2022.
[1525] Jian "SCIO briefing on implementation of National Human Rights Action Plan of China (2016–2020)" (7 June 2021).
[1526] Gumpinger 2011 120.

supreme. If EU companies are to continue to contribute to the EU's GDP, these divergent understandings of human rights must be considered. Therefore, it is imperative to find a way to overcome the inherent discrepancy that will truly lead to a level of the playing field.

5.7. Conclusion

This chapter dealt with the environment in which initiatives to make TNCs accountable for human rights in their supply or value chains are taking place. It discussed the possible impact of the rise of China on the EU. Also highlighted were how the PRC's interpretation of human rights enables the government to speak the language of human rights while remaining true to its vision that human rights are a national-centred development in which the goals of the communist party are paramount. If Chinese workers have a livelihood and can maintain, nourish, and support themselves, their human rights are respected. This is a different understanding of human rights to what is understood internationally, which is not infringing the dignity of workers while they secure their livelihoods and as they maintain, nourish, and support themselves. The implications of these differences on the obligations of TNCs also were discussed in this chapter.

CHAPTER 6 – RECOMMENDATIONS AND CONCLUDING REMARKS

> *"[V]oluntarism is frequently limited to the borders of the company, sometimes overflows to the subsidiaries, and rarely extends to the business relations that are the suppliers and service providers. The proliferation of subcontracting even leads … to not knowing precisely who does what … and in what place …"* [1527]

6.1. Revisiting the Research Questions

The central focus of this thesis was identified in Chapter 1 above.[1528] The research question investigated is: What role does the UNGP play in ensuring that human rights are respected during global trade? The main line of inquiry in the thesis is to explore the issue of TNCs having supply chains across national borders, and thus not bound by specific national legislation. This situation involves consideration of a supranational framework, the soft law UNGP, and enforcement through national legislation.

Therefore, the following issues are addressed:

(1) The UNGP, how it came about[1529] and what it is,[1530] that is, the context and content of the UNGP at a supranational level;

(2) What response is there to UNGP at a regional level[1531] and at an international level, with the call for[1532] and the start of the process of drafting an internationally legally binding instrument;[1533]

(3) The response at national level, which compares how countries responded to the UNGP, specifically France,[1534] Germany,[1535] the EU[1536] and, briefly, China;[1537]

[1527] *Assemblée Nationale* 11 March 2015. Bill relating to the duty of care of parent companies and ordering companies 2578 Potier Rapporteur. Available at: https://www.assemblee-nationale.fr/14/rapports/r2628.asp (accessed 5 May 2022).
[1528] See para 1.6 above.
[1529] See paras 2.2 and 2.3 above.
[1530] See para 2.4 above.
[1531] See para 2.5 above.
[1532] See para 2.6.1 above.
[1533] See para 2.6.2 above.
[1534] See para 3.2 above.
[1535] See para 3.3 above.
[1536] See para 3.4 above.
[1537] See para 3.6 above.

(4) The role of CSOs which, through sustained campaigns, pressured governments to act regarding the UNGP;[1538]

(5) At national level, the response (or lack thereof) of the South African government to the UNGP;[1539] and

(6) China is an important role player in international trade, so a discussion of the issue of human rights in the supply chain is incomplete without looking at the role of China.[1540]

To answer the research question, the history, purpose, and effect of the UNGP were elaborated on, and as the UNGP is intended to ensure responsible global corporate practices, the thesis answers the following secondary (specific) questions:

(1) What makes the UNGP different to other attempts to make corporations address human rights concerns?[1541]

(2) Is the status quo in South Africa sufficient or does it need UNGP-based legislation?[1542]

(3) Will the Chinese government's divergent view on human rights affect the competitiveness of EU companies given the EU Directive on Corporate Sustainability Due Diligence?[1543]

(4) What is the prospect of a treaty on business and human rights coming to fruition?[1544]

The research question was answered starting with a broad view looking at the UNGP, its features, and how it came about. The impunity with which corporations, especially TNCs, operated from the 1970s seemed impossible to regulate internationally as numerous attempts, among which the Norms, were rejected by states at UN level.[1545] Regarding corporations, human rights violations, though not exclusively, occur in labour relationships and in supply chains as they conduct their business globally. The ILO has been unable to curtail human rights violations,[1546] and the WTO, though "better positioned to enforce labour standards"[1547] that

[1538] See para 3.3 above.
[1539] See ch 4 above.
[1540] See ch 5 above.
[1541] See para 2.6 above.
[1542] See paras 4.5, 4.6, 4.7, 4.8 and 4.9 above also 6.3 below.
[1543] See para 5.5 above
[1544] See para 2.6 above.
[1545] See para 2.3.3 above.
[1546] See paras 2.3.1 and 2.3.3 above.
[1547] Smit and Botha 2022 8.

would prevent human rights abuses, does not do so.[1548] Thus, there was a need for an instrument such as the UNGP as it articulates states' duty to ensure that human rights are protected[1549] and businesses have a duty to respect[1550] while reinforcing the recognition that those harmed through the activities of business have access to remedy.[1551] The Framework and Guiding Principles regarding business and human rights were drafted after a stakeholder-inclusive consultative process and detail the role states and businesses play in pursuing their global activities.

The initial reception of the UNGP by CSOs, such as Human Rights Watch, was lukewarm.[1552] Despite consultation with states, civil society and business, implementation of the UNGP at national level was sluggish the first couple of years after the UNGP's endorsement by the UNHRC.[1553] However, the UNGP has become a document around which CSOs could coalesce and mobilise in order to put pressure on governments (in France and Germany), and it has become a soft law instrument that has the effect of hard law as governments have passed human rights due diligence legislation.[1554] Thus, the UNGP is different from other initiatives because, though it is a soft law instrument, it was as the result of consultation and is referred to as a measure that states can implement to hold corporations accountable for human rights violations.

Also examined was whether the UNGP, in fact, is an effective expansion of rights through the adoption of a non-binding political act,[1555] which was carried out by analysing the responses of Germany, France, and the EU to the UNGP. The responses were as if the UNGP was, in fact, hard law. South Africa's approach to the soft law instrument was examined as well. By comparing two jurisdictions that had implemented the UNGP, one that proposes to implement it, another that has not, this thesis highlights that not all governments accept the UNGP as being an authoritative standard regarding business and human rights. The actions taken by France, Germany, the EU, and South Africa cannot be more different: Germany first passed a NAP and

[1548] See paras 2.3.2 and 2.3.3 above.
[1549] See paras 2.4.1.1 and 2.4.2 above.
[1550] See paras 2.4.1.2 and 2.4.2 above.
[1551] See paras 2.4.1.3 and 2.4.2 above.
[1552] See para 2.6 above.
[1553] See para 3.1 above.
[1554] See paras 3.2 and 3.5 above.
[1555] Karadzhova 2002 discussed in Domaradzki *et al*. 2019 *Hum Rights Rev* 427.

then supply chain legislation,[1556] France passed a duty of vigilance legislation,[1557] the EU has issued a draft Directive on Corporate Sustainability Due Diligence, and the South African government, together with Ecuador, tabled a resolution[1558] at the UNHRC that initiated proceedings towards formulating a legally binding instrument.[1559] Also, Chinese TNCs seem to implement a version of the UNGP.[1560]

The passing of Resolution 26/9[1561] started a process towards establishing a treaty on business and human rights. Since first meeting in 2015, the OEIGWG has been working on articulating a legally binding instrument to assist victims of corporate-related human rights and environmental abuses in accessing justice.[1562] The thesis reflects on the work[1563] of the intergovernmental working group chaired by Ecuador, which has the "mandate to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights".[1564] There is a need for an international regulatory framework that ensures the pursuit of commercial activity does not conflict with but enhances fundamental human dignity and development.[1565]

Integral to the issue of business and human rights is the role that CSOs play. As human rights defenders and the protectors of shared civic spaces, they have kept up the pressure on governments to engage with the UNGP and to pass legislation requiring human rights due diligence.[1566] Highlighted is that despite CSOs and academic centres, such as the Centre for Human Rights at the University of Pretoria, developing a shadow baseline assessment that the South African government could use for the implementation of a NAP on business and human rights, the government has opted not to pursue endeavours to enhance human rights in the

[1556] *Nationaler Aktionsplan Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte* 2016–2020. Available at: https://www.auswaertiges-amt.de/blob/297434/8d6ab29982767d5a31d2e85464461565/nap-wirtschaft-menschenrechte-data.pdf (accessed 20 October 2022).
[1557] Code de Commerce [C. com.] [Commercial Code] Art L. 225-102-4. Available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000035181820/ (accessed 30 October 2022).
[1558] Passed in June 2014 Resolution 26/9 UN Doc. A/HRC/RES/26/9. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9
[1559] Yeates and Pillinger (2019).
[1560] See para 3.6 above.
[1561] Sponsored by Ecuador. Bolivia, Cuba, South Africa, and Venezuela co-sponsored the resolution.
[1562] UN Doc. A/HRC/RES/26/9. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 (accessed 20 October 2022).
[1563] See paras 2.6.2, 2.6.3, 2.6.4, 2.6.5, 2.6.6 and 2.6.7 above.
[1564] UN Doc. A/HRC/RES/26/9. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 (accessed 20 October 2022).
[1565] Choudhury 2017 Fn 76.
[1566] See para 3.5 above.

business context.[1567] South Africa is fully engaged in the process of negotiating an internationally legally binding instrument but at the expense of any other measure to ensure that companies that have their home base in South Africa implement steps that would ensure that they are not at the risk of human rights violations.

Despite encouragement from the SAHRC to implement the UNGP,[1568] the South African government's focus on a binding treaty at the international level has given rise to a "lack of any meaningful efforts to address the existing human rights and business/accountability challenges".[1569] South Africa has multiple laws[1570] and voluntary corporate governance measures, yet studies conducted by international CSOs have brought to light human rights violations against South African workers and communities.[1571] The government implemented the policy of black economic empowerment as a means of transforming a historically unequal and racist economy. However, this policy has not had as its beneficiaries the ordinary worker. Only in June 2021 were trade unions, employee share ownership programmes, and cooperatives included in B-BBEE.[1572] In contrast, UNGP-based legislation aims to detect human rights violations and necessitates that corporations manage, record, and publish the adverse impacts their activities have on workers and the environment in and, especially, outside South Africa.[1573] CSR is called corporate social investment in South Africa because it is aimed at addressing the effects of historical wrongs, but in spite of corporate social investment's emphasis on human rights and investment in the development of communities, it fails to advance businesses' respect for human rights as it is based on philanthropy.[1574]

Ostensibly, UNGP-based legislation places an obligation on companies as they are forced to conduct human rights due diligence in order to detect where human rights violations and environmental risks exist in their business activities. As human rights due diligence will presumably affect costs and the competitiveness of global companies, it is imperative to

[1567] See paras 2.6, 2.6.7 and 4.6 above.
[1568] See para 4.3 above.
[1569] Faracik 2017 46.
[1570] See para 4.2 above.
[1571] See para 4.7 above.
[1572] Announced by the Minister for Trade, Industry and Competition; See para 4.6 above.
[1573] See paras 2.4.1.2 and 2.4.2 above.
[1574] See para 4.7 above.

investigate whether the understanding of the nature of human rights, in fact, is shared by all states in a globalised economy.

China's fundamentally divergent understanding of human rights was interrogated, whereafter it was concluded that despite the rhetoric of human rights, its version of human rights emphasises social/economic aspects and addresses the feeding and clothing of its billion-plus citizens rather than the right of the individual not to have their dignity infringed.[1575] China's definition of human rights is meant to support rather than hinder state power and the primacy of state sovereignty. For this reason, as well as the fact that China endorses only what is consistent with its state-centred view on human rights, China's involvement in the UN process of negotiating an internationally legally binding instrument was examined.[1576] From a review of the annual OEIGWG sessions that have been held since 2015, it is clear that the PRC's primary focus remains state sovereignty. They further wish for the OEIGWG to stay within its mandate of only requiring TNCs and other business entities of a transnational character to fall within the scope of the eventual treaty.[1577]

The insistence of states such as China and others that a treaty should be an instrument that is arrived at through a broad consensus when states have divergent expectations of what a legally binding instrument must deliver does not instil confidence that a treaty on business and human rights will become a reality soon. In 2014, China voted in favour of the resolution that initiated the treaty-making process; many states from the Global North voted against Resolution 26/9. It can be concluded it would require a broad coalition of states from the Global South to vote together if a treaty is to materialise.[1578] It is argued, because "China has shown all the signs of dominance in the global market, especially on the African continent",[1579] the way China votes is how many African states will vote in the negotiating process.

What follows is a review of the chapters.

[1575] See paras 5.2, 5.3, and 5.7 above.
[1576] See paras 5.1, 5.2, 5.3, and 5.7 above.
[1577] See paras 2.2.7 and 2.8 above.
[1578] See paras 2.6.2 and 2.6.7 above.
[1579] Mpya 449.

6.2. Review of Previous Chapters

The central focus of the thesis was the UNGP: what it is, how it came about, and how countries respond to it. The UNGP did not arise in a vacuum; thus, Chapter 2 outlines international and regional attempts to deal with the issue of business and human rights before the UNHRC unanimously endorsed the UNGP.[1580] Also discussed in Chapter 2 is the failure of international labour and trade mechanisms to make companies more accountable for activities that affect human rights.[1581] An unexpected consequence of the UNGP was the acceptance of UNHRC Resolution 26/9 in 2014, which initiated the process of negotiating a binding instrument for business and human rights at the international level; this process is explored in Chapter 2.[1582]

The UNGP was viewed as a "game-changer"[1583] at the time of its endorsement, and the main inquiry of this thesis was explored by focusing on that aspect by examining the effect of the UNGP and what countries (France and Germany) did in response to the UNGP (Chapter 3).[1584] The UNGP encourages members of multilateral institutions to promote business respect for human rights. In 2021, the EU, as a regional organisation, passed a resolution calling upon the EU Commission to prepare proposals for the EU-wide "mandatory supply chain due diligence" directive and, in February 2022, a draft directive was published, [1585] also discussed in Chapter 3.[1586] South Africa is home to many TNCs operating globally. However, to date, the South African government has not appointed a government department to engage with the UNGP despite CSOs and academics producing a shadow baseline study to assist with the compilation of a NAP for business and human rights. Chapter 4 also deals with South Africa and its singular focus on the states' negotiating process for a legally binding instrument on business and human rights.[1587]

A discussion about supply chains and human rights is incomplete without an examination of China's role. Therefore, Chapter 5 discusses the PRC's understanding of human rights and how the Chinese government navigates the global economic landscape as it seeks to advance

[1580] See paras 2.3 above.
[1581] See paras 2.3, 2.3.1, 2.3.2, 2.3.3 above.
[1582] See paras 2.6, 2.6.2, 2.6, 2.6.3, 2.6.4, 2.6.5, 2.6.6, and 2.7 above.
[1583] Skadegård Thorsen *et al.* "A Game Changer" (no date).
[1584] See paras 3.2 and 3.3 above.
[1585] Proposal for a Directive on Corporate Sustainability Due Diligence and Annex 23 February 2022.
[1586] See para 3.4 above.
[1587] See paras 4.4, 4.5, 4.6, 4.7 and 4.8 above.

China's human rights in accordance with its national conditions and according to its interpretation of the Chinese people's needs.[1588]

What follows in this chapter is a general discussion of the issues that the thesis has researched: centrally, the UNGP, which is "profoundly different from other voluntary initiatives and self-regulation",[1589] and how it upended the world of business and human rights. The road ahead and recommendations are discussed at the end of this chapter.

6.3. Lessons Learnt

From this study, it has become clear that whether or not one believes that the UNGP is an effective means of holding corporations accountable for human rights abuses, it undoubtedly succeeded in going where no other voluntary initiative on this issue has gone before: into the legislatures and business practices.[1590]

To find a solution to the problem of corporate accountability in the event of corporations violating human rights, directly or indirectly, has not been an easy endeavour. According to Amnesty International, of the 100 largest economies globally, 51 are corporations and only 49 are countries.[1591] The world has seen a rise in corporate power since the 1970s and states have granted corporations privileges and exemptions that allowed them to operate freely in their pursuit of profit.[1592] An effort to establish rules to govern the behaviour of TNCs started in 1970 but remained unsuccessful until the UNGP. Despite the UNGP being a voluntary instrument, Ruggie, the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, managed to insert the issue of human rights onto corporations' agenda by using a language known and understood by business. By framing human rights in terms of a risk faced by TNCs and by using the concept of due diligence, which involves collecting and analysing information to assess risk, Ruggie created the vocabulary by which businesses could accept that human rights violations affect their bottom line.

[1588] See para 4.6 above.
[1589] Sherman 2020 1.
[1590] See paras 2.4, 2.5, 3.2, 3.3 and 3.4 above.
[1591] Amnesty International *Corporations* (no date).
[1592] Jessen (30 January 2020).

This thesis discusses the UNGP and the context of the international legal regimes that address business and human rights.[1593] There have been initiatives that failed to come to fruition, such as the Norms. However, other voluntary initiatives currently operate successfully and have incorporated the UNGP, such as the OECD Guidelines.[1594] The UNGP not only envisages that states implement human rights due diligence legislation but also calls for regional organisations to enact such legislation, so this thesis discusses initiatives that the EU, African Union, and SADC took or failed to take.[1595]

Since the introduction of the UNGP, there has been evidence of a shift in how the EU Commission views the responsibilities of corporations and their impact on society because the EU has undertaken several initiatives prior to publishing its proposed draft directive on corporate sustainability.[1596] For example, the Commission has proposed regulation that introduces due diligence measures for companies involved in the production and extraction of raw material of batteries.[1597] Another step taken by the EU Commission is the initiative revising the Directive on Non-Financial Reporting, that introduces an obligation to conduct due diligence and to report on due diligence processes concerning aspects such social matters, respect for human rights, environmental issues, anti-corruption and anti-bribery concerns.[1598] Together with the Conflict Minerals Regulation and the EU Timber Regulation, the EU Commission proposed a Directive on sustainable corporate governance and due diligence.[1599] The proposed directive, when passed by the European parliament and European Council, will impose a binding due diligence duty on companies to identify, address, and remedy situations that could give rise to or contribute to any human rights, environmental, or good governance violations in their value chains. The understanding is that the value chain would not only include all the operations of direct business partners but also the indirect business relations and investment chains.

The proposal, if it becomes EU law, will go further than the legislatures in France and in Germany, which passed supply chain due diligence legislation.[1600] Due to the sustained

[1593] See paras 2.4, 2.2 and 2.3 above.
[1594] See paras 2.2 and 2.3.3 above.
[1595] See paras 2.5, 2.5.1, 2.5.2 and 2.5.3 above.
[1596] See paras 2.5 and 2.5.1 above.
[1597] See para 2.5.1 above.
[1598] *Ibid.*
[1599] See paras 2.5, 2.5.1 and 3.4 above.
[1600] See para 3.6 above.

campaigns by human rights advocates and CSOs for the implementation of UNGP-based legislation, as well as governing parties having to make good on election promises, the EU member states (Germany and France) passed legislation that forces companies above a certain size and number of employees to undertake human rights due diligence measures in their supply chains.[1601] Although both legislations in their final versions provided for less than CSOs had hoped for, the measures are seen as a good start. If the Commission's proposed directive becomes law, it will set out what member states must achieve regarding corporate sustainability and governance, yet member states are free to decide how they would transpose their national laws to be in line with the directive. Unlike the Conflict Minerals and Timber initiatives, the EU's Corporate Sustainability Due Diligence Directive is not a regulation and, therefore, does not have immediate binding legal force nor will it be directly applicable within all member states. This thesis also dealt with the lack of action by other regional organisations such as the African Union and SADC.[1602]

In conclusion, regardless of the inaction of some states, the UNGP has been a roadmap that helps bridge the governance gaps and imbalances that businesses must address so that global supply chains and globalisation can become socially sustainable and respectful of human rights.[1603] The UNGP tries to assist businesses to respect the dignity of every person. According to Ruggie, this is key to ensuring that globalisation is socially sustainable; after all, TNCs and other businesses are the major beneficiaries of a globalised world.[1604] Ruggie was a fierce advocate for the UNGP and was proud the UNGP was endorsed by countries that had not ratified key international human rights conventions, such as China and the US.[1605] Zerk describes soft law initiatives as representing a way of testing attitudes towards a certain issue,[1606] and the UNGP can be said to have achieved that. CSOs have been able to use it to apply pressure on governments to pass legislation that gives effect to the UNGP. Despite initial opposition to the UNGP,[1607] CSOs have persistently advocated the UNGP's implementation, and this makes the

[1601] See paras 3.5 above.
[1602] See paras 2.5.2 and 2.5.3 above.
[1603] Ruggie "There is no longer a choice for businesses to act responsibly" (27 February 2018).
[1604] *Ibid.*
[1605] Ruggie 2020 *HKS Working Paper* 23.
[1606] Zerk (2006) 70.
[1607] Batesmith "HRW vs. Ruggie: How Valid is the Criticism of the UNGPs?" (8 February 2013).

UNGP more than just another voluntary instrument. In a globalised world and in global trade, when reference is made to human rights in the business context, it is in terms of the UNGP.

The process of drafting a legally binding instrument has been underway since 2015 and the UNGP provisions, such as human rights due diligence and the access to remedy, have commentators hoping that an eventual legally binding treaty would complement and reinforce as a legal obligation the "protect, respect and remedy" framework established by the UNGP.[1608] Although the Third Revised Draft treaty, which is currently being negotiated by states, has the potential to reinforce legislative endeavours already being carried out by national and regional governments, no forecast indicates whether a legally binding treaty will materialise. There has been no internationally agreed treaty since 2010.[1609] What is clear is the momentum of the UNGP since 2011 – it frames how the issue of business and human rights is spoken about. Human rights due diligence has become the method that businesses now use to manage their risk relating to human rights abuses.[1610] Given that the UNGP has been in existence for ten years, there is an extensive infrastructure. Deva indicates the era of business of human rights, despite being in its infancy, will gain traction as a new industry of consultants emerges ready to advise corporations on how to conduct human rights due diligence.[1611] If the aim was to get TNCs from a point where they do nothing to a point where they conduct measures to prevent, mitigate, and remedy human rights violations and/or environmental risks, then it must be conceded that the UNGP achieves that. Despite it being a soft law instrument, states have implemented legislation based on the UNGP.

6.4. Lessons from France, Germany, and the EU

In a world where human rights in the business context are of significant concern, it is valuable that France, Germany, and the EU have not waited for hard law in the form of a legally binding instrument but have taken steps to implement national legislation (France and Germany) and propose EU legislation that holds companies accountable for human rights.

[1608] Zorob "The road to corporate accountability: UN business and human rights treaty under scrutiny" (22 October 2021).
[1609] Ruggie (2017) "The Social Construction of the UN Guiding Principles on Business and Human Rights" 5.
[1610] *Ibid* 12.
[1611] Deva (2020) 5; Deva and Birchall (2020).

It has been twenty-plus years since the UNGP was endorsed by the UNHRC, and since then, it has framed how to deal with human rights in the business context. Business and human rights, which require specific measures to be undertaken so that companies can know and show that they respect rights, is now part of the business context in France and Germany. Before the UNGP, businesses typically undertook due diligence measures in merger and acquisition transactions, where they conducted detailed examinations of a company and its financial records before getting involved in a business arrangement.[1612] This is a way of assessing risks companies face, and it is imperative for business operations involving mergers and acquisitions.

Despite the UNGP being the product of a consultative process, it was not negotiated by states, and, given how little progress has been made with drafting a treaty on business and human rights, it is understandable why the then UN Secretary-General, Kofi Annan, opted for a soft law instrument and appointed Ruggie as Special Representative to draft an instrument. The UNGP has provided the vocabulary for human rights in the business context, and together with the GPRF, the UNGP presents a tangible means of how to go about determining and reporting on human rights in the business environment.[1613] Because it is a soft law instrument, it has allowed the states that implemented UNGP-based legislation to determine the scope of their legislation, which companies are to conduct, implement, and report on human rights and environmental risks. Ruggie's Guiding Principles determine that human rights due diligence "should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships".[1614] In other words, responsibility extends to business activities that exert some kind of impact.[1615]

The German law limits companies' human rights due diligence to be conducted of a company's own operations, that of direct suppliers and, only when the company has "substantiated knowledge" of a human rights violation, must risk analysis due diligence be done of indirect suppliers. German legislation is more restrictive in scope than the French statute. Ruggie's Guiding Principles are intended to apply to all businesses, regardless of size, sector, operational

[1612] Cambridge Dictionary, Due diligence. Available at: https://dictionary.cambridge.org/dictionary/english/due-diligence?q=due+diligence+ (accessed 2 December 2022).
[1613] See para 2.4.3 above.
[1614] Ruggie (2013).
[1615] *Ibid*.

context, ownership, and structure. Nevertheless, the national and proposed regional initiatives restrict application to companies that have a certain number of employees or above a certain turnover. The French and German legislations and the EU proposal restrict the scope, thereby intentionally disregarding many harmful business activities that impact the lives of workers and communities worldwide.[1616] Because the UNGP is non-binding, countries need not ensure that their national laws are consistent with UNGP requirements.

The UNGP's articulation on the effectiveness of judicial remedy and recommendation that states not erect barriers suggest a reverse burden of proof in claims of damages where a company must prove that its activities are carried out correctly instead of the victim proving that the company caused the harm.[1617] The reverse burden of proof is often viewed as necessary to have true access to remedy because it addresses and balances the lack of equality between parties, as the information necessary to prove a claim usually lies in the hands of the defendants.[1618] CSOs have tried and failed to get the onus reversed in the national French and German legislations, and the EU proposal also does not address the matter.[1619] Soft law instruments are said to function as a gap filler, giving guidance to states and other stakeholders in the absence of binding legal norms.[1620] The UNGP focuses on the business process by which all businesses identify, avoid, mitigate, and remedy human rights risks.[1621] Because they have not negotiated and committed themselves to these businesses in the form of a legally binding instrument, states are able to determine the specifics of national legislation and there need not be specific stipulations as is the case with treaties. In the case of a treaty, domestic law would have to be consistent with the specific requirements of that treaty. The OEIGWG treaty-drafting process demonstrates that state delegations are reluctant to accept a broader scope or reverse onus as articulated in the UNGP. The current UNGP-based legislations and the EU proposal seem to indicate that states are willing to accept and impose a limited level of restraint on their TNCs.

[1616] ECCJ 23 February 2022.
[1617] Guiding Principle 25 https://globalnaps.org/ungp/guiding-principle-25/ and Guiding Principle 26 https://globalnaps.org/ungp/guiding-principle-26/.
[1618] European Union Agency for Fundamental Rights 2020 Report Business and Human Rights Access to Remedy 7.
[1619] See para 3.4 above.
[1620] United Nations Human Rights Office "Soft law, hard consequences" (no date).
[1621] Muchlinski 2021 *Bus & Hum Rights J* 220.

Although they are imperfect and watered down, the UNGP and subsequent supply chain legislations in France and Germany make human rights an issue that companies need to consider as they pursue profit, thus achieving a long-desired goal in the absence of an internationally binding instrument. The conclusion is that the UNGP plays a crucial role in providing states with a blueprint for how they hold companies accountable for respecting human rights in their global business.

6.5. Prospects of an International Legally Binding Instrument on Business and Human Rights

During the eighth treaty-negotiating session, it remained evident that the states were far apart in their expectations of what a treaty should entail, and it is inconceivable that consensus will be reached and a treaty negotiated any time soon, let alone by 2025.[1622] As stated previously, no treaty regarding business and human rights exists, and for many years, the EU Commission has given the absence of EU rules as the reason for the EU's failure to engage with the OEIGWG's process.[1623] Now that the EU has a proposal directive, it is hoped that this is a good reason for the EU to engage constructively in the negotiations process, especially given that there are shortcomings in the proposed directive that the treaty could offer solutions for.[1624] Nevertheless, it is submitted that if, at some stage, an agreement on the treaty is reached, the EU might not be inclined to sign the treaty because the EU and many of its member states already have addressed the issue of business and human rights (if the proposed directive becomes law). This is so, even though the EU proposal is seen as "fraught […] with glaring loopholes".[1625]

One could argue that the EU's proposed directive is paving the way for a different vision of the EU on business and human rights and showing that the EU might be tempted to allow a more binding instrument. However, a majority of EU member states have not as yet articulated their positions regarding a treaty and, eight years into the negotiation process, there has been no mandate for the regional organisation to negotiate.[1626] The EU's engagement at the last OEIGWG session in 2022, and the EU Council's commitment to "strengthen its engagement in

[1622] See para 2.7 above.
[1623] Cioffo and McArdle Why isn't the EU more engaged in the Binding Treaty negotiations? 30 September 2022.
[1624] *Ibid*. Also see paras 2.4.6 and 3.7 above.
[1625] *Ibid*. Also see para 3.4.6 above.
[1626] Luthango and Schulze "SWP Comment 2023/C 16" (14 March 2023).

the UN fora and to actively participate in UN discussions on a legally binding instrument on business and human rights",[1627] can be interpreted as a way of going along to get along while the negotiations are underway. After all, how difficult can it be to get a mandate from all EU member states and to negotiate in earnest eight years after the process started? The reality is, the Global South and CSO's expectations of what a treaty should look like, are very different to that of the EU and Global North.[1628] The EU Council hopes for a "consensus-based instrument"[1629] and if consensus means, "absence of objection rather than a particular majority",[1630] then the road ahead will be long.

The attendance of the US government at the seventh and eighth sessions of the OEIGWG was marked by the statement that they continue to believe that the best way to move forward is not to be too prescriptive and instead suggested that a framework instrument is "a good way to go".[1631] At the 2021 session, China's proposal that criminal liability be subject to national law and legal principles, especially in the light of China's concept of state sovereignty which it defines as the exclusive right of states to govern within their own territory,[1632] together with an insistence on finding consensus expressed in their opening statement at the 2022 session,[1633] is an indication that a multilateral agreement to govern business and human rights is unlikely in the near future. Given China's growing presence in Africa, the strong indication is that African countries will not vote in the interests of their citizens when it comes to a vote for a legally binding instrument. Neither China nor the US has ratified the main international human rights conventions, so there is little chance they will accede to a binding instrument dealing with business and human rights in the event of the negotiations succeeding successfully and a treaty coming into effect. The states of the Global North and China might negotiate but it is unlikely that they will support a final version of the treaty as many of the delegations from these states voiced their support for a framework agreement that establishes broader commitments based on the UNGP.[1634] Without a broad multilateral agreement regarding business and human rights,

[1627] Council of the EU: Statement 20 February 2023.
[1628] Also see paras 2.6.6 and 2.6.7 above.
[1629] *Ibid*.
[1630] See UN FAQ. Available at: https://ask.un.org/faq/260981 (accessed 5 September 2023).
[1631] Peters Statement by the United States of America at the Open-Ended Working Group on Transnational Corporations and Other Business Enterprises 25 October 2021.
[1632] Hellström no date Decoding China: Sovereignty.
[1633] 2nd Meeting, 8th Session of Open-ended Intergovernmental Working Group on Transnational Corporations. Available at: https://media.un.org/en/asset/k19/k19fknxmsg (accessed 30 October 2022).
[1634] See para 2.6.7 above.

there is little possibility of levelling the playing field; although greatly desired, its form is nebulous and its achievement ever elusive.

6.6. South Africa – Quo Vadis?

As a result of the UNGP, the debate about business and human rights moved into the open from being a divisive and niche issue and generated broad attention and support.[1635] Even China has an action plan promoting responsible business conduct in global supply chains. Chinese businesses are encouraged to abide by the UNGP in their foreign trade and investment and to conduct due diligence on human rights.[1636]

The Chinese government displays a unique understanding and has "(re)framed [it] in certain ways and by certain terms"; [1637] nevertheless, they have acknowledged the existence of the UNGP, which is more than the South African government has done. The South African government needs to display greater flexibility in its position. A report by the EU Policy Department on the implementation of the UNGP notes that the South African approach is an example of where a country's decision to push for a binding treaty at international level results in a "lack of any meaningful efforts to address the existing human rights and business accountability challenges".[1638] South Africa views equality, human dignity, and the achievement of each person's potential as of paramount importance. The South African Constitution prominently features rights to equality (section 9), human dignity (section 10), and life (section 11).[1639] Yet, the South African government permits companies founded in South Africa not to be obliged to conduct human rights due diligence and does not allow them to determine whether their activities or those of their suppliers violate human rights along their supply chains. It is perplexing that despite Regulation 43 of the Companies Act, the South African government does not require their companies to conduct human rights due diligence.

In 2008, the Companies Act was amended and the regulations that were promulgated show that the government is intent on aiding companies to "develop a social conscience and behave like

[1635] Wettstein 2015 *J Hum Rights* 162, 164.
[1636] See para 5.6 above.
[1637] Cheng 260.
[1638] Faracik 2017 46.
[1639] Serfontein (2019) "Humans: The Biggest Barrier to Realising Human Rights – A South African Perspective" 7.

responsible corporate citizens".[1640] A survey conducted by the IoDSA on SECs, published in 2021, found that SECs play a vital role in most companies and that boards take the function of these committees seriously despite, on average, their members being paid the second lowest level of remuneration.[1641] The IoDSA study detected a "worrisome trend" that companies combine this type of committee with others, a practice that could lead to even less time being spent on matters the SECs are meant to address. [1642] Nevertheless, the study indicated that issues such as employment equity, organisational ethics, broad-based BEE, fraud and corruption prevention, stakeholder relationships, and employee relations seemingly encourage ethical behaviour in some companies in South Africa.[1643] Unlike Regulation 43, which resulted in ambiguity around the role and purpose of SECs,[1644] the UNGP provides "conceptual and operational clarity"[1645] regarding human rights due diligence to identify, prevent, mitigate, and address adverse impacts on human rights. Despite this, the government is silent and inactive in respect of violations of human rights in companies' supply chains, with South Africa as their home base.

The UNGP is an international non-binding political act, and states have implemented legislation based on its principles. It is argued that the UNGP effectively expands rights because national laws have been enacted based on the UNGP, and corporations are compelled to adopt measures to investigate and prevent the violation of the rights of others. Thus, people have a right not to be harmed and have access to remedies. Ruggie states the UNGP is "not a silver bullet",[1646] but it is all we have now. At the very least, South Africa should make corporations more accountable for their actions, especially if they are pursuing the negotiation of an internationally legally binding instrument. Failure to do so allows South African corporations to operate with impunity outside the country in ways that negate the values espoused by the South African Constitution.

[1640] Schoeman "Social and ethics committees: a value or a cost?" (no date).
[1641] Social and Ethics Committee Trends and Survey Report 2021 21. Available at: https://www.tei.org.za/wp-content/uploads/2021/12/SEC_Trends_Report_2021_Final.docx.pdf (accessed 2 December 2022).
[1642] *Idem* 16.
[1643] *Ibid*.
[1644] *Idem* 21.
[1645] The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments July 2011 (Updated June 2014). Available at: https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FResources%2FGPs_GC+note.pdf (accessed 12 October 2022).
[1646] Ruggie (2013).

It is crucial to remember the reasons a UNGP or a treaty on business and human rights is necessary in a globalised world. A McKinsey 2021 discussion paper indicates that business activity remains the "dominant contributor to the economy and its growth".[1647] Profit is fundamental for companies to satisfy their stakeholders, employees, suppliers, financial institutions, other creditors, and the state.[1648] The goal is profit maximisation, essentially understood as the opposite of wastefulness – to be profitable and grow, a company strives to minimise waste.[1649] In pursuit of this goal, companies aim to provide their services or products with a minimum of resource input and preferably without waste;[1650] they strive for better performance by using fewer resources.[1651] The reason that companies have been moving their production or service lines from high-wage to low-wage countries since the 1970s is in pursuit of that goal because the saving of costs resulted in greater profits. However, the processes of cost-cutting and minimisation of waste have as side effects the death of workers in Bangladesh,[1652] environmental damage in Nigeria,[1653] and the violation of workers' rights in Türkiye[1654] and India.[1655] The reports by international CSOs suggest that in countries where labour laws are lax or not enforced, workers' rights are violated. The UNGP, the draft treaty, and other legislative measures and proposals aim to counter human rights violations by obliging corporations to be accountable for what happens in their production and service lines.

In addition, it is not only companies that have brick-and-mortar factories or service centres that create a situation where human rights can be violated; the advances in communicative technologies mean big tech companies, such as Facebook (Meta),[1656] are increasingly being accused of violating rights.[1657] These companies do not employ workers in dilapidated factories or cause water or soil contamination that harms communities, but because social media can amplify or accelerate a movement that already exists, these platforms give them momentum and

[1647] Manyika *et al*. 2021 Mckinsey Report.
[1648] Simon (2020) *Am Gewinn Ist Noch Keine Firma Kaputtgegangen* 22.
[1649] *Ibid* 9.
[1650] Gyurcsik *et al*. 2020 "Competitive Business Models from the Perspective of Profitability" (5 December 2020).
[1651] *Ibid*.
[1652] Rahman and Yadlapalli *The Conversation* (22 April 2021).
[1653] Vetter "Niger Delta Oil Spills: Shell Ruled Responsible in Landmark Verdict" (29 January 2021).
[1654] Report: Turkey's garment industry profile and the living wage. Available at: https://cleanclothes.org/file-repository/turkeys-garment-industry-report.pdf/view (accessed 12 October 2022).
[1655] Report: Spinning around workers' rights international companies linked to forced labour in Tamil Nadu spinning mills. Available at: https://www.somo.nl/spinning-around-workers-rights/ (accessed 20 October 2022).
[1656] Amnesty International 2022 Report The Social Atrocity: Meta and the Right to Remedy for the Rohingya.
[1657] Brown "Big Tech's Heavy Hand Around the Globe: Facebook and Google's dominance of developing-world markets has had catastrophic effects. US regulators should take note" 8 September 2020.

contribute to situations in which human rights are violated.[1658] Technology does not intrinsically present a "radical dynamics of 'freedom' or 'oppression'", but it can be used to amplify hate and disinformation that infringes dignity and rights.[1659] The UNGP or a legally binding instrument are sources of remedy for those whose rights are violated. The initiatives to hold corporations accountable may seem weak, but they are a resource for the global community to rein in the harm that corporations cause. It is for this reason that the following is recommended.

6.7. Proposed Framework for Business and Human Rights in South Africa

The Centre for Human Rights at the University of Pretoria and the International Corporate Accountability Roundtable published a shadow NBA that assessed South African laws, policies, regulations, and standards relating to business and human rights at the national level and evaluated them in terms of the UNGP and other relevant business and human rights frameworks.[1660] The shadow NBA analysed conditions at the national level to assess how far the effect has been given to the state's duty to protect human rights under the UNGP and other international business and human rights standards.[1661] The shadow baseline assessment report lays the foundation for drafting a NAP. This endeavour requires the South African government to identify a government department that must engage with the UNGP and take steps to develop a NAP. The government department tasked with compiling a NAP would make recommendations that deal with transparency and accountability issues, stakeholder participation, and the scope and content of the NAP. The next step is finalising and drafting a NAP, which would pave the way for binding legislation.

The government must identify the department that will take the lead, for example, the Department of Trade and Industry (DTI) with strong cooperation from the Department of Labour, as well as the Department of International Relations and Cooperation (the latter is involved in the treaty negotiations in Geneva). The endeavour will be successful only if government departments cooperate and support one another because the issue of business and human rights involves supply chains in international trade. The creation of the Information Regulator

[1658] Vaidhyanathan (2022) 138.
[1659] *Ibid.*
[1660] See para 4.5 above.
[1661] *Ibid* 5.

was a lengthy process,[1662] so there is an urgent need to establish a regulatory authority (such as BAFA in Germany)[1663] in the DTI that can be charged with implementing the UNGP-based legislation and be responsible for monitoring and imposing appropriate fines and penalties where violations occur. Already, several regulatory agencies are housed in the DTI; thus, capacities to regulate already exist.[1664] As is the case with other DTI agencies, there can be a supply chain regulator with a grievance mechanism. Because regulatory authorities responsible for the implementation and for monitoring compliance with statutory obligations are often underfunded, the supply chain authority must be well-funded, and additional income can be generated from fines and penalties paid to the regulator. The regulatory authority also needs to be well-staffed with people who have specialised qualifications. The proposed regulatory body would have to be granted extensive legislative powers to make orders and issue fines, including having the power to investigate, issue warrants, undertake searches, or issue subpoenas.

Business and human rights legislation of this kind would entail a variety of measures. Ideally, the scope of legislation would apply to all businesses, as the UNGP and the Revised Third Draft of the legally binding instrument foresee. Businesses must identify, avoid, mitigate, and remedy human rights risks throughout their business relationships, including subsidiaries and suppliers throughout their supply chains.[1665] Due diligence measures must identify risks of human rights violations and environmental harm risks, and the findings must be reported annually. The due diligence measures that businesses would be required to conduct should be proportionate to the risk of committing human rights violations. This means that smaller businesses would need to take fewer due diligence steps than larger businesses that might require “more formal, structured and sophisticated processes”.[1666] A failure to do so will result in appropriate and substantial fines, rather than a minor penalty in order to force businesses to comply in conducting human rights due diligence. Fines and penalties for non-compliance could be between R500,000 and R1.5 million or possibly 2% of the average annual turnover for large companies with an annual

[1662] See para 4.2 above.
[1663] See para 3.6 above.
[1664] DTI Agencies. Available at: http://www.thedtic.gov.za/agencies/ (accessed 2 December 2022).
[1665] See “Text of the Third Revised Draft legally binding instrument with the textual proposals submitted by States during the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”.
[1666] Smit *et al*. 2020.

turnover of between R6 million and R75 million.[1667] In addition, due diligence measures should also include ways of identifying undeclared subcontracting, and substantial fines can be imposed for the use of undeclared work. If a violation is discovered, companies must take preventive measures to end the violation. The legislation should include a provision conducting and reporting on human rights due diligence as a requirement for doing business, but where harm does occur, companies are not absolved of liability for causing or contributing to harm.[1668] Fines, for which companies and subsidiaries can be jointly and severally liable, need not be the only enforcement mechanism. Non-compliance could result in the exclusion from public procurement possibilities, the withdrawal of licences, or even winding up the company in the event of gross non-compliance.[1669]

According to Ruggie, in a perfect world, there would be both state-based judicial and non-judicial mechanisms that would form the foundation of a system of remedy for abuses caused by corporations.[1670] Therefore, ideal legislation dealing with corporate-related human rights should include "company-level grievance mechanisms [that] would provide early-stage recourse and resolution, in at least some instances",[1671] as well as provide uncomplicated access to the judicial process.

In addition to access to remedy through judicial and non-judicial mechanisms, a South African statute must allow victims to gain access to courts, place limits on what lawyers and advocates can charge in such cases and, where appropriate, allow for a reversal of the burden of proof. Reversing the onus would be vital where there is an information differential and *prima facie* evidence of systematic violations.[1672] Liability should include shareholder liability or holding directors personally liable, as those harmed should be able to pierce the corporate veil in the event that companies file for bankruptcy to prevent taking responsibility. However, this can only happen when financial access and other barriers to access are removed.

[1667] Depending on the industrial sector. Amount in the range of Labour Court fines imposed in terms of s 20(7) of the Employment Equity Act, if a designated employer fails to prepare or implement an employment equity plan in terms of this section. See Pienaar *et al*. "Paying the penalty for non-compliance with the EEA" (20 April 2022).
[1668] See "Text of the Third Revised Draft legally binding instrument with the textual proposals submitted by States during the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights".
[1669] Smit *et al*. 2020.
[1670] Ruggie (2013).
[1671] *Ibid*.
[1672] Roberts 2022 *Int J Hum Rights.*

The role that CSOs and human rights activists play in defending human rights in the business context is mentioned in the commentary of Principle 18 of the UNGP.[1673] The UNGP recognises the crucial role CSOs play in assisting those affected adversely by business activities to gain access to justice; therefore, legislation relating to business and human rights must allow trade unions, CSOs, and human rights activists to act on behalf of those harmed. South Africa has already proven that it is willing to allow for the institution of proceedings on behalf of another; therefore, legislation dealing with human rights violations in the supply chains of companies should allow organisations to bring cases on behalf of victims.[1674] The prohibition of SLAPPs would be crucial for any South African supply chain legislation.

In 2015, South Africa adopted the 2030 Agenda for Sustainable Development, and the government's National Development Plan is closely aligned with the 2030 Agenda and the African Union Agenda 2063.[1675] The Sustainable Development Goals (SDGs) of the 2030 Agenda envisage partnerships between the private sector and government as part of the effort to solve the world's development challenges, and the role of business is based on accountability and respect for human rights.[1676] The UNWG released key recommendations, including that respect for human rights must be a cornerstone when envisioning the role that business will play in the pursuit of the SDGs and that states must ensure that their business partners for sustainable development have made a clear and demonstrable commitment to the UNGP and uphold these principles in efforts to reach the SDGs. Also, national plans to implement the SDGs should align with NAPs to implement the UNGP.[1677] It is reasonable to suggest that the passing of UNGP-based legislation could result in meeting the SDGs that are aimed at ending poverty[1678] and hunger,[1679] promoting decent work and economic growth,[1680] reducing inequality,[1681] achieving responsible consumption and production,[1682] and building strong peace and justice

[1673] "Business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society".
[1674] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Also see Kaersvang 2008 *J Int Inst*.
[1675] SDGs available at: https://sustainabledevelopment.un.org/memberstates/southafrica (accessed 2 December 2022).
[1676] United Nations Human Rights Office "Key recommendations for connecting the business and human rights agenda to the 2030 Sustainable Development Goals".
[1677] *Ibid.*
[1678] SDG 1.
[1679] SDG 2.
[1680] SDG 8.
[1681] SDG 10.
[1682] SDG 12.

institutions.[1683] By passing legislation that requires the risk of human rights violations in the supply chains of business, the SDGs are advanced, and the goal of South African companies becoming responsible for conducting human rights due diligence is one to which the South African government should be committed.

6.8 Recommendations for Future Research

The following additional research is recommended:

If legislation for business and human rights is to become a reality, CSOs need to pressure the South African government to accept the shadow NBA, come up with a NAP, and pass supply chain legislation. The exclusive focus on a legally binding instrument may potentially lead to human rights violations along the supply chains of South African companies. There is a need for research into how best CSOs can build coalitions and learn lessons from CSOs in Germany and France if there is to be a sustained and effective campaign for supply chain legislation in South Africa.

Further research is needed into the reasons for the South African government's strong ties to corporations and why it turns a blind eye to company activities in their supply chains.

South African banks operate in many African countries; for example, FirstRand Group is in ten countries,[1684] Standard Bank Group in twenty,[1685] and Absa in fourteen.[1686] Human rights is an issue in the operations of the financial sector.[1687] Research is required into the lending policies of South African-based financial institutions because these practices involve human rights risks, especially as a result of loans increasingly being approved or denied by algorithms.[1688] A 2015 article analysed human rights considerations in the finance sector and highlighted initiatives undertaken in South Africa in creating standards for banks.[1689] Only Standard Bank of South Africa Limited has stated that a part of its corporate responsibility is to protect and uphold human rights in its operational practice and financing activities in line with the UNGP on Business and

[1683] SDG 16.
[1684] FNB CIB "Our International Presence". Available at: https://www.fnbcib.com/presence (accessed 2 December 2022).
[1685] See para 4.6 above.
[1686] https://www.absa.africa/absaafrica/about-us/who-we-are/ (Accessed 2 December 2022).
[1687] 10 Human Rights Priorities for the Financial Sector. Available at: https://www.bsr.org/reports/BSR_Human_Rights_Finance_Sector_Primer.pdf (accessed 2 December 2022).
[1688] *Ibid*.
[1689] Meyersfeld and Kinley 2015 *SUR Int J Hum Rights* 201.

Human Rights.[1690] Elsewhere, banks concluded that financial institutions contribute to human rights harm only through their activities but not their relationships with clients[1691] and they have human rights policies. Therefore, it is essential to investigate the banks' business and human rights policies in their clients' relationships.

Supply chains have become opaque in a globalised world. In South Africa, the previously vibrant textile and shoemaking industries have disappeared. Regulations overseeing the labelling and marking of products[1692] do not require companies to show whether products were made under conditions that uphold human rights. South Africa claims to champion human rights; therefore, the rights of those working in the supply chains of South African TNCs must be protected. The conditions under which the products that fill South African store shelves are manufactured or grown must be studied. There is a need to know where South African brands and companies source their products; for example, is the cotton from the Chinese province of Xinjiang, where ethnic groups, the Muslim Uyghurs, are oppressed and forced to harvest and process the cotton?[1693] A recent investigation in Germany demonstrated that German brands, including Adidas, Hugo Boss, and Puma, source cotton from this region.[1694]

Finally, technological advances give rise to previously unimaginable forms of work but often at the expense of the dignity of work. Technology has given rise to microworkers, also called clickworkers. These individuals provide data for algorithms to optimise searches on search engines or enable artificial intelligence, for example, in self-driving cars to recognise particular objects.[1695] A need to regulate what people say on social media platforms has given rise to workers doing data labelling and content moderation. Often, these types of work are without basic labour protections such as the right to organise, obtain mental health support, or adhere to safety regulations.[1696] There is a need to examine how South Africa will deal with what the

[1690] Debevoise & Plimpton 2021.
[1691] Ruggie's letter to the Thun Group (28 February 2017).
[1692] South Africa Country Guide Labeling/Marking Requirements 1 October 2020. Available at: https://www.trade.gov/knowledge-product/south-africa-labelingmarking-requirements (accessed 5 May 2022).
[1693] ECCHR "Adidas, Hugo Boss, Puma and Co.: Sourcing cotton produced with forced labor?" 5 May 2022. Available at: https://www.ecchr.eu/en/press-release/cotton-xingjang-forced-labor/ (accessed 2 December 2022).
[1694] Adidas, Puma, Boss & Co: *Baumwolle aus China-Zwangsarbeit*? | STRG_F https://www.funk.net/channel/strgf-11384/adidas-puma-boss-co-baumwolle-aus-chinazwangsarbeit-strgf-1800765 (accessed 2 December 2022).
[1695] See Kersley "Clickwork and labour exploitation in the digital economy")5 October 2022). Also, Reese "Inside Amazon's clickworker platform: How half a million people are being paid pennies to train AI" (16 December 2022).
[1696] Royer A "The urgent need for regulating global ghost work" 9 February 2021. Available at: https://www.brookings.edu/techstream/the-urgent-need-for-regulating-global-ghost-work/ (accessed 31 October 2022).

ILO has warned are "major transformations in the world of work over the past decade [that] has seen the emergence of online digital labour platforms".[1697] The ILO recommends investigating the opportunities and risks that workers face in addition to their motivations for undertaking this type of work.[1698] It is recommended that the South African government develop a policy regarding digital labour platform work because, despite creating opportunities, this work can violate fundamental rights.[1699]

[1697] ILO 2018 Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World.
[1698] *Ibid*.
[1699] A 2021 ILO report calls for a "global social dialogue and regulatory cooperation between digital labour platforms, workers and governments" Available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_771909/lang--en/index.htm (accessed 31 October 2022). Also the in 2021, the EU Commission introduced a proposed directive that would address platform work in Europe. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605 (accessed 31 October 2022).

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